Chapter 49

Virginia

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§ 49:1 Summary of postconviction remedies in Virginia

Principal postconviction remedy:

Habeas Corpus. In a death sentence case this remedy is applied for in the Virginia Supreme Court. In a noncapital case where the conviction occurred in a circuit court, the remedy is applied for the convicting court, but where the conviction occurred in a district court, the remedy is applied for in the circuit court for the city or county in which the district court sits. The remedy is an independent civil action, not a postsentencing phase of the original criminal case. The remedy is authorized by statute. There is a custody requirement applicable to the remedy. Newly discovered evidence of innocence is not a ground for relief in Virginia postconviction habeas corpus litigation.

Right to counsel:

There is a right to counsel in Virginia postconviction habeas corpus proceedings in death sentence cases, but not in noncapital cases.

Statute of limitations:

In a death sentence case the habeas petition shall be filed within 60 days of the earliest of the following: (1) denial of certiorari by the U.S. Supreme Court on direct appeal; (2) decision of U.S. Supreme Court affirming the death sentence after a grant of certiorari; or (3) the time for filing a timely certiorari petition in the U.S. Supreme Court has expired, and the defendant has not filed a certiorari petition. However, notwithstanding these time restrictions, an indigent death row inmate may file his habeas petition within 120 days following appointment of postconviction counsel, which appointment must be made within 30 days after the state supreme court affirms the death sentence on direct appeal. In a noncapital case the habeas petition shall be filed within two years from the date of final judgment in the trial court or within two years from either the final disposition of the direct appeal or the time for filing such appeal has expired, whichever is later.

Secondary postconviction remedies:

Writ of actual innocence based on nonbiological evidence

Motion to correct void sentence

Motion to modify or suspend sentence

Writ of error coram nobis

Other remedies:

Virginia has a postconviction DNA testing statute, enacted in 2001, and amended in 2003 and (twice) in 2005.

Virginia has an erroneous convictions act, enacted in 2004.

Helpful readings:

(1) Miller and Shepard, New Looks at an Ancient Writ: Habeas Corpus Reexamined, 9 U. Rich. L. Rev. 49 (1974)

(2) Moohr, Murray v. Giarratano: A Remedy Reduced to a Meaningless Ritual, 39 Am. U. L. Rev. 765 (1990)

(3) Comment: Defending the Defenseless: Murray v. Giarratano and the Right to Counsel in Capital Post Conviction Proceedings, 75 Iowa L. Rev. 1305 (1990)

(4) Comment: Murray v. Giarratano: Right to Counsel in Postconviction Proceedings in Death Penalty Cases, 18 Hastings Const. L.Q. 211 (1990)

(5) Recent Development, Meaningful Access for Indigents on Death Row: Giarratano v. Murray, 43 Vand. L. Rev. 569 (1990)

(6) Horace, Commonwealth v. Morris: The Disappearance of 169 Years of Common Law, 71 Wash. & Lee L. Rev. Online 1 (2014)

(7) Current Development, Virginia Supreme Court Decision Commonwealth v. Morris Limits Immigrants' Access to Review of Convictions Leading to Removal Proceedings, 25 Geo. Immigr. L.J. 751 (2011)

(8) Walker and Wisegarver, Civil Practice And Procedure, 50 U. Rich. L. Rev. 39 (2014)

§ 49:2 Writ of habeas corpus

The principal postconviction remedy in Virginia is the writ of habeas corpus, as statutorily authorized and regulated by the provisions of Va. Code Ann. §§ 8.01-654 through § 8.01-668.

Postconviction habeas corpus relief in Virginia is also regulated by: (1) Va. Code Ann. § 17.1-310 (Virginia Supreme Court shall have jurisdiction to award writs of habeas corpus; in accordance with Va. Code Ann. § 8.01-654, that court shall have exclusive jurisdiction to award writs of habeas corpus upon petitions filed by prisoners held under the sentence of death); (2) Va. Code Ann. § 19.2-163.7 (if a sentence of death is affirmed on appeal, the convicting court shall, within 30 days after the decision of the Virginia Supreme Court, appoint counsel to represent an indigent prisoner under sentence of death in a state habeas corpus proceeding); (3) Va. Code Ann. § 19.2-163.8(A), (B), (D) (list of attorneys qualified to represent defendants sentenced to death; noncompliance with the requirements of § 19.2-163.8 shall not form the basis for a claim of error in any habeas corpus proceeding, and the performance of appointed habeas corpus counsel shall not form a basis for relief in any subsequent habeas corpus proceeding); (4) Va. Code. Ann. § 19.2-327.1(G) (a claim based on the portion of Virginia's postconviction DNA testing statute relating to scientific analysis of evidence is not a ground for postconviction relief in Virginia); (5) Va. Code. Ann. § 19.2-327.6 (a claim based on the portion of Virginia's postconviction DNA testing statute relating to writs of actual innocence is not a ground for postconviction relief in Virginia); (6) Va. Code. Ann. § 19.2-327.14 (a claim based on Virginia's writ of actual innocence statute involving nonbiological evidence is not a ground for postconviction relief in Virginia); (7) Rule 3A:24, Va. Sup. Ct. R. (governing circuit court orders denying postconviction petitions for writs of habeas corpus); (8) Rule 4:1(b)(5), Va. Sup. Ct. R. (in any proceeding for a writ of habeas corpus or in the nature of coram nobis,

the scope of discovery shall extend only to matters which are relevant to the issues in the proceeding and which are not privileged, and no discovery shall be allowed without prior leave of the court, which may deny or limit discovery in any such proceeding), and (9) Rule 5:7A, Va. Sup. Ct. R. (governing death sentence postconviction habeas petitions filed originally in Virginia Supreme Court).

§ 49:3 Writ of habeas corpus—Postconviction proceedings—Va. Code §§ 8.01-654 to 8.01-668—Text

The relevant provisions of the Virginia habeas corpus statutes governing postconviction proceedings are set forth in certain provisions of Article 3 ("Habeas Corpus") of Chapter 25 ("Extraordinary Writs") of Title 8.01 ("Civil Remedies and Procedure") of the Annotated Code of Virginia (Va. Code Ann. §§ 8.01-654 to 8.01-668).

These statutory provisions provide:

§ 8.01-654. When and by whom writ granted; what petition to contain

A. 1. The writ of habeas corpus ad subjiciendum shall be granted forthwith by the Supreme Court or any circuit court, to any person who shall apply for the same by petition, showing by affidavits or other evidence probable cause to believe that he is detained without lawful authority.

2. A petition for writ of habeas corpus ad subjiciendum, other than a petition challenging a criminal conviction or sentence, shall be brought within one year after the cause of action accrues. A habeas corpus petition attacking a criminal conviction or sentence, except as provided in § 8.01-654.1 for cases in which a death sentence has been imposed, shall be filed within two years from the date of final judgment in the trial court or within one year from either final disposition of the direct appeal in state court or the time for filing such appeal has expired, whichever is later.

B. 1. With respect to any such petition filed by a petitioner held under criminal process, and subject to the provisions of subsection C of this section and of § 17.1-310, only the circuit court which entered the original judgment order of conviction or convictions complained of in the petition shall have authority to issue writs of habeas corpus. If a district court entered the original judgment order of conviction or convictions complained of in the petition, only the circuit court for the city or county wherein the district court sits shall have authority to issue writs of habeas corpus. Hearings on such petition, where granted in the circuit court, may be held at

any circuit court within the same circuit as the circuit court in which the petition was filed, as designated by the judge thereof.

2. Such petition shall contain all allegations the facts of which are known to petitioner at the time of filing and such petition shall enumerate all previous applications and their disposition. No writ shall be granted on the basis of any allegation the facts of which petitioner had knowledge at the time of filing any previous petition. The provisions of this section shall not apply to a petitioner's first petition for a writ of habeas corpus when the sole allegation of such petition is that the petitioner was deprived of the right to pursue an appeal from a final judgment of conviction or probation revocation, except that such petition shall contain all facts pertinent to the denial of appeal that are known to the petitioner at the time of the filing, and such petition shall certify that the petitioner has filed no prior habeas corpus petitions attacking the conviction or probation revocation.

3. Such petition may allege detention without lawful authority through challenge to a conviction, although the sentence imposed for such conviction is suspended or is to be served subsequently to the sentence currently being served by petitioner.

4. In the event the allegations of illegality of the petitioner's detention can be fully determined on the basis of recorded matters, the court may make its determination whether such writ should issue on the basis of the record.

