

IN THE SUPREME COURT OF THE VIRGIN ISLANDS

IN RE:) **PROMULGATION No. 2017-008**
ADOPTION OF THE VIRGIN ISLANDS)
HABEAS CORPUS RULES.)
_____)

ORDER OF THE COURT

THIS MATTER comes before the Court pursuant to the December 15, 2017 recommendation of the Advisory Committee on Rules which, upon review of all the comments submitted with respect to the Virgin Islands Habeas Corpus Rules, has requested that this Court permit the rules previously promulgated on August 18, 2017, and which went into effect on December 1, 2017, to remain in effect, subject to various technical and other amendments. This Court concurs in the amendments that have been proposed, and accordingly it is hereby

ORDERED that the Virgin Islands Habeas Corpus Rules, as amended, attached hereto in final form as Exhibit A, is **HEREBY ADOPTED**. As a convenience, the memorandum from the Advisory Committee on Rules highlighting the technical and other amendments is attached hereto as Exhibit B. However, to the extent any differences exist between Exhibit A and Exhibit B, the language in Exhibit A shall control. The Bench, Bar, and the public are **ADVISED** that, pursuant to this Court’s October 11, 2017 order, all portions of the Virgin Islands Habeas Corpus Rules, as amended, went into effect on December 1, 2017, as previously ordered. It is further

ORDERED that, pursuant to Rule 37(b) of the Rules of Appellate Procedure, the Advisory Committee on Rules **MAY CONTINUE TO STUDY** the Virgin Islands Habeas Corpus Rules, and suggest amendments thereto, in conjunction with its mandate to continuously monitor all rules of practice and procedure in the courts of the Judicial Branch of the Virgin Islands. It is further

ORDERED that all Rules of the Superior Court inconsistent with the Virgin Islands Habeas Corpus Rules are **HEREBY REPEALED**. It is further

ORDERED that copies of this order be directed to the appropriate parties.

SO ORDERED this 19th day of December, 2017.

/s/ Ive Arlington Swan
IVE ARLINGTON SWAN
Associate Justice

/s/ Maria M. Cabret
MARIA M. CABRET
Associate Justice

/s/ Rhys S. Hodge
RHYS S. HODGE
Chief Justice

ATTEST:

VERONICA J. HANDY, ESQ.
Clerk of the Court

EXHIBIT A

VIRGIN ISLANDS HABEAS CORPUS RULES

Revised Effective: December 1, 2017

Rule 1. Application and Definitions

(a) **Title and Citation.** These rules shall be known as the Virgin Islands Habeas Corpus Rules and may be cited in short-form as V.I. H.C.R.

(b) **Effective Date.** These rules shall take effect as provided in a promulgation order by the Supreme Court of the Virgin Islands.

(c) **Proceedings Governed.** The Rules apply to habeas corpus proceedings in the Superior Court as provided by Chapter 91 of Title 5 of the Virgin Islands Code, 5 V.I.C. § 1301 et seq., or any other provision of law authorizing relief from unlawful confinement or unlawful conditions of confinement.

(d) **Definitions.** In these Rules, the following definitions apply:

(1) A "*petition for writ of habeas corpus*" is the petitioner's initial filing that commences a proceeding.

(2) A "*writ of habeas corpus*" is an order directing the respondent to file a return. The writ – which operates as a procedural order to show cause – is issued if the petitioner has made a prima facie showing of entitlement to relief on claims that are not otherwise barred; issuance of the writ of habeas corpus does not grant the ultimate relief requested but simply requires further proceedings on the petitioner's application for discharge or other relief from unlawful custody or detention.

(3) The "*return*" is the respondent's statement of reasons why the court should not grant the relief requested by the petitioner. The return must allege facts establishing the legality of the petitioner's custody in accordance with 5 V.I.C. § 1308.

(4) The "*traverse*" is the petitioner's pleading in response to the return.

(5) An "*evidentiary hearing*" is a hearing held by the court to resolve contested factual issues.

(6) An "*informal response*" is a written submission requested by the court – prior to ruling on whether to issue a writ of habeas corpus ordering a return by the respondent – to be made by the respondent, the real party in interest, or a custodian of any record pertaining to the petitioner's case, which produces either the requested record(s) or certified copies thereof, and which is filed with the clerk of the court with a copy served upon to the petitioner.

(7) A "*reply*" is an optional filing by the petitioner concerning any information or records submitted in an informal response, and must be filed within 15 days after an informal response

(8) An "*order granting habeas corpus relief*" or an "*order denying habeas corpus relief*" is the court's final order – issued after review of the petition on the merits – awarding or denying the ultimate relief sought by the petitioner.

(e) **Application.** These rules, and subsequent amendments, govern:

(1) habeas corpus proceedings commenced after their effective date; and

(2) habeas corpus proceedings pending on the effective date of the rules or amendments, unless:

(i) the Supreme Court of the Virgin Islands specifies otherwise by order; or
(ii) the Superior Court makes an express finding that applying them in a particular previously-pending action would be infeasible or would work an injustice.

(f) Interpretation. These rules are to be interpreted to provide for the just determination of every habeas corpus proceeding, to secure simplicity in procedure and fairness in administration, and to eliminate unjustifiable expense and delay.

(g) Procedures Not Addressed in These Rules. When procedure is not prescribed by these Virgin Islands Habeas Corpus Petition Rules, precedent from the Supreme Court of the Virgin Islands, or the Virgin Islands Code, the Virgin Islands Rules of Civil Procedure may be applied as appropriate. Where no statute, precedent or rule governs, a judge may regulate practice in a habeas corpus proceeding in any manner consistent with law of the Virgin Islands.

NOTE

The preliminary provisions in Rule 1 of the V.I. Habeas Corpus Rules include definitions intended to assist in keeping clear the various stages of the proceedings that are spelled out in detailed procedural provisions of Rule 2, implementing the Virgin Islands statutory, Organic Act, and common law habeas corpus protections. In particular, these Rules reserve the terminology "order granting habeas corpus relief" or "order denying habeas corpus relief" to describe the ultimate disposition of the petition on the merits – whether petitioner is entitled to discharge or other relief. The initial order of the court after review of the petition to determine whether it states a prima facie case for relief is referred to as "an order denying the petition" or "a writ of habeas corpus" which is – in effect – an order to show cause for further proceedings on the writ, initially a "return" by the respondent. Issuance of a "writ of habeas corpus" will require the respondent to file a formal return responding to the averments of the petition. Thereafter (following the filing of the return, and the petitioner's opportunity to file a traverse in response thereto) the court will determine whether there are any material facts at issue warranting a hearing, and subsequently will issue a decision "granting habeas corpus relief" or "denying habeas corpus relief" on the merits.

Rule 2. Habeas Corpus Proceedings

(a) Petition form and content.

(1) *Availability.* Any person who believes he or she is unlawfully imprisoned or detained in custody, confined under unlawful conditions, or otherwise unlawfully restrained of his or her liberty, may file a petition for a writ of habeas corpus to seek review of the legality of that imprisonment or detention.

(2) *Format.* A petitions for writ of habeas corpus shall be writing and must be dated and must be signed under oath by the party seeking relief or, if authorized by law, by someone on that party's behalf. The petition may be typed, printed, or neatly handwritten.

