

Rule 1. Scope of Rules

These rules govern the procedure in the Superior Court on a motion under D.C. Code § 23-110:

- (1) by a person in custody pursuant to a judgment of the Court for a determination that the judgment was imposed in violation of the Constitution or laws of the United States or the District of Columbia, or that the Court was without jurisdiction to impose such judgment, or that the sentence was in excess of the maximum authorized by law, or is otherwise subject to collateral attack; and
- (2) by a person in custody pursuant to a judgment of a state or federal court and subject to future custody under a judgment of the Superior Court for a determination that such future custody will be in violation of the Constitution or laws of the United States, or that the Superior Court was without jurisdiction to impose such judgment, or that the sentence was in excess of the maximum authorized by law, or is otherwise subject to collateral attack.

COMMENT

These rules may also be used as a guide for procedures governing collateral attacks on convictions brought as petitions for a writ of habeas corpus or a writ of error coram nobis. The rules are largely patterned after "Rules Governing Section 2255 Proceedings for the United States District Courts," and reference to the comparable federal rules is made in many of the Comments to these rules.

Rule 2. Motion

(a) Nature of application for relief. If the person is presently in custody pursuant to the judgment in question, or if not presently in custody may be subject to such custody in the future pursuant to such judgment, the application for relief shall be in the form of a motion to vacate, set aside, or correct the sentence.

(b) Form of Motion. The motion shall specify all the grounds for relief which are available to the movant and of which he has or, by the exercise of reasonable diligence, should have knowledge and shall set forth in summary form the facts supporting each of the grounds thus specified. It shall also state the relief requested. The motion shall be typewritten or legibly handwritten and shall be signed under penalty of perjury by the petitioner. Motions filed by the movant pro se must be filed on standard forms to be supplied by the clerk upon request without cost. Counsel filing a motion under this rule need not use a standard form, but any such motion shall contain essentially the same information set forth on the standard form.

(c) Motions to be directed to one judgment only. A motion shall be limited to the assertion of a claim for relief against one judgment only. If a movant desires to attack the validity of other judgments under which he or she is in custody or may be subject to future custody, as the case may be, he or she shall do so by separate motions.

COMMENT

Rule 2(b) requires a movant, whether or not represented by counsel, to specify all the grounds for relief of which the movant has knowledge, or by the exercise of reasonable diligence should have knowledge, in one motion. This provision will encourage movants to raise all claims in one proceeding, rather than in a piecemeal fashion, thereby ensuring judicial economy and facilitating the expeditious handling of motions made under D.C. Code § 23-110. This requirement extends to appellate counsel under *Shepard v. United States*, 533 A.2d 1278 (D.C. 1987), as well as counsel appointed by the trial court.

Rule 3. Filing Motion

(a) Place of filing; copies. A motion under these rules shall be filed in the office of the clerk. If a motion is delivered directly to a judge, the judge shall transmit the motion to the clerk for review and filing pursuant to Rules 2 and 3.

(b) Filing and service. Upon receipt of the motion and having ascertained that it appears on its face to comply with Rules 2 and 3, or as may be directed by the judge, the clerk shall file the motion and enter it on the docket in his or her office in the criminal action in which was entered the judgment to which it is directed. The clerk shall thereupon deliver or serve a copy of the motion together with a notice of its filing on the prosecutor. The filing of the motion shall not require the prosecutor to answer the motion or otherwise move with respect to it unless so ordered by the court.

(c) Return of insufficient motion. If a motion received by the clerk does not substantially comply with the requirement of Rule 2 or Rule 3, it may be returned to the movant, together with a statement of the reason for its return. The clerk shall retain a copy of the motion. The clerk shall send the movant a copy of the standard form if the non-complying motion did not follow the standard form. The judge may direct the clerk to file a motion that does not substantially comply with the form requirements of this rule if the judge determines that the motion sufficiently states a claim for relief.

Rule 4. Preliminary Consideration by Judge; Appointment of Counsel

(a) Reference to judge; dismissal or order to answer. The original motion shall be presented promptly to the judge who presided at the movant's trial and sentenced him or her, or, if the judge who imposed sentence was not the trial judge, then it shall go to the judge who was in charge of the part of the proceedings being attacked by the movant. If the appropriate judge is unavailable to consider the motion, it shall be presented to another judge in accordance with the procedure of the court for the assignment of its business.

