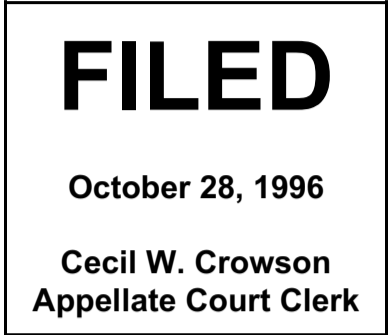


IN THE SUPREME COURT OF TENNESSEE

IN RE:)
)
RULE 28,)
TENNESSEE SUPREME COURT RULES)



ORDER

It is hereby ordered that the attached revised Rule 28, Tennessee Rules of Post-Conviction Procedure, and appendices shall replace existing Rule 28 and appendices.

This 28th day of October, 1996.

PER CURIAM

TENNESSEE RULES OF POST-CONVICTION PROCEDURE

SECTION 1. SCOPE AND AUTHORITY OF RULES

(A) Purpose - These rules supplement the remedies and procedures set forth in the Post-Conviction Procedure Act (hereinafter the "Act"), Tenn. Code Ann. § 40-30-201 et seq. (1996 Supp.).

(B) Authority - These rules are adopted pursuant to Tenn. Code Ann. § 40-30-218 (1996 Supp.) and the inherent authority of the Tennessee Supreme Court.

SECTION 2. DEFINITIONS

(A) Petition for Post-Conviction Relief - A petition for post-conviction relief is an application to the court, filed by or on behalf of a person convicted of and sentenced for the commission of a criminal offense, that seeks to have the conviction or sentence set aside or an appeal granted on the ground or grounds that the conviction or the sentence or the denial of an appeal violated the state or federal constitution. A pro se petition is one filed by a petitioner without the benefit of counsel.

(B) Answer - An answer is a response filed by the state to the petition for post-conviction relief that admits or denies every claim in the petition and which raises affirmative and specific statutory defenses.

(C) Motion to Reopen - A motion to reopen is a request filed by or on behalf of a person whose original petition for post-conviction relief has been finally ruled upon, to reopen the post-conviction proceeding to consider a new claim of constitutional error pursuant to Tenn. Code Ann. § 40-30-217.

(D) Waiver - A ground for relief is waived if petitioner or petitioner's counsel failed to present the ground for determination in any proceeding before a court of competent jurisdiction in which the ground could have been presented. A rebuttable

presumption of waiver arises if a ground for relief was not raised before a court of competent jurisdiction in which it could have been raised. Waiver does not occur if the claim for relief is based upon a constitutional right not recognized at the time of the prior proceeding and if either the state or federal constitution requires retroactive application of the right.

(E) Previously Determined - A claim for relief is previously determined if a court of competent jurisdiction has ruled on the merits of the claim after a full and fair hearing at which petitioner is afforded the opportunity to call witnesses and present evidence.

(F) Post-Conviction Proceeding - A post-conviction proceeding is a proceeding filed and adjudicated in accordance with these rules of post-conviction procedure.

(G) Filing - A post-conviction petition filed by an attorney or a pro se petitioner who is not incarcerated is filed when it is received by the clerk of court. A post-conviction petition filed by a pro se petitioner who is incarcerated is filed when it is received by the appropriate prison authorities for mailing.

(H) Colorable Claim - A colorable claim is a claim, in a petition for post-conviction relief, that, if taken as true, in the light most favorable to the petitioner, would entitle petitioner to relief under the Post-Conviction Procedure Act.

SECTION 3. APPLICABILITY OF OTHER RULES

(A) Rules Applicable - The Tennessee Rules of Evidence apply in post-conviction proceedings except as otherwise provided by these rules.

(B) Rules Not Applicable - Neither the Tennessee Rules of Civil Procedure nor the Tennessee Rules of Criminal Procedure apply to post-conviction proceedings except as specifically provided by these rules.

SECTION 4. COMMENCEMENT OF POST-CONVICTION PROCEEDING

(A) Manner of Commencing - A post-conviction proceeding is commenced by filing a petition as defined in Section 2 in the court in which petitioner was convicted or sentenced, if the court was a court of record, or, if the conviction or sentence was not in a court of record, by filing a petition as defined in Section 2 in the court of record having criminal jurisdiction in which the conviction occurred or the sentence was imposed.

(B) Time for Commencing - A petition for post-conviction relief must be filed within the statute of limitations set forth in Tenn. Code Ann. § 40-30-202.

(C) Filing the Petition - A petition shall be filed in accordance with Section 2(G) of these rules.

(D) Filing Fees - No filing fee shall be a prerequisite for the filing of a petition for post-conviction relief.

(E) Place of Filing - A petition shall be filed in the court in which the conviction was obtained or in which the sentence was imposed. If the conviction was not obtained in a court of record, the petition shall be filed in a court of record having criminal jurisdiction in the county in which the conviction occurred or the sentence was imposed.

SECTION 5. NATURE OF PLEADINGS

(A) Nature of Pleadings - The pleadings in a post-conviction case shall consist of a petition or a motion to reopen and a responsive motion or answer.

(B) Number of Petitions - Each petitioner shall be entitled to file only one petition for each conviction or sentence incurred.