5. The court shall give findings of fact and conclusions of law following a determination on the record or after hearing, to be made a part of the record and transcribed.

6. If petitioner alleges as a ground for illegality of his detention the inadequacy of counsel, he shall be deemed to waive his privilege with respect to communications between such counsel and himself to the extent necessary to permit a full and fair hearing for the alleged ground.

C. 1. With respect to any such petition filed by a petitioner held under the sentence of death, and subject to the provisions of this subsection, the Supreme Court shall have exclusive jurisdiction to consider and award writs of habeas corpus. The circuit court which entered the judgment order setting the sentence of death shall have authority to conduct an evidentiary hearing on such a petition only if directed to do so by order of the Supreme Court.

2. Hearings conducted in a circuit court pursuant to an order issued under the provisions of subdivision 1 of this

subsection shall be limited in subject matter to the issues enumerated in the order.

3. The circuit court shall conduct such a hearing within 90 days after the order of the Supreme Court has been received and shall report its findings of fact and recommend conclusions of law to the Supreme Court within 60 days after the conclusion of the hearing. Any objection to the report of the circuit court must be filed in the Supreme Court within 30 days after the report is filed.

§ 8.01-654.1. Limitation on consideration of petition filed by prisoner sentenced to death

No petition for a writ of habeas corpus filed by a prisoner held under a sentence of death shall be considered unless it is filed within sixty days after the earliest of:

However, notwithstanding the time restrictions otherwise applicable to the filing of a petition for a writ of habeas corpus, an indigent prisoner may file such a petition within 120 days following appointment, made under § 19.2-163.7 of counsel to represent him.

(i) denial by the United States Supreme Court of a petition for a writ of certiorari to the judgment of the Supreme Court of Virginia on direct appeal,

(ii) a decision by the United States Supreme Court affirming imposition of the sentence of death when such decision is in a case resulting from a granted writ of certiorari to the judgment of the Supreme Court of Virginia on direct appeal, or

(iii) the expiration of the period for filing a timely petition for certiorari without a petition being filed.

§ 8.01-654.2. Presentation of claim of mental retardation by person sentenced to death before April 29, 2003

Notwithstanding any other provision of law, any person under sentence of death whose sentence became final in the circuit court before April 29, 2003, and who desires to have a claim of his mental retardation presented to the Supreme Court, shall do so by one of the following methods:

If the person has completed both a direct appeal and a habeas corpus proceeding under subsection C of § 8.01-654, he shall not be entitled to file any further habeas petitions in the Supreme Court and his sole remedy shall lie in federal court.

(i) if the person has not commenced a direct appeal, he shall present his claim of mental retardation by assign-

ment of error and in his brief in that appeal, or if his direct appeal is pending in the Supreme Court, he shall file a supplemental assignment of error and brief containing his claim of mental retardation, or

(ii) if the person has not filed a petition for a writ of habeas corpus under subsection C of § 8.01-654, he shall present his claim of mental retardation in a petition for a writ of habeas corpus under such subsection, or if such a petition is pending in the Supreme Court, he shall file an amended petition containing his claim of mental retardation. A person proceeding under this section shall allege the factual basis for his claim of mental retardation. The Supreme Court shall consider a claim raised under this section and if it determines that the claim is not frivolous, it shall remand the claim to the circuit court for a determination of mental retardation; otherwise the Supreme Court shall dismiss the petition. The provisions of §§ 19.2-264.3:1.1 and 19.2-264.3:1.2 shall govern a determination of mental retardation made pursuant to this section. If the claim is before the Supreme Court on direct appeal and is remanded to the circuit court and the case wherein the sentence of death was imposed was tried by a jury, the circuit court shall empanel a new jury for the sole purpose of making a determination of mental retardation.

§ 8.01-655. Form and contents of petition filed by prisoner

A. Every petition filed by a prisoner seeking a writ of habeas corpus must be filed on the form set forth in subsection B. The failure to use such form and to comply substantially with such form shall entitle the court to which such petition is directed to return such petition to the prisoner pending the use of and substantial compliance with such form. The petitioner shall be responsible for all statements contained in the petition and any false statement contained therein, if the same be knowingly or willfully made, shall be a ground for prosecution and conviction of perjury as provided for in § 18.2-434.

B. Every petition filed by a prisoner seeking a writ of habeas corpus shall be filed on a form to be approved and provided by the office of the Attorney General, the contents of which shall be substantially as follows:

IN THE ___ COURT

Full name and prisoner number (if any) of Petitioner	Case No. ___ (To be supplied by the Clerk of the Court)

-vs-

—

—

Name and Title of Respondent

PETITION FOR WRIT OF HABEAS CORPUS

Instructions—Read Carefully

In order for this petition to receive consideration by the Court, it must be legibly handwritten or typewritten, signed by the petitioner and verified before a notary or other officer authorized to administer oaths. It must set forth in concise form the answers to each applicable question. If necessary, petitioner may finish his answer to a particular question on an additional page. Petitioner must make it clear to which question any such continued answer refers. The petitioner may also submit exhibits.

Since every petition for habeas corpus must be sworn to under oath, any false statement of a material fact therein may serve as the basis of prosecution and conviction for perjury under § 18.2-434. Petitioners should, therefore, exercise care to assure that all answers are true and correct.

When the petition is completed, the original and two copies (total of three) should be mailed to the clerk of the court. The petitioner shall keep one copy.

NOTICE

The granting of a writ of habeas corpus does not entitle the petitioner to dismissal of the charges for conviction of which he is being detained, but may gain him no more than a new trial.

——

Place of detention: ——

A. Criminal Trial

1. Name and location of court which imposed the sentence from which you seek relief:

—

—

2. The offense or offenses for which sentence was imposed (include indictment number or numbers if known):

a. —

b. —

c. —

The date upon which sentence was imposed and the terms of the sentence:

a. —

b. —

c. —

4. Check which plea you made and whether trial by jury: Plea of guilty: . . . ; Plea of not guilty: . . .; Trial by jury: . . . ; Trial by judge without jury: . . .

5. The name and address of each attorney, if any, who represented you at your criminal trial:

—

—

6. Did you appeal the conviction? —

7. If you answered "yes" to 6, state: the result and the date in your appeal or petition for certiorari:

a. —

b. —

citations of the appellate court opinions or orders:

a. —

b. —

8. List the name and address of each attorney, if any, who represented you on your appeal:

—

—

B. Habeas Corpus

9. Before this petition did you file with respect to this conviction any other petition for habeas corpus in either a State or federal court? —

10. If you answered "yes" to 9, list with respect to each petition: the name and location of the court in which each was filed:

a. —

b. —

the disposition and the date:

a. —

b. —

the name and address of each attorney, if any, who represented you on your habeas corpus:

a. —

b. —

11. Did you appeal from the disposition of your petition for habeas corpus?

12. If you answered "yes" to 11, state: the result and the date of each petition:

a. —

b. —

citations of court opinions or orders on your habeas corpus petition:

a. —

b. —

the name and address of each attorney, if any, who represented you on appeal of your habeas corpus:

a. —

b. —

C. Other Petitions, Motions or Applications

13. List all other petitions, motions or applications filed with any court following a final order of conviction and not set out in A or B. Include the nature of the motion, the name and location of the court, the result, the date, and citations to opinions or orders. Give the name and address of each attorney, if any, who represented you.

a. —

b. —

c. —

D. Present Petition

14. State the grounds which make your detention unlawful, including the facts on which you intend to rely:

a. —

b. —

c. —

15. List each ground set forth in 14, which has been presented in any other proceeding:

a. —

b. —

c. —

List the proceedings in which each ground was raised:

a. —

b. —

c. —

16. If any ground set forth in 14 has not been presented to a court, list each ground and the reason why it was not:

a. —

b. —

c. —

_____
Signature of Petitioner

_____
Address of Petitioner

STATE OF VIRGINIA
CITY/COUNTY OF __

The petitioner being first duly sworn, says:

1. He signed the foregoing petition;

2. The facts stated in the petition are true to the best of his information and belief.

_____
Signature of Petitioner

Subscribed and sworn to before me this __ day of __, __

__ Notary Public

My commission expires: __

The petition will not be filed without payment of court costs unless the petitioner is entitled to proceed in forma pauperis and has executed the affidavit in forma pauperis.

The petitioner who proceeds in forma pauperis shall be furnished, without cost, certified copies of the arrest warrants, indictment and order of his conviction at his criminal trial in order to comply with the instructions of this petition.