(b) Initial consideration by judge. The motion, together with all the files, records, transcripts, and correspondence relating to the judgment under attack, shall be examined promptly by the judge to whom it is assigned. If it conclusively appears from the face of the motion and any annexed exhibits and the prior proceedings in the case that the movant is not entitled to relief, the judge shall make an order for its summary dismissal and cause the movant to be notified. Otherwise, the judge shall order the prosecutor to file an answer or other pleading within the period of time fixed by the court or take such other action as the judge deems appropriate.

(c) After preliminary consideration by judge. The Court has discretion to appoint counsel to represent the movant pursuant to D.C. Code § 11-2601 in the interest of justice at any time, provided the movant is eligible for appointment under that section.

(d) To conduct discovery. In any case in which the assistance of counsel is required in order to effectively make use of discovery procedures under either the Rules of Criminal Procedure or the Rules of Civil Procedure or elsewhere in the usages and principles of law, the Court shall appoint counsel to represent the movant, provided the movant is eligible for appointment under D.C. Code § 11-2601.

(e) To conduct an evidentiary hearing. The Court shall appoint counsel to represent the movant if the court determines that an evidentiary hearing is required under Rule 8, provided the movant is eligible for appointment under D.C. Code § 11-2601.

COMMENT

Because D.C. Code § 23-110 permits dismissal only if it "conclusively" appears that the movant is not entitled to relief, the word "conclusively" is substituted for "plainly" in the Federal Rule. The Court has the authority to appoint counsel "in the interests of justice" in any proceeding under D.C. Code § 23-110. *Doe v. United States*, 583 A.2d 670, 673 (D.C. 1990). The Federal Rule has been modified to consolidate all provisions concerning the appointment of counsel in one rule. This modification has been made in recognition of the practice in the Superior Court of appointing new counsel prior to or soon after sentencing in a case in which a claim for post-conviction relief appears likely. This practice is consistent with the requirement that appellate counsel investigate and file a motion under D.C. Code § 23-110 based upon ineffective assistance of trial counsel, as part of appellate counsel's appointment. *See Shepard v. United States*, 533 A.2d 1278 (D.C. 1987); *Johnson v. United States*, 633 A.2d 828 (D.C. 1993). However, if the files and records of the case conclusively demonstrate that a movant is not entitled to relief under this section, then the Court need not appoint counsel. *See Doe*, 583 A.2d at 672 ("In order to demonstrate a need for the appointment of counsel, a petitioner usually must satisfy the same criteria that would entitle the petitioner to a

hearing on the § 23-110 motion . . .).

Appointment of counsel is required if the Court determines that an evidentiary hearing is needed. *Garmon v. United States*, 684 A.2d 327 (D.C. 1996). Generally, counsel should also be appointed in a case in which the Court determines that depositions may be taken.

Rule 5. Answer; Contents

(a) Contents of answer. The answer shall respond to the allegations of the motion. In addition it shall state whether the movant has used any other available remedies including any prior post-conviction motions under these rules or those existing previous to the adoption of the present rules.

(b) Supplementing the answer. The Court shall examine its files and records to determine whether it has available copies of transcripts and briefs whose existence the answer has indicated. If any of these items should be absent, the government shall be ordered to supplement its answer by filing the needed records. The Court shall allow the government an appropriate period of time in which to do so, without unduly delaying the consideration of the motion.

Rule 6. Discovery

(a) Leave of court required. A party may invoke the processes of discovery available under the Superior Court Rules of Criminal Procedure or Rules of Civil Procedure (Civil Rules 26-37) or elsewhere in the usages and principles of law if, and to the extent that, the judge in the exercise of his or her discretion and for good cause shown grants leave to do so, but not otherwise. If necessary for effective utilization of discovery procedures, counsel shall be appointed by the judge for a movant who qualifies for appointment of counsel under D.C. Code § 11-2601.

(b) Requests for discovery. Requests for discovery involving interrogatories, requests for admission, or requests for documents under the Rules of Civil Procedure shall be accompanied by a statement of the interrogatories or requests for admission and a list of the documents, if any, sought to be produced. Requests to conduct depositions under the Rules of Civil or Criminal Procedure shall be accompanied by a list of the persons to be deposed and a brief description of testimony to be elicited.