(C) Limitation of Petitions - Each petition shall be limited to claims arising from the judgment or judgments entered in a single trial or proceeding. A petitioner who desires to obtain relief from judgments entered in more than one trial or proceeding must file separate petitions for each trial or proceeding.

(D) Form of Petition or Motion to Reopen - The petition for post-conviction relief shall be substantially in the form set forth in the appendix. Likewise, a motion to reopen a post-conviction proceeding shall be substantially in the form set forth in the appendix.

(E) Contents of Petition - The petition shall contain:

(1) the biographical and case identifying information contained in the form petition in the appendix;

(2) an affidavit of petitioner in the form set forth in the appendix;

(3) each and every error that petitioner asserts as a ground for relief, including a description of how petitioner was prejudiced by the error(s);

(4) specific facts supporting each claim for relief asserted by petitioner;

(5) specific facts explaining why each claim for relief was not previously presented in any earlier proceeding;

(6) the name or names of any attorney(s) who prepared or assisted in preparing the petition.

(F) Effect of Failure to Comply with Rule - A petition may be dismissed without a hearing if it:

- (1) is not timely filed;
- (2) is filed while another post-conviction petition or direct appeal regarding the same conviction is pending;
- (3) does not contain specific factual allegations;
- (4) does not state the reasons that the claim is not barred by the statute of limitations, waived, or previously determined; or
- (5) does not entitle petitioner to relief even if taken as true.

(G) Contents of State's Response - The answer shall admit or deny each and every allegation set forth in the petition. The state shall file a motion to dismiss which includes the facts relied upon to support the motion to raise as a defense that:

- (1) the petition is barred by the statute of limitations;
- (2) the claim has been waived or previously determined;
- (3) the petition is not filed in the court with jurisdiction;
- (4) the petition asserts a claim for relief from judgments entered in separate trials or proceedings;
- (5) a post-conviction petition or direct appeal regarding the same conviction is currently pending; or
- (6) the facts alleged fail to show that petitioner is entitled to relief.

(H) Time for Filing Answer or Motion - The answer or motion to dismiss shall be filed no more than thirty (30) days after the filing of the amended petition or written notice that no amendment will be filed as required by Tenn. Code Ann. § 40-30-207(b)(2), except for good cause shown.

(I) Effect of Failure to Comply with Rule - The failure to timely file the answer or motion to dismiss within thirty (30) days of the amended petition or written notice

that no amendment will be filed or the failure to detail the facts relating to the defenses enumerated in subsection 5(G) shall not entitle petitioner to relief without proof, but may result in the imposition of sanctions in the exercise of the trial judge's discretion.

SECTION 6. PROCEDURE AFTER PETITION FILED

(A) Clerk's Obligations - Upon receiving a petition for post-conviction relief, the clerk shall file the original document and process it pursuant to Tenn. Code Ann. § 40-30-205.

(B) Court Obligations -

(1) The presiding judge shall assign a judge to hear the case who may be the original hearing judge.

(2) Within thirty (30) days after a petition or amended petition is filed, the judge to whom the case is assigned shall review the petition and all documents related to the judgment and determine whether the petition states a colorable claim.

(3) In the event a colorable claim is stated, the judge shall enter a preliminary order which:

(a) appoints counsel, if petitioner is indigent;

(b) sets a deadline for the filing of an amended petition;

(c) directs disclosure by the state of all that is required to be disclosed under Rule 16 of the Tennessee Rules of Criminal Procedure, to the extent relevant to the grounds alleged in the petition, and any other disclosure required by the state or federal constitution;

(d) orders the state to respond and, if appropriate, to file with the clerk certain transcripts, exhibits, or records from the prior trial or hearing; and

(e) makes other orders as are necessary to the efficient management of the case.

(4) (a) In the event the court concludes after the preliminary review that a colorable claim is not asserted by the petition, the court shall enter an order dismissing the petition or an order requiring that the petition be amended.

(b) No pro se petition shall be dismissed for failure to follow the prescribed form until the court has given petitioner a reasonable opportunity to amend the petition with the assistance of counsel.

(c) In the event the court concludes that dismissal is appropriate, the court shall enter an order specifying its findings of fact and conclusions of law in support of the determination that the petition does not state a colorable claim. The order shall state specifically the facts which support dismissal including whether the petition is barred by the statute of limitation, was filed in a court without jurisdiction, or whether the petition fails to specify the grounds for relief, the facts supporting those grounds, or fails to establish that the claim(s) have not been waived or previously determined.

(5) In the event the court finds that certain claim(s) are colorable and others are not, the court shall enter an order specifying which claims are dismissed and which claims must be responded to by the state. The order shall comply with the requirements of Sections 6(B)(2) and (3) above.

(6) After the state's response is filed, the court shall again review the petition, amended petition, answer or motion, and related documents to determine whether a colorable claim has been stated. If a colorable claim has not been stated, the court shall dismiss the petition by order setting forth the findings of fact and conclusions of law. If a colorable claim is stated, the court shall enter an order requiring the state to answer the allegations, if it has not done so, and setting an

evidentiary hearing. The court's order shall be filed within thirty (30) days of the state's response.