(3) *Content.* In compliance with 5 V.I.C. § 1302, the petition must:

(A) specify that the person on whose behalf the writ is sought is imprisoned or restrained of his liberty;

(B) identify the officer or person by whom, and the place where, the petitioner is confined or restrained, naming all the parties, if they are known, or describing them, if they are not known; and

(C) list all of the following:

- (i) name and location of the court that entered the judgment of conviction or order of detention being challenged;
- (ii) criminal docket or case number of that proceeding (if known);
- (iii) date of the judgment of conviction or other order of detention (if known);
- (iv) whether in that proceeding the petitioner pled not guilty, guilty, nolo contendere (no contest), or an insanity plea. If there were multiple charges and different pleas to the various charges, specify the plea for each count or charge.
- (iv) date of sentencing as well as the length and terms of the sentence imposed;
- (v) name(s) of all crimes of which the petitioner was convicted in the judgment of conviction being challenged;
- (vi) date of the judgment of conviction or order of detention; and
- (vii) date and docket number (if known) of each appeal and of each appellate decision relating to these charges.

(4) *Statement of grounds and supporting facts.* The petition shall set forth separately each ground on which the imprisonment or detention is alleged to be illegal, and shall state the specific facts supporting each ground. The petition need not argue or cite law, but it must separately state the facts that support each of the claims.

(5) *Copies of orders and decisions.* The petitioner should attach copies (if available) of any order or court decision regarding the charges that led to the petitioner's incarceration or detention, if relevant to the issues raised in the petition.

(6) *Damage claims are not to be included.* The petition must address the grounds upon which the petitioner's detention is unlawful. Claims for recovery of damages or other relief based on the incarceration, detention or restraint of the defendant shall not be included in the petition for habeas corpus relief.

(7) *Filing.* The petition must be sent to the Clerk of the Superior Court of the Virgin Islands at one of these addresses:

St. Thomas/St. John office:

Superior Court of the Virgin Islands
Office of the Clerk
Alexander A. Farrelly Justice Center
5400 Veteran's Drive
St. Thomas, USVI 00802

St. Croix office:

Superior Court of the Virgin Islands
Office of the Clerk
R.H. Amphlett Leader

Justice Center
RR1 9000
Kingshill, USVI 00850

(8) *Docketing fees.* The petition must be accompanied by the appropriate docket fee, deposited with the Clerk of the Superior Court, unless permission to proceed *in forma pauperis* has been granted. If a petition is docketed without prepayment of the applicable docketing fee, the petitioner shall pay the fee within 14 days after docketing. If the petitioner fails to do so and has not filed a motion for leave to proceed *in forma pauperis* accompanied by supporting documents, the court may dismiss the petition without further notice.

(9) *Presentation to judge or magistrate judge.* Upon filing, the clerk of the court must immediately deliver the petition to the judge assigned to the matter; *provided, however*, that the petition for writ of habeas corpus shall not be assigned for decision to the same judge who presided at the petitioner's trial or other hearing that led to the detention challenged in the petition as unlawful.

(10) *Time for initial action by the court.* The court must take initial action on a petition for writ of habeas corpus within 60 days after it is filed by:

- (A) Requesting an informal response to the petition under subpart (c) of this Rule;
- (B) Entering an order denying the petition after consideration under subpart (b) of this Rule; or
- (C) Issuing a writ of habeas corpus, which requires further proceedings under subpart (d) of this Rule.

(11) *Procedure if initial disposition timetable is not met.* If the court fails to rule on the petition within 60 days of its filing as provided in subpart (a)(8), the petitioner may file a dated notice and request for ruling that includes a declaration stating the date the petition was filed, and indicating that the petitioner has not received a ruling on the petition. A copy of the original petition must be attached to the notice and request for ruling. If the notice is complete and the court has failed to rule – and has made no other scheduling directions – the clerk shall notify the Presiding Judge of the Superior Court of the Virgin Islands and a copy of such notice shall be sent to the parties.

(b) Preliminary consideration by the court.

(1) *Consideration by the court.* When presented with a petition for a writ of habeas corpus, within the period(s) specified in this Rule the Superior Court must first determine whether the petition states a prima facie case for relief — that is, whether it states facts that, if true, would entitle the petitioner to discharge or other relief — and, in its discretion, may also determine, after providing the petitioner with reasonable notice and a right to be heard, whether the stated claims are for any reason procedurally or substantively barred as a matter of law.

(2) *Grounds for relief.* A petitioner may be awarded a discharge – or another form of redress, such as a new sentencing hearing, that remedies the violation alleged – if any of the seven conditions set forth in 5 V.I.C. § 1314 are met, or if relief is warranted to remedy

a constitutional or statutory violation, even if the right to that remedy is not expressly set forth in a statute.

(3) *Issues previously raised on direct appeal to the Supreme Court.* A petitioner may not raise in a petition for writ of habeas corpus an issue previously rejected in direct appeal to the Supreme Court of the Virgin Islands unless there has been a subsequent change in the law affecting the petitioner's claim.

(4) *Denial of a petition at the preliminary consideration stage.* If the court determines that the petition does not state a prima facie case for relief, or that the claims are all barred as a matter of law, the court shall enter an order denying the petition without further proceedings. Where the court requests submission of records in an informal response as provided in subpart (c) of this Rule, the submitted records may also be considered in determining whether the petition states a prima facie case for relief, or whether all claims are barred as a matter of law.

(5) *Issuing a writ of habeas corpus.* If it appears that the petition states a prima facie case for relief and that the claims are not all barred as a matter of law, Superior Court must issue a writ of habeas corpus, requiring further proceedings on the petition as provided in subpart (d) of this Rule – directing the respondent to file a response, as provided in 5 V.I.C. § 1304. Where the petition is not denied as provided in subpart (b)(4) of this Rule, a writ of habeas corpus shall be issued within the initial 60 days after the filing of the petition, or within 45 days after filing of any informal response requested by the court under subpart (c) of this Rule, whichever is later.

(c) Informal response.

(1) As part of its initial consideration of the petition as provided in subpart (b) of this Rule, before ruling upon whether the petition states a prima facie case or is barred as a matter of law, the court may – in the exercise of its discretion – request an informal response from:

(A) The respondent or real party in interest; or

(B) The custodian of any record pertaining to the petitioner, directing the custodian to produce the record or a certified copy to be filed with the clerk of the court.

(2) A copy of the request must be sent to the petitioner.

(3) The respondent, real party in interest, or record custodian shall within 15 days file the requested informal response and serve it upon the petitioner. The informal response must be in writing and, if it consists of records or copies of records, a copy of every record and document furnished to the court must be furnished to the petitioner.

(4) When an informal response is filed, the court must notify the petitioner that a reply thereto may be served within 15 days from the date of service of the informal response on the petitioner. After receiving an informal response, the court may not deny the petition until the petitioner has filed a timely reply to the informal response or the 15-day period provided for a reply under this Rule has expired.

(d) Writ of habeas corpus; further proceedings; appointing counsel.

(1) The court must issue a writ of habeas corpus if the petitioner has alleged, prima facie, grounds showing entitlement to relief and the claims are not legally barred. In assessing whether the petitioner would be entitled to relief if the factual allegations were proved, the court must take petitioner's factual allegations as true. The

court does not determine at this stage whether the petitioner is entitled to discharge or any other form of remedy if habeas corpus relief is ultimately granted. The issuance of a writ of habeas corpus under this Rule is an intermediate step pursuant to 5 V.I.C. § 1304 which does not award any of the relief sought in the petition, but requires the respondent to file a return, responding to the petition.

(2) Pursuant to 5 V.I.C. § 1306 the Superior Court has the duty of serving upon the respondents the writ of habeas corpus calling for further proceedings on the petition.

(3) Upon issuing a writ of habeas corpus, the Superior Court has discretion to appoint counsel for the petitioner under 5 V.I.C. § 3524 (governing the Office of the Territorial Public Defender) or under 4 V.I.C. § 513(d) (providing for appointment of an attorney to represent any person unable to employ counsel).