AFFIDAVIT IN FORMA PAUPERIS
STATE OF VIRGINIA
CITY/COUNTY OF ____

The petitioner being duly sworn, says:

1. He is unable to pay the costs of this action or give security therefor;

2. His assets amount to a total of ____$

_____
Signature of Petitioner

Subscribed and sworn to before me this __ day of __, __

— Notary Public

My commission expires: —

§ 8.01-656. Bond may be required of petitioner

Before granting the writ, the court may require the petitioner to give bond with surety in a reasonable amount for the payment of such costs and charges as may be awarded against him.

Such bond shall be made payable to the person to whom the writ is directed, with condition that the petitioner will not escape, and shall be filed with the other proceedings on the writ, and may be sued on for the benefit of any person injured by the breach of its condition.

§ 8.01-657. How directed and returnable

The writ shall be directed to the person in whose custody the petitioner is detained and shall be made returnable as soon as may be before the court ordering the same, or any other of such courts.

Provided that in the event the allegations of illegality of the petitioner's detention present a case for the determination of unrecorded matters of fact relating to any previous judicial proceeding, such writ shall be made returnable before the court in which such judicial proceeding occurred.

§ 8.01-658. How writ served; dismissal of habeas petition without prejudice

A. The writ shall be served on the person to whom it is directed or, in his absence from the place where the petitioner is confined, on the person having the immediate or potential custody of him.

1. If the petitioner is in jail, prison, or other actual physical restraint due to the conviction or sentence he is attacking, the named respondent shall be (i) the Director of the Department of Corrections or the warden or superintendent of the state correctional facility where the petitioner is detained if the sentence is one year or more or (ii) the sheriff or superintendent of a local or regional jail facility if the sentence is less than one year.

2. If the petitioner is on probation or parole due to the conviction or sentence he is attacking, the named respondent shall be the probation or parole officer responsible for supervising the applicant or the official in charge of the parole or probation agency.

3. If a petitioner has a suspended sentence and is not

under supervision by a probation or parole officer, the respondent shall be (i) the local sheriff if the judgment of conviction the petitioner challenges has a suspended sentence of less than one year or (ii) the Director of the Department of Corrections if the judgment of conviction the petitioner challenges has a suspended sentence of one year or more.

B. The petitioner shall name a proper party respondent, and if he fails to do so, the court shall allow amendment of the petition. If the petitioner fails to amend the petition by naming a proper party respondent in the time provided by the court, the court in which the petition is filed shall dismiss the habeas petition without prejudice.

§ 8.01-659. Penalty for disobeying it

If the person on whom such writ is served shall, in disobedience to the writ, fail to bring the petitioner, with a return of the cause of his detention, before a court before which the writ is returnable, he shall forfeit to the petitioner $300.

§ 8.01-660. When affidavits may be read

In the discretion of the court or judge before whom the petitioner is brought, the affidavits of witnesses taken by either party, on reasonable notice to the other, may be read as evidence.

§ 8.01-661. Facts proved may be made part of record

All the material facts proved shall, when it is required by either party, be made a part of the proceedings and entered by the clerk among the records of the court.

§ 8.01-662. Judgment of court or judge trying it; payment of costs and expenses when petition denied

After hearing the matter both upon the return and any other evidence, the court before whom the petitioner is brought shall either discharge or remand him, or admit him to bail and adjudge the cost of the proceeding, including the charge for transporting the prisoner.

Provided, however, that if the petition is denied, the costs and expenses of the proceeding and the attorney's fees of any attorney appointed to represent the petitioner shall be assessed against the petitioner. If such cost, expenses and fees are collected, they shall be paid to the Commonwealth.

§ 8.01-663. Judgment conclusive

Any such judgment entered of record shall be conclusive, unless the same be reversed, except that the petitioner shall not be precluded from bringing the same matter in question in an action for false imprisonment.

§ 8.01-664. How and when Supreme Court summoned to try appeal therefrom

If, during the recess of the Supreme Court, the Governor or the Chief Justice of the Court should think the immediate revision of any such judgment to be proper, he may summon the Court for that purpose, to meet on any day to be fixed by him.

§ 8.01-665. When execution of judgment suspended; when prisoner admitted to bail

When the prisoner is remanded, the execution of the judgment shall not be suspended by a petition for appeal or by a writ of error, or for the purpose of applying for such writ. When he is ordered to be discharged, and the execution of the judgment is suspended for the purpose of petitioning for appeal to the Court of Appeals or applying for a writ of error from the Supreme Court, the court making such suspending order may admit the prisoner to bail until the expiration of the time allowed for filing a petition for appeal or applying for the writ of error, or, in case the petition for appeal is filed or the writ of error is allowed, until the decision of the Court of Appeals or the Supreme Court thereon is duly certified.

§ 8.01-666. When and by whom writs of habeas corpus ad testificandum granted

Writs of habeas corpus ad testificandum may be granted by any circuit court in the same manner and under the same conditions and provisions as are prescribed by this chapter as to granting the writ of habeas corpus ad subjiciendum so far as the same are applicable.

§ 8.01-667. Transmission of records to federal court

Whenever any habeas corpus case is pending in a federal court, upon written request of the Attorney General or any assistant attorney general, a court of this Commonwealth shall transmit to such federal court such records as may be requested.

§ 8.01-668. Writ de homine abolished

The writ de homine replegiando is abolished.

§ 49:4 Writ of habeas corpus—Independent civil action

A Virginia postconviction habeas corpus proceeding is an independent civil action, not a postsentencing phase of the original criminal case. See, e.g., *Sigmon v. Director of Dept. of Corrections*, 285 Va. 526, 739 S.E.2d 905 (2013) (habeas corpus "is designed to challenge the civil right of the validity of the petitioner's detention" and is therefore "a civil and not a criminal

proceeding"; it is not a continuation of the criminal prosecution, and may not be used as a substitute for an appeal or writ of error); *Teleguz v. Warden of Sussex I State Prison*, 279 Va. 1, 688 S.E.2d 865 (2010) (assertions of actual innocence are outside the scope of habeas corpus review, which concerns only the legality of the petitioner's detention); *Locklear v. Com.*, 46 Va. App. 488, 618 S.E.2d 361, 363 (2005) (habeas corpus is a civil and not a criminal proceeding and in no sense a continuation of the criminal prosecution; petitions for habeas corpus and appeals from orders in habeas cases are civil in nature).

§ 49:5 Writ of habeas corpus—Right to counsel in capital cases

There is a right to counsel in Virginia habeas corpus proceedings in death sentence cases. Va. Code Ann. § 19.2-163.7 (if a sentence of death is affirmed on appeal, the convicting court shall, within 30 days after the decision of the Virginia Supreme Court, appoint counsel to represent an indigent prisoner under sentence of death in a state habeas corpus proceeding). See, e.g., *Johnson v. Tice*, 275 Va. 18, 654 S.E.2d 917 (2008) (death sentence case; a defendant's right to counsel under the Sixth Amendment includes the right to effective assistance of counsel; a defendant is constitutionally entitled to counsel who is reasonably competent and who gives advice that is within the range of competence required of attorneys in criminal cases).

§ 49:6 Writ of habeas corpus—Right to counsel in noncapital cases

With the repeal of the former version of Va. Code Ann. § 19.2-163.3(d) (which required public defenders to represent prisoners filing habeas petitions) by the Act of Mar. 20, 2007, ch. 680, 2007 Va. Sess. Law Serv., there is no longer a right to counsel in noncapital Virginia postconviction habeas corpus proceedings. But see Va. Code Ann. § 53.1-40 (the judge of a circuit court in whose county or city a state correctional facility is located shall, on motion of the attorney for the commonwealth for such county or city, when he is requested so to do by the superintendent or warden of a state correctional facility, appoint, for a period of no less than 30 days nor more than one year, one or more discreet and competent attorneys to counsel and assist indigent prisoners therein confined regarding any legal matter relating to their incarceration; an attorney so appointed shall be paid as directed by the court from the criminal fund reasonable compensation on an hourly basis and necessary expenses based upon monthly reports to be furnished the court by him).