(7) The court may issue such interlocutory orders, including stays of execution, as may be required.

(8) Upon motion, in capital cases involving indigent petitioners, the court may authorize expenditure of funds for experts, investigation, or similar services in accordance with Rule 13, § 2B(10) of the Rules of the Supreme Court of Tennessee. The court's order granting or denying the motion shall include specific findings of fact and conclusions of law and shall, upon request, be filed under seal with the record.

(9) All orders issued by the court except orders of dismissal and final orders shall be served upon counsel for petitioner, or petitioner if pro se, and the district attorney general.

(10) Orders of dismissal shall be considered final orders for purposes of appeal. Orders of dismissal and all final orders shall be served upon counsel for petitioner, petitioner, the district attorney general, the Attorney General and Reporter in Nashville, and any authority imposing restraint on petitioner. The clerk shall certify on each order the date of entry and the date and manner of service.

(C) Petitioner's and State's Obligations -

(1) In the event the court dismisses the petition, petitioner may appeal as of right in accordance with the Tennessee Rules of Appellate Procedure. In the event the court requires petitioner or the state to take other steps to prepare the case for trial, petitioner and the state shall comply.

(2) Appointed or retained counsel shall be required to review the pro se petition, file an amended petition asserting other claims which petitioner arguably has or a written notice that no amended petition will be filed, interview relevant witnesses,

including petitioner and prior counsel, and diligently investigate and present all reasonable claims.

(3) Appointed or retained counsel shall file the certificate of counsel set forth in the appendix within thirty (30) days of either being retained or appointed to represent petitioner, except for good cause shown.

(4) If retained counsel has prepared or assisted in preparing the initial petition and intends to represent petitioner, counsel shall sign the initial petition and shall file the certificate of counsel set forth in the appendix.

(5) Appointed counsel who fails to comply with this section may be denied compensation for services rendered.

(6) The state shall file an answer or a motion to dismiss within thirty (30) days of the filing of the amended petition or of the written notice that no amended petition will be filed. The answer or motion to dismiss shall comply with the statute and with the requirements of Section 5(G).

(7) Upon receiving the court's preliminary order, the state shall provide to petitioner discovery of all those items deemed discoverable under Rule 16, Tennessee Rules of Criminal Procedure, if relevant to the issues raised in the post-conviction petition, and shall provide any other disclosure required by the state or federal constitution.

(8) Petitioner may withdraw a petition at any time prior to the evidentiary hearing, but the withdrawn petition does not toll the statute of limitations.

SECTION 7. DISCOVERY AND PRODUCTION OF EVIDENCE

(A) Discovery - The state shall provide discovery in accordance with Section 6(C)(7).

(B) Production of Documents - The court may require any clerk of any Tennessee court to furnish copies of documents, orders, or records to petitioner or to file the documents in the clerk's office at the state's expense.

SECTION 8. EVIDENTIARY HEARING

(A) Timing - Upon finding that the petition states a colorable claim and within thirty (30) days of the state's response, the court shall enter an order scheduling an evidentiary hearing.

(B) Continuances - The evidentiary hearing shall be conducted within four (4) months of the order scheduling the hearing. The hearing shall not be continued except by order of the court finding that unforeseeable circumstances render a continuance a manifest necessity. No continuance shall extend the hearing more than sixty (60) days beyond the original hearing date.

(C) Witnesses -

(1) Petitioner -

(a) Petitioner has the right to testify unless petitioner is incarcerated in a state that will not release petitioner to the custody of Tennessee for appearance at the evidentiary hearing.

(b) Petitioner shall testify at the evidentiary hearing if the petition raises substantial issues of facts, unless petitioner is incarcerated out of state.

(c) If petitioner is incarcerated out of state, petitioner shall be allowed to offer testimony by affidavit or deposition.

(d) Under no circumstances shall petitioner be required to testify regarding the facts of the conviction which the petition attacks unless necessary to establish the allegations of the petition or necessary to the state's attempt to rebut the allegations of the petition.

(2) Affidavit and Deposition Testimony - If the judge allows affidavit or deposition testimony under the provisions of Tenn. Code Ann. § 40-30-210(a), the judge shall allow the other party sufficient time to file affidavits or depositions in response. If affidavit testimony is allowed, the judge may allow interrogatories to be propounded to the affiant by the other party. If the state is allowed to file deposition testimony, the state shall provide to counsel for indigent petitioners or indigent petitioners if pro se a copy of the deposition at state expense.

(3) Subpoenas - Each party shall have the right to subpoena witnesses for appearance at the evidentiary hearing.

(D) Hearing Procedure -

(1) Petitioner shall be required to present petitioner's case and to establish the grounds alleged and the entitlement to relief by clear and convincing evidence.

(2) Each party shall have the right to examine all witnesses.

(3) In the event the petition alleges that petitioner was unconstitutionally deprived of an appeal and was also entitled to relief on other grounds, the court may bifurcate the proceedings and determine whether petitioner was denied an appeal first, while holding the other claims in abeyance. Those claims may be considered after the outcome of the delayed appeal if allowed, or after the appeal of the claim, if denied.

(4) The hearing shall be limited to issues raised in the petition.