(4) Further proceedings under the order granting a writ of habeas corpus – and any later orders of the court – shall afford the petitioner appropriate opportunities to confer with counsel.

(e) Return. If a writ of habeas corpus is issued as provided in subpart (d) of this Rule, the respondent shall file a return – verified upon oath – within 30 days, or within such other period as the writ may prescribe. The return must explain under what lawful order the petitioner is detained and must allege facts establishing the legality of the petitioner's custody. Any material allegation of the petition not controverted in the return is deemed admitted for purposes of the proceeding. The return must comply with 5 V.I.C. § 1308 and must be served on the petitioner.

(f) Traverse by Petitioner. Within 30 days after service and filing of a return by the respondent, the petitioner may file a traverse. The petitioner may deny or controvert any of the material facts or matters set forth in the respondent's return, challenge the sufficiency thereof, or allege any fact to show either that the imprisonment or detention is unlawful, or that petitioner is entitled to discharge or another form of relief. Any material allegation of the respondent's return not contested in the petitioner's traverse is deemed admitted for purposes of the proceeding. A traverse must be verified under oath and must be served on the respondent.

(g) Evidentiary hearing; when required; standard applied.

(1) The Superior Court generally must hold an evidentiary hearing after it has concluded that a petitioner has alleged a prima facie case for relief, a writ of habeas corpus has been issued, and the respondent has filed a return; *provided, however*, that an evidentiary hearing is not necessary if the submissions before the court, including any reply or traverse by the petitioner, reveal no factual disputes that are material to disposition of the issues raised in the petition, and the court makes a written finding to that effect.

(2) Except where an express finding is made under subpart (g)(1) of this Rule that there are no material factual matters in dispute, within 30 days after the filing of any traverse by the petitioner or, if none is filed, within 30 days after the expiration of the time allowed for filing a traverse, the court must either grant or deny the habeas corpus relief sought by the petition – or order an evidentiary hearing to be held without any unnecessary delay, on a date certain.

(3) The petitioner must be produced at the evidentiary hearing unless the court, for good cause, directs otherwise. The court may, in its discretion, require that the petitioner appear by approved video-conferencing arrangements that provide two-way audio and visual

connection; *provided however*, that if the petitioner is represented by counsel – whether retained or appointed by the court – the petitioner must be afforded the means and opportunity for appropriate confidential consultation with, and private advice from, counsel before, during and after the proceedings.

(4) At the evidentiary hearing the court shall proceed in a summary way to hear such proof as may be offered against the petitioner's imprisonment or detention, or in favor of the same, and to dispose of the petition as the justice of the case may require. The court has full authority to compel the attendance of witnesses, to issue subpoenas, and to perform all other acts necessary for a full and fair hearing and determination of the case, as provided in 5 V.I.C. § 1311. At the evidentiary hearing the petitioner may deny or controvert any of the material facts or matters set forth in the respondent's return, or challenge the sufficiency thereof, and may present any facts showing that his imprisonment or detention is unlawful, or that he is entitled to discharge or another form of relief.

(h) Granting relief on the merits of the petition. If the Superior Court grants habeas corpus relief on the merits, in whole or in part, it may order discharge of the petitioner or award a different form of remedy as the justice of the case may require. Consistent with Section 3 of the Revised Organic Act, the court shall provide a successful habeas corpus petitioner with redress in the form of a remedy that cures the constitutional or statutory violation, even if that specific remedy is not set forth in a statute.

(i) Reasons for denial of petition Any order denying a petition for writ of habeas corpus upon preliminary consideration under subpart (b) of this Rule – or denying habeas corpus relief on the merits upon consideration of the parties submissions and any evidentiary hearing, as provided in subparts (c) and (d) of this Rule – must contain a brief statement of the reasons for the denial. An order merely declaring the petition or habeas corpus relief "denied" is insufficient.

(j) Extending or shortening time. On motion of any party, or on the court's own motion, for good cause stated in an order the court may shorten or extend the time for doing any act under this Rule. A copy of the order must be mailed to each party.

(k) Successive petitions. A petitioner should raise all then-available legal grounds in support of the writ of habeas corpus in the initial application; *provided, however*, that successive habeas corpus petitions may be filed. In a later petition, any ground for relief that has been ruled upon by the Supreme Court of the Virgin Islands on a prior direct appeal will be barred. If a subsequent petition is not legally barred on the merits or procedurally, the Superior Court may reject a successive petition only if the Government pleads and demonstrates, or the court finds on its own motion, that the successive filings are an abuse of the writ process (or violate similar common law standards for striking repetitive baseless, improper, harassing, or frivolous petitions); this is an equitable issue and the decision to invoke the abuse-of-writ doctrine to preclude a subsequent habeas corpus petition is vested in the sound discretion of the Superior Court, which shall set forth its reasons for so ruling and must explain its consideration of all relevant circumstances and factors, including the petitioner's prior writ history, the merits of the claim, and the reasons for raising new arguments or attempting to relitigate prior unsuccessful arguments.

NOTE

Rule 2 provides procedures, requirements and timetables for all stages of a petition for writ of habeas corpus.

Subpart (a) addresses the petition form and content, and (a)(3) identifies key factual material that should be set forth in the body of the petition to identify the proceedings and orders that

have resulted in the detention of the petitioner alleged to be unconstitutional or otherwise unlawful. Subpart (a)(4) calls for each "ground" for relief to be separately stated – with the supporting facts for each. Subpart (a)(6) implements the doctrine in Smith v. Turnbull, 54 V.I. 369 (V.I. 2010) and Preiser v. Rodriguez, 411 U.S. 475, 494, (1973), that if a petitioner is seeking damages, "he is attacking something other than the fact or length of his confinement, and he is seeking something other than immediate or more speedy release—the traditional purpose of habeas corpus. In the case of a damages claim, habeas corpus is not an appropriate or available . . . remedy."

Subpart (a)(8) notes that the required docketing fee must be paid unless the petitioner is granted – upon appropriate application – permission to proceed in forma pauperis.

Subpart (a)(9) implements the case law doctrine that the petition for writ of habeas corpus must not be assigned for decision to the same judge who presided at the petitioner's trial or other hearing that led to the detention challenged in the petition as unlawful.

Subpart (a)(10) requires that the court take initial action on a petition for writ of habeas corpus within 60 days after it is filed, in one of three ways: (A) requesting an informal response that provides records necessary to evaluate the petition, (B) denying the petition because it is barred or fails to state a prima facie case, as provided subpart (b) of the Rule; or (C) issuing an order granting a writ of habeas corpus, which requires further proceedings on the petition under subpart (d) of the Rule.

Subpart (11) provides a procedure for the petitioner to follow if no action is taken on the petition within 60 days of its filing as provided in subpart (a)(8).

Subpart (b) of Rule 2 embodies the requirement that the Superior Court must first determine whether the petition states a prima facie case for relief— that is, whether it states facts that, if true, would entitle the petitioner to relief— and also whether the stated claims are for any reason procedurally or substantively barred as a matter of law. As provided in governing case law, it notes that a petitioner may seek a discharge – or another form of redress, such as a new sentencing hearing, that remedies the violation alleged – if any of the seven conditions set forth in 5 V.I.C. § 1314 are met, or if relief is warranted to remedy a constitutional or statutory violation, even if the right to that remedy is not expressly set forth in a statute. Subpart (b)(3) implements case law that a petitioner may raise in a petition for writ of habeas corpus an issue previously rejected in direct appeal to the Supreme Court of the Virgin Islands only if there has been a subsequent change in the law affecting the petitioner's claim.