§ 49:7 Writ of habeas corpus—Effect of failure to raise claim at trial or on direct appeal—Case law

For case law on the effect of a previous failure to raise a claim at trial, on direct appeal, or in a previous state habeas petition on the availability of postconviction habeas corpus relief in Virginia, see, e.g., *Morva v. Warden of Sussex I State Prison*, 285 Va. 511, 741 S.E.2d 781 (2013) (due process claim based on use of restraints on defendant in the courtroom, whether defendant was afforded assistance of expert witnesses at trial, and whether defendant's multiple sentences for separate murders violated double jeopardy could have been raised at trial and on direct appeal and, thus, was not cognizable in a petition for a writ of habeas corpus, in capital murder prosecution); *Dorr v. Clarke*, 284 Va. 514, 733 S.E.2d 235 (2012) (prisoner petitioning for writ of habeas corpus must include all claims that he intends to bring before the court in his first habeas petition, and, regardless of the manner in which that habeas petition is resolved, he may not thereafter file a subsequent habeas petition that seeks relief based upon any allegations of fact that were known to him at the time of the initial filing and not included therein; Virginia trial judges must notify pro se petitioners of the potential consequences when recharacterizing their pleading as a petition for writ of habeas corpus; however, if thereafter the pro se litigant is given the opportunity to withdraw or amend the pleading to state all then-available claims and does not withdraw the pleading, or agrees to the recharacterization, after receiving notice and warning from the trial judge, then the statute governing successive habeas petitions and its associated limitations apply; pro se litigant is not limited to challenging an unwarned recharacterization of his pleading on appeal, but may do so when a later-filed habeas petition is challenged as being a second habeas application barred by the successive petitions provision of the statute; an unwarned recharacterization of a petitioner's pleading as a petition for writ of habeas corpus cannot count as a habeas petition for purposes of the statute governing second or successive habeas petitions, whether the unwarned pro se litigant does, or does not, take an appeal); *Juniper v. Warden of Sussex I State Prison*, 281 Va. 277, 707 S.E.2d 290 (2011) (petitioner's third supplemental appendix was stricken as the exhibits contained therein relate to claims known to petitioner but not presented in either of the previous petitions for a writ of habeas corpus; nonjurisdictional issue could have been raised at trial and on direct appeal and, thus, was not cognizable in a petition for a writ of habeas corpus); *Walls v. Johnson*, 2009 WL 1608810 (E.D. Va. 2009) (Supreme Court has stated that: under Virginia law, failure to raise a claim on direct appeal from a criminal conviction

ordinarily bars consideration of that claim in any subsequent state proceeding); *Muhammad v. Warden of Sussex I State Prison*, 274 Va. 3, 646 S.E.2d 182 (2007) (due process and ineffective counsel claims; to the extent petitioner is reiterating the arguments raised on direct appeal, this court holds that this portion of one of his claims is barred because this issue was raised and decided in the trial court and on direct appeal from the criminal conviction and, therefore, it cannot be raised in a habeas corpus petition; to the extent petitioner is challenging any other aspect of the trial court's inquiry or warnings to petitioner, this court holds this claim is procedurally defaulted because this nonjurisdictional issue could have been raised at trial and on direct appeal and, thus, is not cognizable in a petition for a writ of habeas corpus); *Jackson v. Warden of Sussex I State Prison*, 271 Va. 434, 627 S.E.2d 776 (2006) (death sentence case; claims that habeas petitioner failed to raise at trial or on direct appeal were waived for purposes of collateral review on petition for habeas relief); *Morrisette v. Warden of Sussex I State Prison*, 270 Va. 188, 613 S.E.2d 551 (2005) (death sentence case; when an issue of an alleged constitutional defect could have been raised and adjudicated at trial and upon appeal to this court, a petitioner lacks standing to raise the claim in a petition for writ of habeas corpus; the failure of an indictment to include aggravating circumstances is not a jurisdictional defect and is waived by the failure to object to the indictment before trial); *Davis v. Johnson*, 274 Va. 649, 652 S.E.2d 114 (2007) (a circuit court need not in every case dismiss without prejudice all additional habeas corpus claims accompanying a successful request for a belated appeal; the discretionary nature of the circuit court's authority permits a circuit court to evaluate a petitioner's additional claims; if the circuit court is able to determine from the record that these claims are insufficient as a matter of law, or are procedurally barred as a matter of law, the circuit court retains the discretionary authority to dismiss those deficient claims with prejudice; if the additional claims cannot be resolved as a matter of law on the face of the record, the circuit court should dismiss those claims without prejudice to enable a petitioner to reassert the same claims in a later petition after his belated appeal is concluded; circuit court did not abused its discretion in denying the petitioner's request to dismiss his claims without prejudice); *Bowman v. Washington*, 269 Va. 1, 605 S.E.2d 585 (2004) (although Va. Code Ann. § 8.01-654 bars a petitioner from raising new claims in a subsequent petition for habeas corpus, the statute does not prevent a petitioner from reasserting claims that have been dismissed without prejudice in a prior proceeding); *Lenz v. Warden of Sussex I State Prison*, 267 Va. 318, 593 S.E.2d 292 (2004) (death sentence case;

petitioner could not have adjudicated, at the capital murder trial or on direct appeal; his claims that bailiff provided ex parte answers to jurors' questions about trial court's sentencing instructions, in violation of his right to counsel, and that one or more jurors consulted a Bible in jury room during sentencing deliberations, and thus, such claims could be raised in a habeas corpus proceeding).

§ 49:8 Writ of habeas corpus—Relitigation of issues

Generally, the postconviction writ of habeas corpus may not be used in Virginia to relitigate issues previously litigated on the petitioner's direct appeal or in a prior habeas corpus proceeding instituted by the petitioner.

§ 49:9 Writ of habeas corpus—Relitigation of issues—Case law

For case law on the use of Virginia habeas corpus to relitigate issues previously decided on the petitioner's direct appeal or petitioner's previous postconviction habeas corpus proceeding, see, e.g., *Teleguz v. Warden of Sussex I State Prison*, 279 Va. 1, 688 S.E.2d 865 (2010) (non-jurisdictional claim of Brady violation, which challenged prosecutorial trial tactics, that could have been raised at trial and on direct appeal was not cognizable in a petition for a writ of habeas corpus); *Muhammad v. Warden of Sussex I State Prison*, 274 Va. 3, 646 S.E.2d 182 (2007) (due process and ineffective counsel claims; to the extent petitioner is reiterating the arguments raised on direct appeal, this court holds that this portion of one of his claims is barred because this issue was raised and decided in the trial court and on direct appeal from the criminal conviction and, therefore, it cannot be raised in a habeas corpus petition; to the extent petitioner is challenging any other aspect of the trial court's inquiry or warnings to petitioner, this court holds this claim is procedurally defaulted because this nonjurisdictional issue could have been raised at trial and on direct appeal and, thus, is not cognizable in a petition for a writ of habeas corpus).

§ 49:10 Writ of habeas corpus—Capital cases—Original jurisdiction vested in Virginia Supreme Court

Exclusive jurisdiction to entertain original habeas petitions filed by persons under sentence of death is vested in the Supreme Court of Virginia. Va. Code Ann. § 8.01-654(C)(1) (Supreme Court of Virginia shall have exclusive jurisdiction to consider and award writs of habeas corpus to persons sentenced to death); Va. Code Ann. § 17.1-310 (Virginia Supreme Court shall have jurisdiction

to award writs of habeas corpus; in accordance with Va. Code Ann. § 8.01-654, that court shall have exclusive jurisdiction to award writs of habeas corpus upon petitions filed by prisoners held under the sentence of death). See also Va. Const. art. 6, § 1 (Virginia Supreme Court shall, by virtue of this constitution, have original jurisdiction in cases of habeas corpus).

The procedural requirements applicable to a death sentence case where the habeas petition is filed originally in the Virginia Supreme Court are set forth in Va. Code Ann. § 8.01-654(C) and Rule 5:7A, Va. Sup. Ct. R.

§ 49:11 Writ of habeas corpus—Capital cases—Evidentiary hearing

In a death sentence case where the habeas petition has been filed in the Virginia Supreme Court, the circuit court which imposed the death sentence shall have authority to conduct an evidentiary hearing on the habeas petition in behalf of the petitioner only if directed to do so by order of the Supreme Court of Virginia. Va. Code Ann. § 8.01-654(C)(1). The evidentiary hearing shall be limited to the subject matter enumerated in the Virginia Supreme Court's order, Va. Code Ann. § 8.01-654(C)(2), and shall be conducted within 90 days after the order of the Virginia Supreme Court has been received, Va. Code Ann. § 8.01-654(C)(3).