(5) If evidence is objected to on the basis that it concerns issues not raised in the petition or answer, the court may allow amendments and shall do so freely when the presentation of the merits of the cause will otherwise be subserved. The court shall liberally allow a continuance in the event an amendment is allowed to enable the objecting party to meet the evidence.

(6) The hearing, and any other proceedings regarding the petition, shall be recorded.

SECTION 9. DETERMINATION & RELIEF

(A) Decision - The court shall enter an order granting or denying the petition within sixty (60) days of the conclusion of the proof. The order shall contain specific findings of fact and conclusions of law relating to each issue presented. The deadline for entry of the order shall not be extended unless the court finds that unforeseeable circumstances make an extension a manifest necessity. In such circumstances, the entry of the order shall not be delayed more than thirty (30) days beyond the original deadline.

(B) Availability of Relief - A petitioner shall be entitled to post-conviction relief when petitioner's conviction or sentence is void or voidable because of the violation of any right guaranteed by the state or federal constitution, including a right not recognized as existing at the time of the trial or sentencing if either constitution requires retroactive application of that right.

(C) Orders Granting Relief - If the court finds that petitioner is entitled to relief, the court shall enter an order vacating and setting aside the judgment of conviction or sentence or an order granting a delayed appeal. The court shall also enter any other appropriate supplementary orders that may be necessary and proper.

(D) Grant of a Delayed Appeal - Upon determination by the trial court or the Court of Criminal Appeals that petitioner was deprived of the right to request an appeal pursuant to Rule 11, Tennessee Rules of Appellate Procedure, the petitioner shall have sixty (60) days to seek Rule 11 review.

SECTION 10. APPEALS

_____ (A) Dismissals or Denials of Petition - An appeal from the dismissal or denial of a post-conviction petition shall be in accordance with the Tennessee Rules of Appellate Procedure.

(B) Denials of Motions to Reopen - A petitioner whose motion to reopen is denied shall have ten (10) days to seek permission to appeal by filing an application, accompanied by the order denying the motion, in the Court of Criminal Appeals. The state shall have ten (10) days to respond. The Court of Criminal Appeals may allow the parties to file additional briefs, argue the case, or both. In the event the Court of Criminal Appeals finds that the trial court abused its discretion by denying the motion to reopen, the court shall, by order, remand the case to the trial court for further proceedings.

(C) Motions for Review of Motions for Stay - Either party may request review of a trial court's ruling on a motion for stay of execution by filing a motion for review in the Tennessee Court of Criminal Appeals within five (5) days of the trial court's ruling on the stay of execution. The Court of Criminal Appeals may allow the opposing party to respond in writing within three (3) days of the service of the motion for review or may ascertain the party's position by other means. Oral argument shall not be permitted unless ordered by the appellate court. A single judge of the appellate court, or a three-judge panel, shall rule on the motion within five (5) days of the filing of the motion for review. In the event the appellate court finds that the lower court abused its discretion in ruling on the motion for a stay of execution, it shall set aside the order regarding the stay and enter an order either granting or denying the stay, as appropriate. Review of the Court of Criminal Appeals' action may be sought in the Supreme Court. In the event review is sought in the Supreme Court, the procedures for filing and processing the motion shall be the same as those for review in the Court of Criminal Appeals.

SECTION 11. CITATION

These rules may be cited as Tenn. Sup. Ct. R. 28, § _____.

APPENDICES

APPENDIX A. FORM PETITION

The following form petition shall be available without cost to a prisoner in the prisons and other places of detention and shall also be available without cost to any potential petitioner in the office of the clerk of court for any court of record with criminal jurisdiction. This standard form, together with Tenn. Code Ann. § 40-30-202(C), is designed to achieve early finality in post-conviction proceedings through one comprehensive petition and one full and fair hearing at which all grounds for challenging the validity of a conviction or sentence will be considered.

READ THESE INSTRUCTIONS CAREFULLY BEFORE PREPARING THE PETITION

(1) This petition must be legibly handwritten or typewritten. It must be signed by petitioner under penalty of perjury. Any false statement of a material fact may serve as the basis for prosecution and conviction of petitioner for perjury. All questions must be answered completely in the proper space on the form or on additional sheets submitted with the form. This form may be obtained at the place of confinement or from any clerk of a court of record, with criminal jurisdiction.

(2) No citation of authorities need be furnished. If briefs or arguments are submitted, they should be submitted in the form of a separate memorandum and not as part of this form.

(3) A separate petition must be filed for each judgment you seek to challenge. If you seek to challenge judgments entered in different trials or guilty plea proceedings, either in the same county or in different counties, you must file separate petitions.

(4) YOU MUST INCLUDE IN THIS PETITION ALL GROUNDS FOR RELIEF. FAILURE TO INCLUDE A GROUND FOR RELIEF IN THIS PETITION WILL RESULT IN YOUR BEING PERMANENTLY BARRED FROM PRESENTING IT IN A FUTURE PETITION OR PROCEEDING.

(5) YOU MUST INCLUDE ALL FACTS SUPPORTING EACH GROUND FOR RELIEF. YOU MUST BE AS SPECIFIC AS POSSIBLE AS TO THE FACTS.