Subpart (b)(4) provides that – if the court determines that the petition does not state a prima facie case for relief, or that the claims are all barred as a matter of law – it will deny the petition without further proceedings. Where the court requests submission of records in an informal response as provided in subpart (c) of the Rule, the submitted records may also be considered in determining whether the petition states a prima facie case for relief, or whether all claims are barred as a matter of law.

Subpart (b)(5) requires that – if the petition states a prima facie case for relief and the claims are not all barred as a matter of law, the Superior Court must enter an order granting the writ of habeas corpus requiring further proceedings on the petition as provided in subpart (d) of the Rule – requiring that the respondent file a response, as provided in 5 V.I.C. § 1304. It further assures timeliness in the habeas proceeding by requiring that the writ of habeas corpus must be entered within the initial 60 days after the filing of the petition, or within 45 days after filing of any informal response requested by the court under subpart (c) of this Rule, whichever is later.

Subpart (c) provides a mechanism – short of requiring a formal return by the respondent – for the court to request submission of records or other information that could be dispositive of the petition, or are necessary for determining whether the claims state a prima facie case for relief or are barred as a matter of law. The respondent, the real party in interest, or a custodian of records can be requested under Subpart (c) to provide that information. A copy of the request must be sent to the petitioner, and the petitioner will be notified when any material is submitted, and afforded 15 days in which to file any reply to the submitted information.

Subpart (d) specifies that – if the petitioner has alleged, prima facie, grounds showing entitlement to relief and the claims are not legally barred, the court must issue a writ of habeas corpus ordering further proceedings on the petition. The court does not determine at this stage whether the habeas petitioner will ultimately be entitled to discharge or any other relief. This Subpart of the Rule expressly states that issuance of the writ is an intermediate step pursuant to 5 V.I.C. § 1304 which does not award any of the relief sought in the petition, but requires the respondent to file a return, responding to the petition. Pursuant to 5 V.I.C. § 1306 the Superior Court has the duty of serving the writ upon the respondents.

Subpart (d)(3) tracks governing case law holding that, upon issuing a writ of habeas corpus triggering further proceedings on the petition, the Superior Court has discretion to appoint counsel for the petitioner under 5 V.I.C. § 3524 (governing the Office of the Territorial Public Defender) or under 4 V.I.C. § 513(d) (providing for appointment of an attorney to represent any person unable to employ counsel). Subpart (d)(4) expressly states that proceedings held on the petition must be structured to afford the petitioner appropriate opportunities to confer with counsel.

Subpart (e), relating to the return, require that the respondent provide a verified response within 30 days after issuance of the order granting the writ of habeas corpus, or within such other period as the order prescribes. The Rule specifies that the return must explain under what lawful order the petitioner is detained and must allege facts establishing the legality of the petitioner's custody, and warns that any material allegation of the petition not controverted in the return is deemed admitted for purposes of the proceeding.

Subpart (f) recognizes that within 30 days after service and filing of a return by the respondent, the petitioner may file a sworn responsive document called a traverse, which may deny or controvert any of the material facts or matters set forth in the respondent's return, challenge the sufficiency thereof, or allege any fact to show either that the imprisonment, detention or restraint is unlawful, or that petitioner is entitled to discharge or another form of relief. This subpart also warns the petitioner that any material allegation of the respondent's return not contested in the petitioner's traverse is deemed admitted for purposes of the proceeding.

Subpart (g) implements the case law holding that the Superior Court generally must hold an evidentiary hearing after it has concluded that a petitioner has alleged a prima facie case for relief, issued the writ of habeas corpus, and the respondent has filed a return – but that in the rare case where no factual disputes exist that are material to disposition of the issues raised in the petition, and the court makes a written finding to that effect. In the normal situation, a hearing will be scheduled, and subpart (g) specifies that an order setting a hearing date must be entered within 30 days after the filing of any traverse by the petitioner or, if none is filed, 30 days after the expiration of the time allowed for filing a traverse, in which the court either denies relief under the petition (based on submissions to that point) or orders an evidentiary hearing to be held. The Rule does not set a specific timetable for holding the hearing but requires that it be set for a date certain "without any unnecessary delay."

Subpart (g)(3) requires that the petitioner be produced at the evidentiary hearing unless the court, for good cause, directs otherwise. It further states that the court may, in its discretion, require that the petitioner appear by approved video-conferencing arrangements that provide two-way audio and visual connection; provided however, that the petitioner must be afforded the means and opportunity for appropriate confidential consultation with, and private advice from, counsel before, during and after the proceedings.

Subpart (h) provides that – if the Superior Court grants the writ on its merits, in whole or in part, it may order discharge of the petitioner or award a different form of remedy as the justice of the case may require. This implements case law holding that – consistent with Section 3 of the Revised Organic Act – the court shall provide a successful habeas corpus petitioner with redress in the form of a remedy that cures the constitutional or statutory violation, even if that specific remedy is not set forth in a statute.

Subpart (i) applies in those instances where the petition is denied (whether on initial review, after submissions by the parties, or after a hearing). It requires that any order denying a habeas petition upon initial review, or denying habeas corpus relief after issuances of the writ, must contain a brief statement of the reasons for the denial. An order merely declaring the petition to be "denied" is insufficient.

Subpart (j) allows the court, for good cause stated in an order, to shorten or extend the time for doing any act under Rule 2.

Subpart (k) recognizes that under Virgin Islands law successive habeas corpus petitions may be filed. It notes that any ground for relief that has been ruled upon by the Supreme Court of the Virgin Islands on a prior direct appeal will be barred. In general, if a subsequent petition is not legally barred on the merits or procedurally, subpart (k) specifies that the Superior Court may reject a successive petition only if the Government pleads and demonstrates that the successive filings are an abuse of the writ process (or violate similar common law standards for striking repetitive baseless, improper, harassing, or frivolous applications). The Rule notes that these are equitable considerations and that the decision to invoke the abuse-of-writ doctrine to preclude a subsequent habeas corpus petition is vested in the sound discretion of the Superior Court. Subpart (k) of Rule 2 requires that the court set forth its reasons for so ruling and must explain its consideration of all relevant circumstances and factors, including the petitioner's prior writ history, the merits of the claim, and the reasons for raising new arguments or attempting to relitigate prior unsuccessful arguments.

Rule 3. Discovery in habeas corpus proceedings

(a) Leave of court required. A judge may, for good cause, authorize a party in a habeas corpus proceeding to conduct discovery under the Virgin Islands Rules of Civil Procedure, and shall specify by order the limitations on the scope or extent of any such discovery. If necessary for effective discovery, the judge may appoint an attorney for a petitioner who qualifies to have counsel appointed.

(b) Requesting discovery. A party requesting discovery must provide reasons for the request in writing. The request must also include or attach the full text of any proposed interrogatories and requests for admission, and must identify any requested documents with reasonable specificity.

(c) Deposition expenses. If the respondent is granted leave to take a deposition, the judge may require the respondent to pay the travel expenses, any required witness fees, recordation and/or transcription costs, and fees of the petitioner's attorney to attend the deposition.

NOTE

Rule 3 reflects the doctrine that discovery is not available as a matter of right in habeas corpus proceedings. However, Rule 3 recognizes that a judge may, for good cause, authorize a party in a habeas corpus proceeding to conduct discovery under the Virgin Islands Rules of Civil Procedure. Any order authorizing this activity must specify the limitations on its scope or extent. It provides that if necessary for effective discovery, the judge may appoint an attorney for a petitioner who qualifies to have counsel appointed.

Subpart (b) requires a party requesting discovery to expressly state the reasons why it is needed, and to attach the full text of any proposed interrogatories and requests for admission, and must identify any requested documents with reasonable specificity.