§ 49:12 Writ of habeas corpus—Capital cases—Mental retardation determination

For case law on postconviction habeas corpus and mental retardation in capital cases in Virginia, see e.g., *Burns v. Com.*, 279 Va. 243, 688 S.E.2d 263 (2010) (requirement, under statute providing redress for certain individuals sentenced to death before April 29, 2003, who raise a claim of mental retardation, that a nonfrivolous claim be remanded applies whether the claim is raised in the context of a direct appeal or a petition for habeas corpus; proceedings to determine the mental retardation of a person sentenced to death, undertaken upon remand are criminal in nature, and any person whose claim is so remanded shall be afforded, in such proceedings, the same rights as those afforded to a defendant in a criminal sentencing proceeding; Rule allowing summary judgment to be entered in civil actions did not permit summary judgment to be entered in remanded proceeding because such proceeding was criminal in nature; trial court's refusal to adjudicate competence of habeas petitioner facing a capital sentence, in remanded proceeding, was reversible error); *In re Com. of Va.*, 278 Va. 1, 677 S.E.2d 236 (2009) (until the enactment of this § 8.01-654.2 the other emergency legislation,

see Code §§ 19.2-264.3:1.1, 19.2-264.3:1.2, and 19.2-264.3:3, there was no procedure in the Commonwealth for a defendant convicted of capital murder to obtain a determination of mental retardation by either a jury or a trial court sitting as the factfinder; notwithstanding any other provision of law, any person under sentence of death whose sentence became final in the circuit court before April 29, 2003, and who desires to have a claim of his mental retardation presented to the Supreme Court, shall do so by one of the following methods: (i) . . . if his direct appeal is pending in the Supreme Court, he shall file a supplemental assignment of error and brief containing his claim of mental retardation . . . The Supreme Court shall consider a claim raised under this section and if it determines that the claim is not frivolous, it shall remand the claim to the circuit court for a determination of mental retardation; otherwise the Supreme Court shall dismiss the petition; the provisions of §§ 19.2-264.3:1.1 and 19.2-264.3:1.2 shall govern a determination of mental retardation made pursuant to this section; if the claim is before the Supreme Court on direct appeal and is remanded to the circuit court and the case wherein the sentence of death was imposed was tried by a jury, the circuit court shall empanel a new jury for the sole purpose of making a determination of mental retardation; in the new but narrow class of cases brought into existence because of the decision of the United States Supreme Court in Atkins III, in which the death sentence in a capital murder case became final in a circuit court before April 29, 2003, this Court has determined that a claim of mental retardation is not frivolous, the General Assembly conferred limited jurisdiction, not plenary jurisdiction over an entire capital murder case, to a circuit court to adjudicate whether the defendant is mentally retarded; given the limited jurisdiction in this particular class of cases, the Circuit Court had the power to adjudicate only the issue as to whether Atkins is mentally retarded; the Circuit Court exceeded the jurisdiction conferred by Code § 8.01-654.2 when it adjudicated Atkins' Brady motion and set aside his sentence of death). *Burns v. Warden of Sussex I State Prison*, 269 Va. 351, 609 S.E.2d 608 (2005) (person qualified to raise the issue of mental retardation as a bar to execution, pursuant to statute, may do so in a habeas corpus petition; however, adjudication of that issue does not occur as part of a habeas corpus proceeding but in the specific statutory proceeding established by the legislature).

§ 49:13 Writ of habeas corpus—Noncapital cases—Original jurisdiction in circuit court

In noncapital cases the postconviction habeas corpus petition shall be filed originally in the circuit court in which the petitioner

was convicted; however, if the conviction occurred in a district court, the petition shall be filed originally in the circuit court for the city or county where in the district court sits. Va. Code Ann. § 8.01-654(B)(1). However, under Va. Code Ann. § 8.01-654(A)(1) and Rule 5:7, Va. Sup. Ct. R., the Virginia Supreme Court does have has jurisdiction to entertain an original postconviction habeas corpus petition filed directly in that court in a noncapital case and occasionally it does exercise that jurisdiction. See, e.g., *West v. Director of Dept. of Corrections*, 273 Va. 56, 639 S.E.2d 190 (2007) (original habeas corpus petition filed directly in state supreme court; defense attorney's failure to raise double jeopardy objection was ineffective assistance of counsel; relief granted).

§ 49:14 Writ of habeas corpus—Custody requirement

There is a custody requirement applicable to postconviction habeas corpus proceedings in Virginia. Va. Code Ann. § 8.01-654(A) (writ of habeas corpus shall be granted to persons detained without lawful authority).

The phrase "detained without lawful authority" in the habeas corpus statute does not limit the availability of a writ of habeas corpus to situations in which a result in the petitioner's favor will result in his or her immediate release; rather, a petitioner may challenge the lawfulness of the entire duration of his or her detention so long as an order entered in the petitioner's favor will result in a court order that, on its face and standing alone, will directly impact the duration of the petitioner's confinement. "Immediate release" from detention is not required for habeas corpus jurisdiction. However, jurisdiction does not extend to cases in which an order entered in the petitioner's favor will only give rise to a possibility of reducing the petitioner's term of imprisonment. Therefore, disputes that only tangentially affect an inmate's confinement, such as prison classification issues concerning the rate at which a prisoner earns good conduct or sentence credits, or challenges to a parole board's decisions, are not proper matters for habeas corpus jurisdiction because an order entered in the petitioner's favor in those cases will not result in an order interpreting convictions or sentences that, on its face and standing alone, will directly impact the duration of the petitioner's sentence. However, the trial court did have jurisdiction to consider an inmate's habeas corpus petition, where based on the inmate's claim, an order entered in his favor would result in a court order that, on its face and as a matter of law, would directly impact the duration of the inmate's imprisonment by shortening his sentence by 288 days. *Carroll v. Johnson*, 278 Va. 683, 685 S.E.2d 647 (2009).

For case law discussing the custody requirement, see e.g.,

Escamilla v. Superintendent, 290 Va. 374, 777 S.E.2d 864 (2015) (in this appeal, we consider whether a Virginia circuit court has jurisdiction to provide habeas corpus relief to a petitioner being detained by federal authorities because of immigration issues arising as a consequence of a state conviction after the sentence for the state conviction has expired; for a Virginia court to exercise jurisdiction over a habeas corpus petition, the Commonwealth must be the source of both the challenged conviction and detention; detention is jurisdictional in habeas corpus, and therefore a prerequisite to any consideration of a habeas petition; the detention requirement was historically interpreted strictly to mean actual physical detention, but in modern times, this reading has been rejected; today we recognize that a petitioner is "detained" within the meaning of Va. Code Ann. § 8.01-654 so long as the sentence under attack has not been "fully served;" a petitioner who enjoys physical freedom but remains subject to a sentence not yet fully served, such as a suspended sentence, supervised parole, or probation, is under detention; jurisdiction for habeas proceedings must exist at the time the petition is filed; the scope of the inquiry is limited to the propriety of the prisoner's present detention; generally, this means that courts do not have jurisdiction to determine the validity of a sentence under which the petitioner is not detained at the time he files the petition; here, Escamilla was not subject to actual or constructive detention for the conviction he seeks to challenge through his habeas petition; Escamilla seeks to attack his 2003 petit larceny conviction, but he completed his sentence for that crime in 2006, eight years prior to seeking habeas relief in 2014; although he was physically detained at the time he filed the habeas petition, he was not detained by the Commonwealth for a violation of Virginia law; rather, he was detained by the federal government based upon federal law; Escamilla argues that his federal immigration detention was sufficient to satisfy the detention required for a Virginia court to exercise jurisdiction under the Virginia habeas corpus statute; however, detention imposed by any other jurisdiction as a result of a Virginia conviction is a collateral consequence of that Virginia conviction; habeas corpus relief under § 8.01-654 is available only to those subject to the actual or constructive detention of the Commonwealth as a result of the conviction they seek to challenge; federal immigration detention does not satisfy the detention requirement of § 8.01-654 because such detention is pursuant to the laws and authority of another sovereign; Escamilla seeks habeas corpus relief concerning a 2003 conviction for petit larceny; Escamilla's sentence for that conviction expired in 2006, and his detention on that conviction ended with the expiration of his sentence;

therefore, Escamilla was not unlawfully detained because of his 2003 Virginia conviction for petit larceny at the time he filed his habeas petition challenging that conviction, and the judgment of the circuit court dismissing Escamilla's petition for want of jurisdiction must be affirmed); *E.C. v. Virginia Dept. of Juvenile Justice*, 283 Va. 522, 722 S.E.2d 827 (2012) (collateral consequences of a conviction challenged in a habeas corpus proceeding may be considered in determining whether the proceeding is moot; release from confinement, probation or parole during the pendency of the proceeding does not automatically render the proceeding moot; juvenile sex offender's release from parole supervision during pendency of his petition for writ of habeas corpus did not render case moot, where collateral consequences imposed on offender by his challenged juvenile adjudication were sufficient to sustain continued controversy, and relief sought, a determination that adjudications which imposed such consequences were invalid because of ineffective assistance of counsel and that juvenile was entitled to new trial, was within court's habeas jurisdiction).