(6) Complete all applicable items in the petition. When the petition is fully completed, the ORIGINAL must be mailed to the appropriate clerk of court.

(7) You must comply with these instructions in order to have your petition promptly considered.

(8) REMEMBER, A PETITIONER IS ENTITLED TO FILE ONLY ONE PETITION PER CASE.

IN THE _____ COURT OF _____ COUNTY, TENNESSEE
AT _____

_____))
PETITIONER (FULL NAME)))
VS.)) CASE NO. _____
STATE OF TENNESSEE)) (POST-CONVICTION)

PETITION FOR RELIEF FROM CONVICTION OR SENTENCE

Mailing Address of Petitioner _____
(including zip code) _____

Place of Confinement _____
Department of Correction Number _____

NOTICE: BEFORE COMPLETING THIS FORM, READ CAREFULLY THE
ACCOMPANYING INSTRUCTIONS.

1. Name and location (city and county) of court which entered the judgment of
conviction or sentence challenged _____

2. Date of judgment of conviction _____

3. Case number _____

4. Length of sentence _____

5. Offense convicted of _____

6. What was your plea? (Check One)

- (a) Guilty _____
- (b) Not Guilty _____
- (c) Not Guilty by reason of mental disease or defect _____
- (d) Not guilty and not guilty by reason of mental disease or defect _____
- (e) Nolo contendere _____
- (f) None _____

If you entered a guilty plea to one count or indictment, and a not guilty plea to another count or indictment, specify:

(a) Guilty plea counts: _____

(b) Not guilty plea counts: _____

7. Kind of trial: (Check One)

(a) Jury _____

(b) Judge only _____

8. Did you testify at the trial?

Yes _____ No _____

9. Did you appeal from the judgment of conviction?

Yes _____ No _____

10. If you did appeal, answer the following:

(a) As to the state court to which you first appealed, give the following information:

(1) Name of court _____

(2) Result _____

(3) Date of result _____

(4) Grounds raised on appeal _____

(Attach additional sheets if necessary)

(b) If you appealed to any other court, then as to the second court to which you appealed, give the following information:

(1) Name of court _____

(2) Result _____

(3) Date of result _____

(4) Grounds raised on appeal _____

(Attached additional sheets if necessary)

(c) If you appealed to any other court, then as to the third court to which you appealed, give the following information:

(1) Name of court _____

(2) Result _____

(3) Date of result _____

(4) Grounds raised on appeal _____

(Attached additional sheets if necessary)

11. If more than one (1) year has passed since the date of final action on your direct appeal by the state appellate courts, state why the one (1) year statute of limitations should not bar your claim. _____

12. Other than a direct appeal from the judgment(s) of conviction and sentence, have you previously filed any petitions, applications, or motions with respect to the judgment(s) in any state or federal court?

Yes _____ No _____

13. If your answer to Question 12 was Yes, then give the following information in regard to the first such petition, application, or motion you filed:

- (a) (1) Name of court _____
(2) Nature of proceeding _____
(3) Grounds raised _____

(Attach additional sheets if necessary)

(4) Did you receive an evidentiary hearing on your petition, application or motion?

Yes _____ No _____

(5) Result _____

(6) Date of result _____

(b) As to any second petition, application, or motion, give same information:

(1) Name of court _____

(2) Nature of proceeding _____

(3) Grounds raised _____

(Attach additional sheets if necessary)

(4) Did you receive an evidentiary hearing on your petition, application, or motion?

Yes _____ No _____
(5) Result _____
(6) Date of result _____

(c) Did you appeal the result of the action taken on any petition, application, or motion identified above to any appellate court:

(1) First petition, etc. Yes _____ No _____
(2) Second petition, etc. Yes _____ No _____

(d) If you did not appeal when you lost on any petition, application, or motion, explain briefly why you did not appeal: _____

14. If you did not raise the grounds you raise here in your original prosecution and on your appeal from that prosecution, explain why your claim in this case has not been waived for failure to raise it on appeal. If the claim was raised, explain why your claim is not previously determined.

15. If you have previously filed a petition, application, or motion with respect to the judgment(s) in any court, explain why your claim in this case has not been waived for failure to raise it in that prior proceeding. If the claim was raised, explain why your claim is not previously determined.

16. Specify every ground on which you claim that you are being held unlawfully, by placing a check mark on the appropriate line(s) below and providing the required information or by attaching separate pages.

INCLUDE ALL FACTS WHICH SUPPORT THE GROUNDS YOU CLAIM.

GROUND(S) OF PETITION

Listed below are possible grounds for relief. Consider the ground(s) that apply in your case, and follow the instruction under the ground(s):

_____(1) Conviction was based on unlawfully induced guilty plea or guilty plea involuntarily entered without understanding of the nature and consequences of the plea.

_____(2) Conviction was based on use of coerced confession.

_____(3) Conviction was based on use of evidence gained pursuant to an unconstitutional search and seizure.

_____(4) Conviction was based on use of evidence obtained pursuant to an unlawful arrest.

_____(5) Conviction was based on a violation of the privilege against self incrimination.

_____(6) Conviction was based on the unconstitutional failure of the prosecution to disclose to defendant evidence favorable to defendant.