(c) Expenses. If the government is granted leave to take the deposition of the movant or any other person, the judge may as a condition of taking it direct that the government pay the expenses of travel and subsistence and fees of counsel for the movant to attend the taking of the deposition.

COMMENT

The equivalent federal rule has been modified to clarify the practice if depositions are held under the Rule.

Rule 7. Expansion of Record

(a) Direction for expansion. If the motion is dismissed summarily, the judge may direct that the record be expanded by the parties by the inclusion of additional materials relevant to the determination of the merits of the motion.

(b) Materials to be added. The expanded record may include, without limitation, letters predating the filing of the motion in the court, documents, exhibits, and answers under oath, if so directed, to written interrogatories propounded by the judge. Affidavits may be submitted and considered as a part of the record.

(c) Submission to opposing party. In any case in which an expanded record is directed, copies of the letters, documents, exhibits, and affidavits proposed to be included shall be submitted to the party against whom they are to be offered, and he or she shall be afforded an opportunity to admit or deny their correctness.

(d) Authentication. The Court may require the authentication of any material under subdivision (b) or (c).

Rule 8. Evidentiary Hearing

(a) Determination by court. If the motion has not been dismissed at a previous stage in the proceeding, the judge, after the answer is filed and any transcripts or records of prior court actions in the matter are in his or her possession, shall, upon a review of those proceedings and of the expanded record, if any, determine whether an evidentiary hearing is required. If it appears that an evidentiary hearing is not required, the judge shall make such disposition of the motion as justice dictates.

(b) Appointment of counsel; time for hearing. If an evidentiary hearing is required, the judge shall appoint counsel for a movant who qualifies for the appointment of counsel under D.C. Code §11-2601 and the hearing shall be conducted as promptly as practicable, having regard for the need of counsel for both parties for adequate time for investigation and preparation. These rules do not limit the appointment of counsel at any stage of the proceeding if the interest of justice so requires.

(c) Production of statement at evidentiary hearing.

(1) In General. Rule of Criminal Procedure 26.2 applies at an evidentiary hearing under these rules.

(2) Sanctions for Failure to Produce Statement. If a party elects not to comply with an order under Rule of Criminal Procedure 26.2(a) to deliver a statement to the moving party at the evidentiary hearing, the Court may not consider the testimony of the witness whose statement is withheld.

COMMENT

D.C. Code § 11-1732 does not confer authority on hearing commissioners to conduct proceedings on motions under § 23-110. Consequently, the portion of the equivalent federal rule dealing with review of magistrate judges' decisions has been deleted.

Rule 9. Delayed or Successive Motions

(a) Delayed Motions. A motion for relief made pursuant to these rules may be dismissed if it appears that the government has been prejudiced in its ability to respond to the motion by the delay in its filing, unless the movant shows that the motion is based on grounds of which he or she could not have known by the exercise of reasonable diligence before the circumstances prejudicial to the government occurred.

(b) Successive Motions. A second or successive motion may be dismissed if the judge finds that it fails to allege new or different grounds for relief and the prior determination was on the merits or, if new and different grounds are alleged, the judge finds that the failure of the movant to assert those grounds in a prior motion constituted an abuse of the procedure governed by these rules.

Rule 10. Powers of Magistrates

COMMENT

Although the equivalent federal rule is inapplicable to the Superior Court of the District of Columbia, it is included here in order to maintain consistency in numbering with the Federal Rules.

Rule 11. Time for Appeal

The time for appeal from an order entered on a motion for relief made pursuant to these rules is as provided in the Rules of the D.C. Court of Appeals. Nothing in these rules shall be construed as extending the time to appeal from the original judgment of conviction in the Superior Court.

Rule 12. Superior Court Rules of Criminal and Civil Procedure; Extent of Applicability

If no procedure is specifically prescribed by these rules, the Court may proceed in any lawful manner not inconsistent with these rules, or any applicable statute, and may apply the Superior Court Rules of Criminal Procedure or Rules of Civil Procedure, whichever it deems most appropriate, to motions filed under these rules.