§ 49:15 Writ of habeas corpus—Statute of limitations

There are time limits on instituting postconviction habeas corpus proceedings in Virginia. Until 1995, there were no fixed time limits on the filing of petitions for postconviction habeas corpus relief in Virginia. However, 1995 legislation enacted a statute of limitations period on applying for Virginia postconviction habeas corpus relief in death sentence case, and under 1988 legislation there is a different statute of limitations period on applying for such relief in a noncapital case.

Under Va. Code Ann. § 8.01-654.1, originally enacted by the Act of Mar. 23, 1995, ch. 503, and amended by the Act of Apr. 2, 1998, ch. 199, no petition for habeas relief filed by a prisoner held under a death sentence shall be considered unless it is filed within 60 days of the earliest of the following: (1) denial of certiorari by the U.S. Supreme Court on direct appeal; (2) decision of U.S. Supreme Court affirming the death sentence after a grant of certiorari; or (3) the time for filing a timely certiorari petition in the U.S. Supreme Court has expired, and the defendant has not filed a certiorari petition. See also Rule 5:7A(a), Va. Sup. Ct. R. (imposing same time limits). However, notwithstanding these time restrictions, an indigent death row inmate may file his habeas petition within 120 days following appointment, made under Va. Code Ann. § 19.2-163.7, of postconviction habeas corpus counsel to represent him. (Under § 19.2-163.7, that appointment of postconviction counsel is required to be made within 30 days after the Virginia Supreme Court decision affirming the death sentence on direct appeal.)

Under Va. Code Ann. § 8.01-654(B)(2), originally enacted by the Act of Apr. 15, 1998, ch. 577, a habeas corpus petition attacking a conviction or sentence in a case where the defendant has not been sentenced to death "shall be filed within two years from the date of final judgment in the trial court or within two years from either the final disposition of the direct appeal or the time for filing such appeal has expired, whichever is later."

A petition for writ of habeas corpus is not "filed," for purposes of the one-year limitations period governing such a petition, until the prisoner had submitted a full filing fee. *Lahey v. Johnson*, 283 Va. 225, 720 S.E.2d 534 (2012).

For case law on the habeas statute of limitations, see, e.g., *Hicks v. Director, Dept. of Corrections*, 768 S.E.2d 415 (Va. 2015) (the tolling provision of Code § 8.01-229(D) is applicable to the limitations period of Code § 8.01-654(A)(2) and, therefore, it was error to conclude that Hicks' petition for habeas corpus was untimely).

§ 49:16 Writ of habeas corpus—Form and filing of petition

Under Va. Code Ann. § 8.01-655(A), every postconviction application for habeas relief must be filed on an approved form. That approved form is set forth in Va. Code Ann. § 8.01-655(B).

The petition for a writ of habeas corpus "shall contain all allegations the facts of which are known to petitioner at the time of filing and such petition shall enumerate all previous applications and their disposition. No writ shall be granted on the basis of any allegation the facts of which petitioner had knowledge at the time of filing any previous petition contain all allegations of the facts which are known to the petitioner." Va. Code Ann. § 8.01-654(B)(2). Furthermore, failure to raise a claim at trial or on direct appeal ordinarily bars consideration of that claim in any subsequent Virginia habeas corpus proceeding.

§ 49:17 Writ of habeas corpus—Affidavits as substantive evidence

Affidavits may be used as substantive evidence in Virginia habeas corpus proceedings. Va. Code Ann. § 8.01-660.

§ 49:18 Writ of habeas corpus—Grounds for relief

The Virginia habeas corpus statutes do not specify the various grounds for postconviction relief; they simply provide in general terms that the remedy extends to persons "detained without lawful authority." Va. Code Ann. § 8.01-654(A)(1); see also Va. Code

Ann. § 8.01-654(B)(3), (4) ("detention without lawful authority;" "illegality of the petitioner's detention").

§ 49:19 Writ of habeas corpus—Grounds for relief—Lack of jurisdiction

It is well established in Virginia, however, that postconviction habeas corpus relief may be granted if the conviction or sentence is void for lack of jurisdiction. Indeed, there is even Virginia case law—mainly older case law—to the effect that only jurisdictional errors are cognizable in postconviction habeas corpus proceedings.

§ 49:20 Writ of habeas corpus—Grounds for relief—Violations of constitutional rights

Since around 1970, however, almost all the Virginia postconviction habeas corpus decisions which have addressed the issue hold, expressly or impliedly, that the writ of habeas corpus is not restricted to review of jurisdictional errors and that the writ may also be used to redress claims of violations of constitutional rights.

§ 49:21 Writ of habeas corpus—Grounds for relief—Violations of constitutional rights—Case law

For a sampling of case law indicating that claims of violations of constitutional rights are, like claims of jurisdictional error, cognizable in Virginia postconviction habeas corpus proceedings, see, e.g., *Laster v. Russell*, 286 Va. 17, 743 S.E.2d 272 (2013) (in a habeas corpus proceeding, the truth-seeking function of the trial process yields to a focus on the legality of a petitioner's detention and whether the petitioner presently is detained in violation of any constitutional rights); *Morva v. Warden of Sussex I State Prison*, 285 Va. 511, 741 S.E.2d 781 (2013) (death sentence case); *West v. Director of Dept. of Corrections*, 273 Va. 56, 639 S.E.2d 190 (2007) (original habeas corpus petition filed directly in state supreme court; defense attorney's failure to raise double jeopardy objection was ineffective assistance of counsel; we find no merit in the commonwealth's argument that we lack jurisdiction to grant a writ of habeas corpus because our granting of the writ will not result in West's release from his immediate detention; although West is serving concurrent sentences on the two manslaughter convictions, our judgment granting a writ of habeas corpus with regard to his common law involuntary manslaughter conviction will result in his release from immediate detention on that conviction and sentence; therefore, our decision complies with the purpose and scope of the writ of habeas corpus, which is to test the legality of a prisoner's detention; relief granted).

§ 49:22 Writ of habeas corpus—Grounds for relief—Ineffective assistance of counsel

The most frequently litigated constitutional claim in Virginia postconviction habeas corpus proceedings has been an assertion that the petitioner received ineffective assistance of counsel at trial, at the guilty plea hearing, at sentencing, or on direct appeal.

§ 49:23 Writ of habeas corpus—Grounds for relief—Ineffective assistance of counsel—Case law

For case law on the use of postconviction habeas corpus to raise claims of ineffective assistance of counsel in Virginia, see, e.g., *Director of Dept. of Corrections v. Kozich*, 290 Va. 502, 779 S.E.2d 555 (2015) (the circuit court issued a writ of habeas corpus to Douglas Todd Kozich, finding that his trial counsel had violated the Sixth Amendment guarantee of effective legal representation by not timely filing, and obtaining a ruling on, a motion seeking a reconsideration of Kozich's sentence; disagreeing with several aspects of the court's reasoning, we nonetheless affirm the judgment granting the writ in this case on alternative grounds legally supported by the habeas court's factual finding; in sum, the habeas court erred in granting a writ of habeas corpus on the ground that the sentencing orders were only to have the effect of "continuing" the case as an "open sentencing;" the sentencing orders were final, appealable orders under Virginia law; no binding precedent recognizes a Sixth Amendment right to counsel to pursue a motion to reconsider a sentence after the entry of final judgment; the habeas court erred in granting the writ on this basis; we nonetheless agree with Kozich that the habeas court's findings of ineffectiveness of counsel and prejudice support the issuance of the writ based upon trial counsel's failure to file a timely motion to reconsider the sentences and to ensure that the trial court had an opportunity to rule on it; counsel's failure to do so in response to an express invitation by the trial court was objectively unreasonable; this omission, coupled with the habeas court's finding that the motion would have been granted, demonstrated prejudice; the writ of habeas corpus, therefore, was properly issued for these reasons); *Dominguez v. Pruett*, 287 Va. 434, 756 S.E.2d 911 (2014) (habeas petitioner Juan Manuel Dominguez was tried and convicted of malicious wounding and robbery in a jury trial in the Circuit Court of Fairfax County; he was sentenced to ten years' imprisonment for malicious wounding and five years' imprisonment for robbery, to be served concurrent; in 2012, Dominguez filed a petition for a writ of habeas corpus in the Circuit Court of Fairfax County; as relevant to this appeal, Dominguez argued that his trial counsel provided ineffec-