_____(7) Conviction was based on a violation of the protection against double jeopardy.

_____(8) Conviction was based on action of a grand or petit jury that was unconstitutionally selected and impaneled.

_____(9) Denial of effective assistance of counsel.

_____(10) Newly discovered evidence

_____(11) Illegal evidence

_____(12) Other grounds

THE LIST ABOVE DOES NOT INCLUDE ALL CONSTITUTIONAL VIOLATIONS. YOU MAY ADD ANY OTHERS YOU DEEM APPROPRIATE. ATTACH A SEPARATE SHEET OF PAPER LISTING EACH CONSTITUTIONAL VIOLATION THAT YOU CLAIM, WHETHER OR NOT IT IS LISTED ABOVE. UNDER EACH CLAIMED VIOLATION, LIST EACH AND EVERY FACT YOU FEEL SUPPORTS THIS GROUND. EXPLAIN IN DETAIL HOW YOU ARE PREJUDICED BY THE VIOLATION AND WHY YOU ARE ENTITLED TO RELIEF. BE SPECIFIC.

IMPORTANT NOTICE REGARDING ADDITIONAL PETITIONS: TENN. CODE ANN. § 40-30-202(c) LIMITS YOU TO ONLY ONE PETITION. TENN. CODE ANN. § 40-30-202 (c) PROVIDES:

This chapter contemplates the filing of only one (1) petition for post-conviction relief. In no event may more than one (1) petition for post-conviction relief be filed attacking a single judgment. If a prior petition has been filed which was resolved on the merits by a court of competent jurisdiction, any second or subsequent petition shall be summarily dismissed.

17. Do you have any petition or appeal now pending in any court, either state or federal, as to the judgment under attack?

Yes _____ No _____

18. Give the name and address, if known, of each attorney who represented you at the following stages of the case that resulted in the judgment under attack:

(a) At preliminary hearing _____

(b) At arraignment and plea _____

(c) At trial _____

(d) At sentencing _____

(e) On appeal _____

(f) In any post-conviction proceeding _____

(g) On appeal from adverse ruling in a post-conviction proceeding _____

19. Are you currently represented by counsel?

Yes _____ No _____

(a) If Yes, give name and address, if known, of the attorney representing you.

(b) If No, do you wish to have an attorney appointed?

Yes _____ No _____

(c) Has any attorney assisted in drafting or given advice regarding this petition for post-conviction relief?

Yes _____ No _____

If Yes, give name and address of attorney(s).

20. In the judgment you are attacking, were you sentenced on more than one count of an indictment, or on more than one indictment, in the same court and at the same time?

Yes _____ No _____

21. Do you have any future sentence to serve after you complete the sentence imposed by the judgment under attack?

Yes _____ No _____

(a) If so, give name and location of court which imposed sentence to be served in the future: _____

(b) Give date and length of sentence to be served in the future: _____

(c) Have you filed, or do you contemplate filing, any petition attacking the judgment which imposed the sentence to be served in the future?

Yes _____ No _____

22. What date is this petition being given to prison authorities for mailing? _____

Wherefore, petitioner prays that the court grant petitioner relief to which petitioner may be entitled in this proceeding.

PETITIONER'S VERIFICATION UNDER OATH
SUBJECT TO PENALTY FOR PERJURY

I swear (or affirm) under penalty of perjury that the foregoing is true and correct.

Executed on _____.

(Date)

Signature of Petitioner

SWORN TO AND SUBSCRIBED before me this the ____ day of _____,
19____.

Notary Public

My commission expires: _____

APPENDIX B. AFFIDAVIT OF INDIGENCY

I, _____, do solemnly swear (or affirm) that because of my poverty, I am not able to bear the expenses of the action which I am about to commence. I further swear (or affirm) that, to the best of my knowledge, I am justly entitled to the relief sought.

Petitioner

APPENDIX C. CERTIFICATION OF COUNSEL

I, _____, certify that I have thoroughly
(Appointed or retained counsel)

investigated the possible constitutional violations alleged by petitioner, including all those in paragraph 16 of the form petition set forth in Appendix A and any other ground that petitioner may have for relief. I have discussed other possible constitutional grounds with petitioner. I have raised all non-frivolous constitutional grounds warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law which petitioner has. I am aware that any ground not raised shall be forever barred by application of Tenn. Code Ann. § 40-30-206(g), and have explained this to petitioner.

Counsel for Petitioner

Board of Professional Responsibility Number

APPENDIX D. FORM MOTION TO REOPEN

The following form petition shall be available without cost to a prisoner in the prisons and other places of detention and shall also be available without cost to any potential petitioner in the office of the clerk of court for any court of record with criminal jurisdiction. The Post-Conviction Procedure Act contemplates the filing of only one (1) petition for post-conviction relief. A motion to reopen should be filed only under the limited circumstances set out in Tenn. Code Ann. § 40-30-217.

READ THESE INSTRUCTIONS CAREFULLY BEFORE PREPARING THE PETITION

(1) This petition must be legibly handwritten or typewritten and must be signed by the petitioner under penalty of perjury. Any false statement of a material fact may serve as the basis for prosecution and conviction for perjury. All questions must be answered completely in the proper space on the form or on additional sheets submitted with the form. This form may be obtained at the place of confinement or from any clerk of a court of record with criminal jurisdiction.