Subpart (c) provides that in the unusual case where a respondent is granted leave to take a deposition, the judge may require the respondent to pay the travel expenses, any required witness fees, recordation and/or transcription costs, and fees of the petitioner's attorney to attend the deposition.

Rule 4. Habeas corpus jurisdiction

(a) Proper court to hear petition. Except as stated in subpart (b) of this Rule, the petition should be heard and resolved in the court in which it is filed.

(b) Transfer of petition.

(1) The Superior Court in the judicial district in which the petition is filed must determine, based on the allegations of the petition, whether the matter should be heard by it or by the Superior Court of the other judicial district.

(2) If the Superior Court in which the petition is filed determines that the matter may be more properly heard by the Superior Court of another division, it may nonetheless retain jurisdiction in the matter or, without first determining whether a prima facie case for relief exists, order the matter transferred to the other judicial district. Transfer may be ordered in the following circumstances:

(A) If the petition challenges the terms of a judgment, the matter may be transferred to the judicial district in which judgment was rendered;

(B) If the petition challenges the conditions of an inmate's confinement, it may be transferred to the judicial district in which the petitioner is confined. A change in the institution of confinement that effects a change in the conditions of confinement may constitute good cause to deny the petition; or

(C) If the petition challenges the denial of parole or the petitioner's suitability for parole and is filed in a judicial district of the Superior Court other than that which rendered the underlying judgment, the court in which the petition is filed should transfer the petition to the Superior Court for the other judicial district in which the underlying judgment was rendered.

(3) The transferring court must specify in the order of transfer the reason for the transfer.

(4) If the receiving court determines that the reason for transfer is inapplicable, the receiving court must, within 30 days of receipt of the case, order the case returned to the transferring court. The transferring court then must retain and resolve the matter as provided by these rules.

NOTE

Under Habeas Corpus Rule 4 it is expected that the court in the judicial district where the petition is filed will hear and decide it, but subpart (b) notes that transfer to another judicial district may be undertaken. Example grounds for transfer identified in the Rule include situations where the petition challenges the terms of a judgment (the matter may be transferred to the division in which judgment was rendered), where the petition challenges the conditions of an inmate's confinement (the petition may be transferred to the judicial district in which the petitioner is confined, or the petition challenges the denial of parole or the petitioner's suitability for parole and is filed in a judicial district other than the court that rendered the underlying judgment. If the court to which the petition is transferred determines that the reason for transfer is inapplicable, it will order the case returned to the transferring court.

EXHIBIT B

HABEAS CORPUS RULE AMENDMENTS RECOMMENDED BY THE ADVISORY COMMITTEE ON RULES, DECEMBER 15, 2017, BASED ON COMMENTS RECEIVED IN THE COMMENT PERIOD SET BY THE SUPREME COURT

At its meeting December 15, 2017 the Advisory Committee on Rules approved the following recommendations for amendments to the Virgin Islands Habeas Corpus Rules in light of comments received during the comment period set by the Supreme Court, ending in November, 2017. The Committee recommends that the Supreme Court promulgate an amended set of Habeas Corpus Rules incorporating these updates.

Rule 1. Application and Definitions

(a) Title and Citation. These rules shall be known as the Virgin Islands Habeas Corpus Rules and may be cited in short-form as V.I. H.C.R.

(b) Effective Date. These rules shall take effect as provided in a promulgation order by the Supreme Court of the Virgin Islands.

(c) Proceedings Governed. The Rules apply to habeas corpus proceedings in the Superior Court as provided by Chapter 91 of Title 5 of the Virgin Islands Code, 5 V.I.C. § 1301 et seq., or any other provision of law authorizing relief from unlawful confinement or unlawful conditions of confinement.

(d) Definitions. In these Rules, the following definitions apply:

(1) A "*petition for writ of habeas corpus*" is the petitioner's initial filing that commences a proceeding.

(2) A "*writ of habeas corpus*" is an order directing the respondent to file a return. The writ – which operates as a procedural order to show cause – is issued if the petitioner has made a prima facie showing of entitlement to relief on claims that are not otherwise barred; issuance of the writ of habeas corpus does not grant the ultimate relief requested but simply requires further proceedings on the petitioner's application for discharge or other relief from unlawful custody or detention.

(3) The "*return*" is the respondent's statement of reasons why the court should not grant the relief requested by the petitioner. [The return must allege facts establishing the legality of the petitioner's custody in accordance with 5 V.I.C. §1308.](#)

(4) The "*traverse*" is the petitioner's pleading in response to the return.

(5) An "*evidentiary hearing*" is a hearing held by the court to resolve contested factual issues.

(6) An "*informal response*" is a written submission requested by the court – prior to ruling on whether to issue a writ of habeas corpus ordering a return by the respondent – to be made by the respondent, the real party in interest, or a custodian of any record pertaining to the petitioner's case, which produces either the requested record(s) or certified copies thereof, and which is filed with the clerk of the court with a copy served upon to the petitioner.

(7) A "*reply*" is an optional filing by the petitioner concerning any information or records submitted in an informal response, and must be filed within 15 days after an informal response

(8) An "*order granting habeas corpus relief*" or an "*order denying habeas corpus relief*" is the court's final order – issued after review of the petition on the merits – awarding or denying the ultimate relief sought by the petitioner.

(e) Application. These rules, and subsequent amendments, govern:

(1) habeas corpus proceedings commenced after their effective date; and

(2) habeas corpus proceedings pending on the effective date of the rules or amendments, unless:

(i) the Supreme Court of the Virgin Islands specifies otherwise by order; or

(ii) the Superior Court makes an express finding that applying them in a particular previously-pending action would be infeasible or would work an injustice.

(f) Interpretation. These rules are to be interpreted to provide for the just determination of every habeas corpus proceeding, to secure simplicity in procedure and fairness in administration, and to eliminate unjustifiable expense and delay.

(g) Procedures Not Addressed in These Rules. When procedure is not prescribed by these Virgin Islands Habeas Corpus Petition Rules, precedent from the Supreme Court of the Virgin Islands, or the Virgin Islands Code, the Virgin Islands Rules of Civil Procedure may be applied as appropriate. Where no statute, precedent or rule governs, a judge may regulate practice in a habeas corpus proceeding in any manner consistent with law of the Virgin Islands.

NOTE

The preliminary provisions in Rule 1 of the V.I. Habeas Corpus Rules include definitions intended to assist in keeping clear the various stages of the proceedings that are spelled out in detailed procedural provisions of Rule 2, implementing the Virgin Islands statutory, Organic Act, and common law habeas corpus protections. In particular, these Rules reserve the terminology "order granting habeas corpus relief" or "order denying habeas corpus relief" to describe the ultimate disposition of the petition on the merits – whether petitioner is entitled to discharge or other relief. The initial order of the court after review of the petition to determine whether it states a prima facie case for relief is referred to as "an order denying the petition" or "~~an order granting~~ a writ of habeas corpus" which is – in effect – an order to show cause for further proceedings on the writ, initially a "return" by the respondent. Issuance of a "writ of habeas corpus" will require the respondent to file a formal return responding to the averments of the petition. Thereafter (following the filing of the return, and the petitioner's opportunity to file a traverse in response thereto) the court will determine whether there are any material facts at issue warranting a hearing, and subsequently will issue a decision "granting habeas corpus relief" or "denying habeas corpus relief" on the merits.

Rule 2. Habeas Corpus Proceedings

(a) Petition form and content.

(1) *Availability.* Any person who believes he or she is unlawfully imprisoned or detained in custody, ~~or~~ confined under unlawful conditions, or otherwise unlawfully restrained of his or her liberty, may file a petition for a writ of habeas corpus to seek review of the legality of that imprisonment or detention.