tive assistance by failing to object to the malicious wounding jury instruction; the habeas court denied relief to Dominguez, holding that he failed to prove his attorney's performance was prejudicial as required under *Strickland v. Washington*, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984); we affirm; Dominguez's claim for ineffective assistance of counsel fails to satisfy the prejudice prong of the two-part test enunciated in Strickland; thus, Dominguez cannot meet his burden of proving that there is a reasonable probability that, had the jury been properly instructed, the result of the trial would have been different); *Zemene v. Clarke*, 768 S.E.2d 684 (Va. 2015) (trial counsel's failure to advise detainee of the immigration consequences of his plea fell below an objective standard of reasonableness, as element of ineffective assistance claim, and petitioner's habeas petition sufficiently alleged that he was prejudiced by counsel's failure to advise him of the immigration consequences of his plea); *Prieto v. Warden of Sussex I State Prison*, 286 Va. 99, 748 S.E.2d 94 (2013), petition for certiorari filed, 134 S. Ct. 2823, 189 L. Ed. 2d 790 (2014) (death sentence case); *Laster v. Russell*, 286 Va. 17, 743 S.E.2d 272 (2013) (Va. Code Ann. § 8.01-654(B)(1) grants jurisdiction over petitions for writs of habeas corpus to this Court and to circuit courts; the "circuit court which entered the original judgment order of conviction or convictions complained of in the petition shall have authority to issue writs of habeas corpus," Code § 8.01-654; the purpose of a writ of habeas corpus is to test the validity of detention, and, for this purpose, the law permits a prisoner to mount a collateral attack upon his conviction or sentence; the primary object of habeas corpus is to determine the legality of the restraint under which a person is held; in a habeas corpus proceeding, the truth-seeking function of the trial process yields to a focus on the legality of a petitioner's detention and whether the petitioner presently is detained in violation of any constitutional rights; Laster asserted in his petition for a writ of habeas corpus that he was denied the effective assistance of counsel because his first attorney, Lawrence, failed to communicate to him the Commonwealth's plea offer of a reduced charge and sentence recommendation; Laster asserts that he is being detained without lawful authority because of his lawyer's ineffectiveness in his first trial; he does not assert any constitutional violations in his second trial; we will assume without deciding that Laster may link the first and second trials and assert ineffective assistance of counsel, and we will further assume without deciding that Laster's first lawyer's performance was deficient for purposes of *Strickland v. Washington*, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984), analysis; nonetheless, Laster may not prevail in his request for relief because he cannot

prove prejudice); *Sigmon v. Director of Dept. of Corrections*, 285 Va. 526, 739 S.E.2d 905 (2013) (in this petition for a writ of habeas corpus filed under this Court's original jurisdiction, we first hold that a petition for a writ of habeas corpus and a direct appeal from a final judgment of conviction can proceed simultaneously in this Court; with regard to the claims of ineffective assistance of counsel raised in the petition, we conclude that the petitioner failed to prove that, but for his counsel's alleged errors, the outcome of his trial would have been different; therefore, we will dismiss the petition); *Morva v. Warden of Sussex I State Prison*, 285 Va. 511, 741 S.E.2d 781 (2013) (death sentence case); *Sigmon v. Director of Dept. of Corrections*, 285 Va. 526, 739 S.E.2d 905 (2013) (defendant's petition for writ of habeas corpus claiming ineffective assistance could proceed simultaneously with his direct appeal of his conviction; in a collateral attack on convictions, defendant has the burden to prove by a preponderance of the evidence his claims of ineffective assistance of counsel); *Teleguz v. Warden of Sussex I State Prison*, 279 Va. 1, 688 S.E.2d 865 (2010) (habeas corpus petitioner failed to establish that trial counsel rendered ineffective assistance in capital murder for hire prosecution by failing to challenge the Commonwealth's alleged motive for the crime and to offer a viable alternative theory; petitioner failed to provide affidavits from any of the witnesses he contended counsel should have called, and failed to allege that, had the issues been presented, the jury would have found him not guilty); *Johnson v. Tice*, 275 Va. 18, 654 S.E.2d 917 (2008) (death sentence case; defense counsel's failure to object to admission of defendant's confession at capital murder trial did not result in prejudice sufficient to undermine confidence in the outcome of the proceedings for purposes of ineffective assistance of counsel claim); *Elliott v. Warden of Sussex I State Prison*, 274 Va. 598, 652 S.E.2d 465 (2007) (defense counsel during guilt phase of capital murder trial was not ineffective for failing to obtain complete transcripts of defendant's first trial, which resulted in a mistrial, for failing to interview jurors from first trial, and for failing to identify, interview, or call witness to testify to defendant's location, activities, and appearance on the morning of the murders did not prejudice defendant); *West v. Director of Dept. of Corrections*, 273 Va. 56, 639 S.E.2d 190 (2007) (original habeas corpus petition filed directly in state supreme court; defense attorney's failure to raise double jeopardy objection was ineffective assistance of counsel; relief granted); *Hines v. Kuplinski*, 267 Va. 1, 591 S.E.2d 692 (2004) (Hines filed a petition for a writ of habeas corpus claiming that he was denied effective assistance of counsel because his trial attorneys erroneously told him that he could challenge his conviction on the basis of newly

discovered evidence at any time in the future; the commonwealth filed a motion to dismiss the petition because it was not filed within the two-year limitations period established in Va. Code Ann. § 8.01-654(A)(2); the circuit court sustained the commonwealth's motion and dismissed the petition, and we affirm the circuit court; motion and dismissed the petition; § 8.01-654(A)(2) provides in relevant part that a habeas corpus petition attacking a criminal conviction or sentence shall be filed within two years from the date of final judgment in the trial court or within one year from either final disposition of the direct appeal in state court or the time for filing such appeal has expired, whichever is later; the statute contains no exception allowing a petition to be filed after the expiration of these limitations periods).

§ 49:24 Writ of habeas corpus—Grounds for relief—Ineffective assistance of counsel—Failure to file discretionary appeal

A claim of ineffective assistance of counsel based on that counsel's failure, following the Virginia Court of Appeals' affirmance of the conviction on direct appeal, to file for a discretionary appeal in Virginia Supreme Court is grounds for postconviction habeas corpus relief in Virginia.

For case law, see e.g., *Brown v. Warden of Virginia State Penitentiary*, 238 Va. 551, 385 S.E.2d 587 (1989); *Dodson v. Director of Dept. of Corrections*, 233 Va. 303, 355 S.E.2d 573 (1987).

§ 49:25 Writ of habeas corpus—Grounds for relief—Claim that petitioner received ineffective assistance in prior postconviction habeas corpus proceeding

A claim that the petitioner received ineffective assistance of counsel in a prior postconviction habeas corpus proceeding is not a ground for habeas relief in Virginia. Va. Code Ann. § 19.2-163.8(D) (noncompliance with the requirements of § 19.2-163.8, providing for appointment of counsel to represent death row inmates seeking state postconviction habeas relief, shall not form the basis for a claim of error in any habeas corpus proceeding, and the performance of appointed habeas corpus counsel shall not form a basis for relief in any subsequent habeas corpus proceeding).

§ 49:26 Writ of habeas corpus—Grounds for relief—Newly discovered evidence of innocence

The Virginia habeas corpus statutes do not provide that newly

discovered evidence of innocence is a ground for habeas relief, and there is no case law holding that Virginia postconviction habeas relief may be granted based on such evidence. Newly discovered evidence of innocence is not, therefore, a ground for relief in Virginia postconviction habeas corpus litigation.

§ 49:27 Writ of habeas corpus—Grounds for relief—Writ of actual innocence based on nonbiological evidence

A claim based on the Virginia postconviction remedy known as the writ of actual innocence based nonbiological evidence is not a ground for postconviction relief in Virginia. Va. Code. Ann. § 19.2-327.14 (an action under this chapter or the actions of any attorney representing the petitioner under this chapter shall not form the basis for relief in any habeas corpus proceeding).