(2) No citation of authorities need be furnished. If briefs or arguments are submitted, they should be submitted in the form of a separate memorandum and not as part of this form.

(3) A separate petition must be filed for each judgment you seek to challenge. Only the judgments entered in a single trial or guilty plea proceeding may be challenged in a particular petition. If you seek to challenge judgments entered in different trials or guilty plea proceedings, either in the same county or in different counties, you must file separate petitions.

(4) YOU MUST INCLUDE IN THIS PETITION ALL GROUNDS FOR RELIEF. FAILURE TO INCLUDE A GROUND FOR RELIEF IN THIS PETITION WILL RESULT IN YOUR BEING BARRED FROM PRESENTING IT IN A FUTURE PETITION.

(5) YOU MUST INCLUDE ALL FACTS SUPPORTING EACH GROUND FOR RELIEF. YOU MUST BE AS SPECIFIC AS POSSIBLE AS TO THE FACTS.

(6) Complete all applicable items in the petition. When the petition is fully completed, the ORIGINAL must be mailed to the appropriate clerk of court.

(7) You must comply with these instructions in order to have your petition promptly considered.

(8) REMEMBER, A PETITIONER IS ENTITLED TO FILE ONLY ONE PETITION PER CASE.

IN THE _____ COURT OF _____ COUNTY, TENNESSEE
AT _____

_____)
PETITIONER (FULL NAME) _____)
VS. _____) CASE NO. _____
STATE OF TENNESSEE _____) (POST-CONVICTION)

MOTION TO REOPEN POST-CONVICTION PETITION

Mailing Address of Petitioner _____
(including zip code) _____

Place of Confinement _____
Department of Correction Number _____

NOTICE: BEFORE COMPLETING THIS FORM, CAREFULLY READ THE
ACCOMPANYING INSTRUCTIONS.

1. Name and location (city and county) of court which entered the judgment of conviction or sentence under attack _____

2. Date of judgment of conviction _____

3. Case number _____

4. Length of sentence _____

5. Offense convicted of _____

6. What was your plea? (Check one)
- (a) Guilty _____
 - (b) Not Guilty _____
 - (c) Not Guilty by reason of mental disease or defect _____
 - (d) Not guilty and not guilty by reason of mental disease or defect _____
 - (e) Nolo contendere _____
 - (f) None _____

If you entered a guilty plea to one count or indictment, and a not guilty plea to another count or indictment, specify:

- (a) Guilty plea counts: _____
(b) Not guilty plea counts: _____

7. Give the following information in regard to the post-conviction proceeding(s) you seek to reopen at this time:

(a) (1) Name and location of post-conviction trial court _____

(2) Grounds raised _____

(attach additional sheets if necessary)

(3) Did you receive an evidentiary hearing on your petition, application or motion?

Yes _____ No _____

(4) Result _____

(5) Date of result _____

(b) Did you appeal to any appellate court the result of the action taken on that petition?

Yes _____ No _____

(c) If you did not appeal when you lost the petition, explain briefly why you did not appeal: _____

8. What grounds exist under Tenn. Code Ann. § 40-30-217 to justify reopening the first post-conviction petition? Check all that apply.

_____ (a) A state or federal appellate court has issued a final ruling establishing a constitutional right that was not recognized as existing at the time of trial but now is required to be recognized and applied in your case.

(1) What was the name and style of the case establishing the constitutional right? _____

(2) On what date was that opinion or ruling filed? _____

(3) If more than one (1) year has passed since the state or federal appellate court ruled establishing this constitutional right, state why the one year statute of limitations should not bar your claim.

(4) Attach a separate sheet of paper listing each constitutional right that you claim that was not recognized as existing at the time of your trial but is now required to be recognized and applied in your case. Include all facts of your case which support your claim that this right now entitles you to relief. Specify how you were prejudiced.

_____ (b) There exists new scientific evidence that establishes that you are actually innocent of the offense or offenses for which you were convicted.

(1) What is the scientific evidence? _____

(2) On what date did the scientific evidence come into existence?

(3) How and when did you become aware of the existence of this evidence? _____

(4) How does the evidence establish your actual innocence?

_____ (c) The sentence in this case was enhanced because of a prior conviction and that prior conviction has subsequently been held invalid.

(1) Name and location of court which entered the judgment of the prior conviction. _____

(2) Case number of prior case. _____

(3) Name and location of court that held the prior conviction invalid. _____

(4) Date the conviction held invalid. _____

(5) Describe how the prior conviction was used to enhance the sentence you now attacking. _____

(6) If more than one (1) year has passed since the date the prior conviction was set aside, state why the one year statute of limitations should not bar your claim? _____

Do you have any petition or appeal involving the judgment which you attack in this petition that is now pending in any court, either state or federal?

Yes _____ No _____

10. Give the name(s) and address(es), if known, of each attorney who represented you.

(a) In any prior post-conviction proceeding _____

(b) On appeal from adverse ruling in any prior post-conviction proceeding

11. Are you currently represented by counsel?

Yes _____ No _____

If Yes, give name and address, if known, of the attorney representing you.