(2) *Format.* ~~Petitions~~Applications for writ of habeas corpus shall be made in writing and a written petition which must be dated, and must be signed under oath by the party seeking relief or, if authorized by law, by someone on that party's behalf. The petition may be typed, printed, or neatly handwritten.

(3) *Content.* In compliance with 5 V.I.C. § 1302, the petition must:

(A) specify that the person on whose behalf the writ is sought is imprisoned or restrained of his liberty;

(B) identify the officer or person by whom, and the place where, the petitioner is confined or restrained, naming all the parties, if they are known, or describing them, if they are not known; and

(C) list all of the following:

- (i) name and location of the court that entered the judgment of conviction or order of detention being challenged;
- (ii) criminal docket or case number of that proceeding (if known);
- (iii) date of the judgment of conviction or other order of detention (if known);
- (iv) whether in that proceeding the petitioner pled not guilty, guilty, nolo contendere (no contest), or an insanity plea. If there were multiple charges and different pleas to the various charges, specify the plea for each count or charge.
- (iv) date of sentencing as well as the length and terms of the sentence imposed;
- (v) name(s) of all crimes of which the petitioner was convicted in the judgment of conviction being challenged;
- (vi) date of the judgment of conviction or order of detention; and
- (vii) date and docket number (if known) of each appeal and of each appellate decision relating to these charges.

(4) *Statement of grounds and supporting facts.* The petition shall set forth separately each ground on which the imprisonment or detention is alleged to be illegal, and shall state the specific facts supporting each ground. The petition need not argue or cite law, but it must separately state the facts that support each of the claims.

(5) *Copies of orders and decisions.* The petitioner should attach copies (if available) of any order or court decision regarding the charges that led to the petitioner's incarceration or detention, if relevant to the issues raised in the petition.

(6) *Damage claims are not to be included.* The petition must address the grounds upon which the petitioner's detention is unlawful. Claims for recovery of damages or other relief based on the incarceration, ~~or~~ detention or restraint of the defendant shall not be included in the petition for habeas corpus relief.

(7) *Filing.* The petition must be sent to the Clerk of the Superior Court of the Virgin Islands at one of these addresses:

St. Thomas/St. John office:

Superior Court of the Virgin Islands
 Office of the Clerk
 Alexander A. Farrelly Justice Center
 5400 Veteran's Drive
 St. Thomas, USVI 00802

St. Croix office:

Superior Court of the Virgin Islands
 Office of the Clerk
 R.H. Amphlett Leader
 Justice Center
 RR1 9000
 Kingshill, USVI 00850

(8) *Docketing fees.* The petition must be accompanied by the appropriate docket fee, deposited with the Clerk of the Superior Court, unless permission to proceed *in forma pauperis* has been granted. If a petition is docketed without prepayment of the applicable docketing fee, the petitioner shall pay the fee within 14 days after docketing. If the petitioner fails to do so and has not filed a motion for leave to proceed *in forma pauperis* accompanied by supporting documents, the court may dismiss the petition without further notice.

(9) *Presentation to judge or magistrate judge.* Upon filing, the clerk of the court must immediately deliver the petition to the judge assigned to the matter; *provided, however*, that the petition for writ of habeas corpus shall not be assigned for decision to the same judge who presided at the petitioner's trial or other hearing that led to the detention challenged in the petition as unlawful.

(10) *Time for initial action by the court.* The court must take initial action on a petition for writ of habeas corpus within 60 days after it is filed by:

- (A) Requesting an informal response to the petition under subpart (c) of this Rule;
- (B) Entering an order denying the petition after consideration under subpart (b) of this Rule; or
- (C) Issuing a writ of habeas corpus, which requires further proceedings under subpart (d) of this Rule.

(11) *Procedure if initial disposition timetable is not met.* If the court fails to rule on the petition within 60 days of its filing as provided in subpart (a)(8), the petitioner may file a dated notice and request for ruling that includes a declaration stating the date the petition was filed, and indicating that the petitioner has not received a ruling on the petition. A copy of the original petition must be attached to the notice and request for ruling. If the notice is complete and the court has failed to rule and the court has made no other scheduling directions, the clerk shall notify the ~~on behalf of the judge, must calendar the petition for a decision within 30 days. The Presiding Judge of the Superior Court of the Virgin Islands shall be notified and a copy of such notice shall be sent to the parties of any habeas petition calendared pursuant to this subpart (a)(11). If the judge assigned rules on the petition before the date it is calendared for decision, the matter may be taken off calendar.~~

(b) Preliminary consideration by the court.

(1) *Consideration by the court.* When presented with a petition for a writ of habeas corpus, within the period(s) specified in this Rule the Superior Court must first determine whether the petition states a prima facie case for relief — that is, whether it states facts that, if true, would entitle the petitioner to discharge or other relief — and, in its discretion, may also determine, after providing the petitioner with reasonable notice and a right to be heard, whether the stated claims are for any reason procedurally or substantively barred as a matter of law.

(2) *Grounds for relief.* A petitioner may be awarded a discharge – or another form of redress, such as a new sentencing hearing, that remedies the violation alleged – if any of the seven conditions set forth in 5 V.I.C. § 1314 are met, or if relief is warranted to remedy a constitutional or statutory violation, even if the right to that remedy is not expressly set forth in a statute.

(3) *Issues previously raised on direct appeal to the Supreme Court.* A petitioner may not raise in a petition for writ of habeas corpus an issue previously rejected in direct appeal to the Supreme Court of the Virgin Islands unless there has been a subsequent change in the law affecting the petitioner's claim.

(4) *Denial of a petition at the preliminary consideration stage.* If the court determines that the petition does not state a prima facie case for relief, or that the claims are all barred as a matter of law, the court shall enter an order denying the petition without further proceedings. Where the court requests submission of records in an informal response as provided in subpart (c) of this Rule, the submitted records may also be considered in determining whether the petition states a prima facie case for relief, or whether all claims are barred as a matter of law.

(5) ~~Issuing Grant of~~ *a writ of habeas corpus.* If it appears that the petition states a prima facie case for relief and that the claims are not all barred as a matter of law, Superior Court must issue a writ of habeas corpus, requiring further proceedings on the petition as provided in subpart (d)

of this Rule – directing ~~that~~ the respondent to file a response, as provided in 5 V.I.C. § 1304. Where the petition is not denied as provided in subpart (b)(4) of this Rule, a writ of habeas corpus shall be ~~issued~~~~entered~~ within the initial 60 days after the filing of the petition, or within 45 days after filing of any informal response requested by the court under subpart (c) of this Rule, whichever is later.

(c) Informal response.

(1) As part of its initial consideration of the petition as provided in subpart (b) of this Rule, before ruling upon whether the petition states a prima facie case or is barred as a matter of law, the court may – in the exercise of its discretion – request an informal response from:

(A) The respondent or real party in interest; or

(B) The custodian of any record pertaining to the petitioner, directing the custodian to produce the record or a certified copy to be filed with the clerk of the court.

(2) A copy of the request must be sent to the petitioner.

(3) The respondent, real party in interest, or record custodian shall within 15 days file the requested informal response and serve it upon the petitioner. The informal response must be in writing and, if it consists of records or copies of records, a copy of every record and document furnished to the court must be furnished to the petitioner.

(4) When an informal response is filed, the court must notify the petitioner that a reply thereto may be served within 15 days from the date of service of the informal response on the petitioner. After receiving an informal response, the court may not deny the petition until the petitioner has filed a timely reply to the informal response or the 15-day period provided for a reply under this Rule has expired.

(d) ~~Writ~~~~Order granting writ~~ of habeas corpus; further proceedings; appointing counsel.