If No, do you wish to have an attorney appointed?

Yes _____ No _____

12. Has any attorney assisted in drafting or given advice regarding drafting this petition for post-conviction relief?

Yes _____ No _____

If Yes, give name and address of attorney(s).

13. In the judgment you are attacking, were you sentenced on more than one count of an indictment, or on more than one indictment, in the same court and at the same time?

Yes _____ No _____

14. Do you have any future sentence to serve after you complete the sentence imposed by the judgment under attack?

Yes _____ No _____

(a) If so, give name and location of court which imposed sentence to be served in the future: _____

(b) Give date and length of sentence to be served in the future: _____

(c) Have you filed, or do you contemplate filing, any petition attacking the judgment which imposed the sentence to be served in the future?

Yes _____ No _____

15. What date is this motion being given to prison authorities for mailing? _____

Wherefore, petitioner prays that the court grant petitioner's motion to reopen the post-conviction proceedings and grant any relief to which petitioner may be entitled in this proceeding.

PETITIONER'S VERIFICATION UNDER OATH
SUBJECT TO PENALTY FOR PERJURY

I swear (or affirm) under penalty of perjury that the foregoing is true and correct.
Executed on _____.

(Date)

Signature of Petitioner

SWORN TO AND SUBSCRIBED before me this the _____ day of _____,
19____.

Notary Public

My commission expires: _____

APPENDIX E. AFFIDAVIT OF INDIGENCY

I, _____, do solemnly swear (or affirm) that because of my poverty, I am not able to bear the expenses of the action which I am about to commence. I further swear (or affirm) that, to the best of my knowledge, I am justly entitled to the relief sought.

Petitioner

APPENDIX F. FORM PRELIMINARY ORDER

IN THE _____ COURT FOR _____ COUNTY, TENNESSEE
AT _____

_____)
PETITIONER)
)
VS.) POST-CONVICTION NO. _____
)
STATE OF TENNESSEE)

PRELIMINARY ORDER
(COLORABLE CLAIM)

After examination of the (petition for post-conviction relief) or (motion to reopen) filed in this case, together with the files, records, transcripts and correspondence relating to the judgment under attack, this court finds as follows:

(1) Petitioner is indigent under the standards of Tenn. Code Ann. § 40-14-201.

The court hereby appoints _____
of the _____ (County Bar)
(_____ District Public Defender's Office) to represent petitioner.

(2) The petition presents a colorable claim.

(3) Counsel is hereby ordered to review the petition, consult with petitioner, and investigate all possible constitutional grounds for relief for the purpose of filing an amended petition, if necessary. The amended petition shall be filed within thirty (30) days of the date of this order. In the event no amended petition will be filed, counsel shall file a notice stating that no amended petition will be filed. In any event, counsel shall file the certificate of counsel required in post-conviction cases.

(4) The District Attorney General is ordered to file an answer or other responsive pleading, together with any record or transcripts, material to the (petition) or (motion to reopen) within thirty (30) days of the filing of the amended petition or of the notice that no amended petition will be filed.

(5) The District Attorney General is ordered to provide discovery to petitioner in accordance with Rule 16, Tennessee Rules of Criminal Procedure, to the extent relevant to the grounds in the petition. The District Attorney General shall make all other disclosures required by the state and federal constitution.

(6) The District Attorney General shall file with the clerk the following items from the prior record:

ENTERED this _____ day of _____, 19____.

JUDGE

APPENDIX G. FORM PRELIMINARY ORDER

IN THE _____ COURT FOR _____ COUNTY, TENNESSEE
AT _____

_____)
PETITIONER)
)
VS.) POST-CONVICTION NO. _____
)
STATE OF TENNESSEE)

PRELIMINARY ORDER
_____(NO COLORABLE CLAIM)

After examination of the (petition for post-conviction relief) or (motion to reopen) filed in this case, together with the files, record, transcripts and correspondence relating to the judgment under attack, this court finds as follows:

(1) The petition shall be dismissed.

(2) The petition shall be dismissed for failure to assert a colorable claim based on the following findings of fact:

_____ ; and

(3) The petition shall be dismissed for failure to assert a colorable claim based on the following conclusions of law:

ENTERED this _____ day of _____, 19____.

JUDGE

APPENDIX H. FORM SCHEDULING ORDER

IN THE _____ COURT FOR _____ COUNTY, TENNESSEE
AT _____

_____)
PETITIONER)
)
VS.) POST-CONVICTION NO. _____
)
STATE OF TENNESSEE)

SCHEDULING ORDER

_____ In this matter, the court has reviewed the (petition) or (the motion to reopen) and answer filed in this case and has concluded that a colorable claim is presented. In order to determine whether the petitioner is entitled to relief, an evidentiary hearing must be conducted.

It is therefore ORDERED that such hearing shall be held at _____ .m. the _____ day of _____, 19____. (Within four months of scheduling order) The sheriff of _____ County is hereby ordered to transport the petitioner from the Department of Correction where he/she is presently housed to the _____ County Jail on the _____ day of _____, 19____, where he/she shall remain pending the conclusion of the evidentiary hearing in this court.

ENTERED this _____ day of _____, 19____.

JUDGE