(1) The court must issue ~~an order granting~~ a writ of habeas corpus if the petitioner has alleged, prima facie, grounds showing entitlement to relief and the claims are not legally barred. In assessing whether the petitioner would be entitled to relief if the factual allegations were proved, the court must take petitioner's factual allegations as true. The court does not determine at this stage whether the petitioner is entitled to discharge or any other form of remedy if habeas corpus relief is ultimately granted. The ~~issuance~~~~granting~~ of a writ of habeas corpus under this Rule is an intermediate step pursuant to 5 V.I.C. § 1304 which does not award any of the relief sought in the petition, but requires the respondent to file a return, responding to the petition.

(2) Pursuant to 5 V.I.C. § 1306 the Superior Court has the duty of serving upon the respondents the writ of habeas corpus calling for further proceedings on the petition.

(3) Upon issuing ~~of~~ a writ of habeas corpus, the Superior Court has discretion to appoint counsel for the petitioner under 5 V.I.C. § 3524 (governing the Office of the Territorial Public Defender) or under 4 V.I.C. § 513(d) (providing for appointment of an attorney to represent any person unable to employ counsel).

(4) Further proceedings under the ~~order granting a~~ writ of habeas corpus – and any later orders of the court – shall afford the petitioner appropriate opportunities to confer with counsel.

(e) Return. If ~~an order granting~~ a writ of habeas corpus is issued as provided in subpart (d) of this Rule, the respondent shall file a return – verified upon oath – within 30 days, or within such other period as the ~~order granting the~~ writ may prescribe. The return must explain under what lawful order the petitioner is detained and must allege facts establishing the legality of the petitioner's custody. Any material allegation of the petition not controverted in the return is deemed admitted for purposes of the proceeding. The return must comply with 5 V.I.C. § 1308 and must be served on the petitioner.

(f) Traverse by Petitioner. Within 30 days after service and filing of a return by the respondent, the petitioner may file a traverse. The petitioner may deny or controvert any of the material facts or

matters set forth in the respondent's return, challenge the sufficiency thereof, or allege any fact to show either that the imprisonment or detention is unlawful, or that petitioner is entitled to discharge or another form of relief. Any material allegation of the respondent's return not contested in the petitioner's traverse is deemed admitted for purposes of the proceeding. A traverse must be verified under oath and must be served on the respondent.

(g) Evidentiary hearing; when required; standard applied.

(1) The Superior Court generally must hold an evidentiary hearing after it has concluded that a petitioner has alleged a prima facie case for relief, a writ of habeas corpus has been issued, and the respondent has filed a return; *provided, however*, that an evidentiary hearing is not necessary if the submissions before the court, including any reply or traverse by the petitioner, reveal **absolutely** no factual disputes that are material to disposition of the issues raised in the petition, and the court makes a written finding to that effect.

(2) Except where an express finding is made under subpart (g)(1) of this Rule that there are **absolutely** no material factual matters in dispute, within 30 days after the filing of any traverse by the petitioner or, if none is filed, within 30 days after the expiration of the time allowed for filing a traverse, the court must either grant or deny the habeas corpus relief sought by the petition – or order an evidentiary hearing to be held without any unnecessary delay, on a date certain.

(3) The petitioner must be produced at the evidentiary hearing unless the court, for good cause, directs otherwise. The court may, in its discretion, require that the petitioner appear by approved video-conferencing arrangements that provide two-way audio and visual connection; *provided however*, that **if the petitioner is represented by counsel – whether retained or appointed by the court –** the petitioner must be afforded the means and opportunity for appropriate confidential consultation with, and private advice from, counsel before, during and after the proceedings.

(4) At the evidentiary hearing the court shall proceed in a summary way to hear such proof as may be offered against the petitioner's imprisonment or detention, or in favor of the same, and to dispose of the petition as the justice of the case may require. The court has full authority to compel the attendance of witnesses, to issue subpoenas, and to perform all other acts necessary for a full and fair hearing and determination of the case, as provided in 5 V.I.C. § 1311. At the evidentiary hearing the petitioner may deny or controvert any of the material facts or matters set forth in the respondent's return, or challenge the sufficiency thereof, and may present any facts showing that his imprisonment or detention is unlawful, or that he is entitled to discharge or another form of relief.

(h) Granting relief on the merits of the petition. If the Superior Court grants habeas corpus relief on the merits, in whole or in part, it may order discharge of the petitioner or award a different form of remedy as the justice of the case may require. Consistent with Section 3 of the Revised Organic Act, the court shall provide a successful habeas corpus petitioner with redress in the form of a remedy that cures the constitutional or statutory violation, even if that specific remedy is not set forth in a statute.

(i) Reasons for denial of petition Any order denying a petition for writ of habeas corpus upon preliminary consideration under subpart (b) of this Rule – or denying habeas corpus relief on the merits upon consideration of the parties submissions and any evidentiary hearing, as provided in subparts (c) and (d) of this Rule – must contain a brief statement of the reasons for the denial. An order merely declaring the petition or habeas corpus relief "denied" is insufficient.

(j) Extending or shortening time. On motion of any party, or on the court's own motion, for good cause stated in an order the court may shorten or extend the time for doing any act under this Rule. A copy of the order must be mailed to each party.

(k) Successive petitions. A petitioner should raise all then-available legal grounds in support of the writ of habeas corpus in the initial application; *provided, however*, that successive habeas corpus petitions may be filed. In a later petition, any ground for relief that has been ruled upon by the Supreme Court of the Virgin Islands on a prior direct appeal will be barred. If a subsequent petition is not legally barred on the merits or procedurally, the Superior Court may reject a successive petition only if the Government pleads and demonstrates, or the court finds on its own motion that the successive filings are an abuse of the writ process (or violate similar common law standards for striking repetitive, baseless, improper, harassing, or frivolous petitions/applications); this is an equitable issue and the decision to invoke the abuse-of-writ doctrine to preclude a subsequent habeas corpus petition is vested in the sound discretion of the Superior Court, which shall set forth its reasons for so ruling and must explain its consideration of all relevant circumstances and factors, including the petitioner's prior writ history, the merits of the claim, and the reasons for raising new arguments or attempting to relitigate prior unsuccessful arguments.

NOTE

Rule 2 provides procedures, requirements and timetables for all stages of a petition for writ of habeas corpus.

*Subpart (a) addresses the petition form and content, and (a)(3) identifies key factual material that should be set forth in the body of the petition to identify the proceedings and orders that have resulted in the detention of the petitioner alleged to be unconstitutional or otherwise unlawful. Subpart (a)(4) calls for each "ground" for relief to be separately stated – with the supporting facts for each. Subpart (a)(6) implements the doctrine in *Smith v. Turnbull*, 54 V.I. 369 (V.I. 2010) and *Preiser v. Rodriguez*, 411 U.S. 475, 494, (1973), that if a petitioner is seeking damages, "he is attacking something other than the fact or length of his confinement, and he is seeking something other than immediate or more speedy release—the traditional purpose of habeas corpus. In the case of a damages claim, habeas corpus is not an appropriate or available . . . remedy."*

Subpart (a)(8) notes that the required docketing fee must be paid unless the petitioner is granted – upon appropriate application – permission to proceed in forma pauperis.

Subpart (a)(9) implements the case law doctrine that the petition for writ of habeas corpus must not be assigned for decision to the same judge who presided at the petitioner's trial or other hearing that led to the detention challenged in the petition as unlawful.

Subpart (a)(10) requires that the court take initial action on a petition for writ of habeas corpus within 60 days after it is filed, in one of three ways: (A) requesting an informal response that provides records necessary to evaluate the petition, (B) denying the petition because it is barred or fails to state a prima facie case, as provided subpart (b) of the Rule; or (C) issuing an order granting a writ of habeas corpus, which requires further proceedings on the petition under subpart (d) of the Rule.

Subpart (11) provides a procedure for the petitioner to follow if no action is taken on the petition within 60 days of its filing as provided in subpart (a)(8).

Subpart (b) of Rule 2 embodies the requirement that the Superior Court must first determine whether the petition states a prima facie case for relief — that is, whether it states facts that, if true, would entitle the petitioner to relief — and also whether the stated claims are for any reason procedurally or substantively barred as a matter of law. As provided in governing case law, it notes that a petitioner may seek a discharge – or another form of redress, such as a new sentencing hearing, that remedies the violation alleged – if any of the seven conditions set forth in 5 V.I.C. § 1314 are met, or if relief is warranted to remedy a constitutional or statutory violation, even if the right to that remedy is not expressly set forth in a statute. Subpart (b)(3) implements case law that a petitioner may raise in a petition for writ of habeas corpus an issue previously rejected in direct appeal to the Supreme Court of the Virgin Islands only if there has been a subsequent change in the law affecting the petitioner's claim.

Subpart (b)(4) provides that – if the court determines that the petition does not state a prima facie case for relief, or that the claims are all barred as a matter of law – it will deny the petition without further proceedings. Where the court requests submission of records in an informal response as

provided in subpart (c) of the Rule, the submitted records may also be considered in determining whether the petition states a prima facie case for relief, or whether all claims are barred as a matter of law.

Subpart (b)(5) requires that – if the petition states a prima facie case for relief and the claims are not all barred as a matter of law, ~~the~~ Superior Court must ~~issue enter an order granting the a~~ writ of habeas corpus ~~to require~~ requiring further proceedings on the petition as provided in subpart (d) of the Rule – requiring that the respondent ~~to~~ file a response, as provided in 5 V.I.C. § 1304. It further assures timeliness in the habeas proceeding by requiring that the writ of habeas corpus must be entered within the initial 60 days after the filing of the petition, or within 45 days after filing of any informal response requested by the court under subpart (c) of this Rule, whichever is later.

Subpart (c) provides a mechanism – short of requiring a formal return by the respondent – for the court to request submission of records or other information that could be dispositive of the petition, or are necessary for ~~determining~~determination whether the claims state a prima facie case for relief or are barred as a matter of law. The respondent, the real party in interest, or a custodian of records can be requested under Subpart (c) to provide that information. ~~Of course, a~~ A copy of the request must be sent to the petitioner, and the petitioner will be notified when any material is submitted, and afforded 15 days in which to file any reply to the submitted information.

Subpart (d) specifies that – if the petitioner has alleged, prima facie, grounds showing entitlement to relief and the claims are not legally barred, the court must ~~issue enter an order granting a~~ writ of habeas corpus ~~ordering for~~ further proceedings on the petition. The court does not determine at this stage whether the habeas petitioner will ultimately be entitled to discharge or any other relief. This Subpart of the Rule expressly states that issuance of the writ is an intermediate step pursuant to 5 V.I.C. § 1304 which does not award any of the relief sought in the petition, but requires the respondent to file a return, responding to the petition. Pursuant to 5 V.I.C. § 1306 the Superior Court has the duty of serving the ~~order issuing the~~ writ upon the respondents.

Subpart (d)(3) tracks governing case law holding that, upon issuing a writ of habeas corpus triggering further proceedings on the petition, the Superior Court has discretion to appoint counsel for the petitioner under 5 V.I.C. § 3524 (governing the Office of the Territorial Public Defender) or under 4 V.I.C. § 513(d) (providing for appointment of an attorney to represent any person unable to employ counsel). Subpart (d)(4) expressly states that proceedings held on the petition must be structured to afford the petitioner appropriate opportunities to confer with counsel.

Subpart (e), relating to the return, require that the respondent provide a verified response within 30 days after issuance of the order granting the writ of habeas corpus, or within such other period as the order prescribes. The Rule specifies that the return must explain under what lawful order the petitioner is detained and must allege facts establishing the legality of the petitioner's custody, and warns that any material allegation of the petition not controverted in the return is deemed admitted for purposes of the proceeding.

Subpart (f) recognizes that within 30 days after service and filing of a return by the respondent, the petitioner may file a sworn responsive document called a traverse, which may deny or controvert any of the material facts or matters set forth in the respondent's return, challenge the sufficiency thereof, or allege any fact to show either that the imprisonment, ~~or~~ detention ~~or~~ restraint is unlawful, or that petitioner is entitled to discharge or another form of relief. This subpart also warns the petitioner that any material allegation of the respondent's return not contested in the petitioner's traverse is deemed admitted for purposes of the proceeding.

Subpart (g) implements the case law holding that the Superior Court generally must hold an evidentiary hearing after it has concluded that a petitioner has alleged a prima facie case for relief, issued the writ of habeas corpus, and the respondent has filed a return – but that in the rare case where ~~absolutely~~ no factual disputes exist that are material to disposition of the issues raised in the petition, and the court makes a written finding to that effect. In the normal situation, a hearing will be scheduled, and subpart (g) specifies that an order setting a hearing date must be entered within 30 days after the filing of any traverse by the petitioner or, if none is filed, 30 days after the expiration of the time allowed for filing a traverse, in which the court either denies relief under the petition (based on submissions to that point) or orders an evidentiary hearing to be held. The Rule does not set a specific timetable for holding the hearing but requires that it be set for a date certain "without any unnecessary delay."

Subpart (g)(3) requires that the petitioner be produced at the evidentiary hearing unless the court, for good cause, directs otherwise. It further states that the court may, in its discretion, require that the petitioner appear by approved video-conferencing arrangements that provide two-way audio and visual connection; provided however, that the petitioner must be afforded the means and opportunity for appropriate confidential consultation with, and private advice from, counsel before, during and after the proceedings.

Subpart (h) provides that – if the Superior Court grants the writ on its merits, in whole or in part, it may order discharge of the petitioner or award a different form of remedy as the justice of the case may require. This implements case law holding that – consistent with Section 3 of the Revised Organic Act – the court shall provide a successful habeas corpus petitioner with redress in the form of a remedy that cures the constitutional or statutory violation, even if that specific remedy is not set forth in a statute.

Subpart (i) applies in those instances where the petition is denied (whether on initial review, after submissions by the parties, or after a hearing). It requires that any order denying a habeas petition upon initial review, or denying habeas corpus relief after issuances of the writ, must contain a brief statement of the reasons for the denial. An order merely declaring the petition to be "denied" is insufficient.

Subpart (j) allows the court, for good cause stated in an order, to shorten or extend the time for doing any act under Rule 2.

Subpart (k) recognizes that under Virgin Islands law successive habeas corpus petitions may be filed. It notes that any ground for relief that has been ruled upon by the Supreme Court of the Virgin Islands on a prior direct appeal will be barred. In general, if a subsequent petition is not legally barred on the merits or procedurally, subpart (k) specifies that the Superior Court may reject a successive petition only if the Government pleads and demonstrates that the successive filings are an abuse of the writ process (or violate similar common law standards for striking repetitive baseless, improper, harassing, or frivolous applications). The Rule notes that these are equitable considerations and that the decision to invoke the abuse-of-writ doctrine to preclude a subsequent habeas corpus petition is vested in the sound discretion of the Superior Court. Subpart (k) of Rule 2 requires that the court set forth its reasons for so ruling and must explain its consideration of all relevant circumstances and factors, including the petitioner's prior writ history, the merits of the claim, and the reasons for raising new arguments or attempting to relitigate prior unsuccessful arguments.