§ 49:28 Writ of habeas corpus—Grounds for relief—Postconviction DNA testing statute

A claim based on the portion of Virginia's postconviction DNA testing statute relating to scientific analysis of evidence is not a ground for postconviction relief in Virginia. Va. Code. Ann. § 19.2-327.1(G) (an action under this section or the performance of any attorney representing the petitioner under this section shall not form the basis for relief in any habeas corpus proceeding). See, e.g., *Harvey v. Warden of Coffeewood Correctional Center*, 268 Va. 5, 597 S.E.2d 58 (2004) (original habeas corpus petition filed directly in state supreme court; in January 2002, after exhausting his opportunities for state and federal direct and collateral review of his convictions, Harvey filed a motion in the Circuit Court of Fairfax County, pursuant to § 19.2-327.1, seeking post-trial scientific analysis of certain evidence; on Mar. 1, 2002, the circuit court ordered the Division of Forensic Science to test the DNA from the human biological evidence obtained from Harvey, another codefendant, and the victim; on May 15, 2002, after testing was completed, the Division of Forensic Science filed a certificate of analysis stating that Harvey could not be eliminated as a possible contributor to the sperm fractions found on the victim; on Sept. 24, 2002, Harvey filed a petition for a writ of habeas corpus in this court, challenging the validity of the certificate of analysis and related test results; we conclude that this court does not have jurisdiction to consider the habeas petition; § 19.2-327.1 expressly states, in pertinent part, that "[a]n action under this section . . . shall not form the basis for relief in any habeas corpus proceeding or any other appeal;" this statutory language means that circuit court proceedings under § 19.2-327.1 are not

subject to review in this court, whether by direct appeal or a petition for a writ of habeas corpus; consequently, Harvey's petition is dismissed for lack of jurisdiction, the rule is discharged, and the respondent shall recover of the petitioner his costs expended about his defense herein).

A claim based on the portion of Virginia's postconviction DNA testing statute relating to writs of actual innocence is not a ground for postconviction relief in Virginia. Va. Code Ann. § 19.2-327.6 (an action under this chapter or the performance of any attorney representing the petitioner under this chapter shall not form the basis for relief in any habeas corpus).

§ 49:29 Writ of habeas corpus—Capital cases—Virginia Supreme Court Rule 5:7A—Text of rule

Rule 5:7A, Va. Sup. Ct. R., adopted in 1995 and amended in 1996, and 2007, which is applicable to postconviction habeas corpus proceedings involving the death sentence where the original habeas petition is filed directly in the Virginia Supreme Court, provides:

RULE 5:7A. PETITIONS FOR WRITS OF HABEAS CORPUS IN CASES IN WHICH THE SENTENCE OF DEATH HAS BEEN IMPOSED

In cases in which the sentence of death has been imposed:

(a) Petition for the Writ. A petition for a writ of habeas corpus shall be filed in the office of the clerk of this Court within 60 days after the earliest of:

(i) the denial by the Supreme Court of the United States of a petition for a writ of certiorari to the judgment of this Court on direct appeal,

(ii) an order of the Supreme Court of the United States affirming imposition of the sentence of death in a case in which that Court granted a writ of certiorari to review the judgment of this Court on direct appeal, or

(iii) the expiration of the period for filing a petition for a writ of certiorari in the Supreme Court of the United States without such a petition being filed.

(b) Contents of Petition for Writ. Each petition for a writ of habeas corpus shall be verified and shall include an enumerated list of the grounds asserted for relief together with all supporting facts upon which the petitioner relies. The petition shall contain citation to the relevant legal authorities and an enumeration of all previous petitions and their disposition. The petition shall state whether, in the opinion of the petitioner, the taking of evidence is necessary

for the proper disposition of the petition. The petition shall be accompanied by a return of service executed by the appropriate officer evidencing service of a copy thereof upon the Attorney General of Virginia or by an acceptance of service signed by the Attorney General or an Assistant Attorney General.

(c) Response. Within 30 days after service of the petition, the Attorney General shall file with the clerk of this Court a responsive pleading, which may include a motion to dismiss. The response shall include citation to the relevant legal authorities and shall state whether, in the opinion of the Attorney General, the taking of evidence is necessary for the proper disposition of the petition.

(d) Reply. Within 20 days after the Attorney General's responsive pleading is filed pursuant to subparagraph (c), the petitioner may file a reply.

(e) Copies to be Filed. Ten copies of the petition, the Attorney General's responsive pleading, and the petitioner's reply shall be filed in the office of the clerk of this Court.

(f) Motions. Upon the filing of any motion other than a motion to dismiss included in a responsive pleading filed pursuant to subparagraph (c) of this Rule, or upon the filing of an objection pursuant to Code § 8.01-654(C)(3), the opposing party may file a response within ten days of the filing of the motion or objection, or within such time as this Court may order.

(g) Length.

Except by permission of a justice of this Court, no petition for a writ of habeas corpus or a response thereto shall exceed the longer of 100 pages or 17,500 words, and no reply to a response shall exceed the longer of 50 pages or 8,750 words. Page or word limits under this Rule do not include appendices, the cover page, table of contents, table of authorities, and certificate. All petitions, responses, replies, motions, and other papers filed pursuant to this Rule shall conform to the provisions of Rule 5:6(a). If counsel wishes to file a petition or response in excess of the page or word limit prescribed in this paragraph, a motion to exceed the page or word limit must be filed with the clerk of this Court at least 10 days before the due date for the petition or response. If the motion is denied, or if no timely motion to exceed the page or word limit is filed, any pages in the petition or response that exceed the page or word limit, except the signature and certificate of service, shall be stricken and not considered by this Court.

(h) Further Proceedings by Order of this Court. Further

proceedings shall be conducted in accordance with the orders of this Court. If it is determined that an evidentiary hearing is necessary for the proper disposition of the petition, this Court shall enter an order directing the circuit court that entered the judgment imposing the sentence of death to conduct such a hearing in accordance with the provisions of Code § 8.01-654(C)(1), (2), and (3).

(i) Amendment of Petition. If the statute of limitations has not expired, a petitioner may move—at any time before a ruling is rendered on the merits of the petition as initially filed—for leave of this Court to substitute an amended petition. This amendment can include additional claims not presented in the petition as initially filed. Any such motion shall attach a copy of the proposed amended petition.

§ 49:30 Writ of habeas corpus—Capital cases—Filing directly in Supreme Court—Case law

For case law on original postconviction habeas corpus petitions filed directly in the Virginia Supreme Court by death row inmates pursuant to the Va. Code Ann. § 8.01-654(C)(1), see, e.g., *Lewis v. Wheeler*, 2009 WL 588957 (W.D. Va. 2009), aff'd, 609 F.3d 291 (4th Cir. 2010) (under Rule 5:7A of the Rules of the Supreme Court of Virginia, state habeas petitions in death penalty cases are limited to 50 pages, unless permission for a longer petition is granted by a justice of the Court); *Hedrick v. True*, 443 F.3d 342 (4th Cir. 2006) (death sentence case; under Virginia law, the Virginia Supreme Court has exclusive jurisdiction with respect to habeas petitions filed by a petitioner held under the sentence of death; once a state habeas petition is pending before the Virginia Supreme Court, that court can order the circuit court which entered judgment to hold an evidentiary hearing; the hearing must be conducted within ninety days of the Virginia Supreme Court's order, and the circuit court has sixty days after the completion of the hearing to report its findings of fact and recommended conclusions of law to the Virginia Supreme Court; any objection to the circuit court's report must be filed within thirty days of the date the report is filed in the Virginia Supreme Court; while a state habeas petition is pending before the Virginia Supreme Court, leave to amend shall be liberally granted in furtherance of the ends of justice; unless a petitioner seeks leave to amend his state habeas petition, the court is without jurisdiction to entertain any additional claims in a new state habeas petition); *Strong v. Johnson*, 495 F.3d 134 (4th Cir. 2007) (Supreme Court of Virginia Rule 5:7 specifies the pleadings permitted in an original jurisdiction habeas corpus case: a verified petition and a

responsive pleading; a memorandum of law may be filed along with either of these pleadings; absent court authorization, no other documents may be filed); *Whitehead v. Johnson*, 2008 WL 3890357 (E.D. Va. 2008) (in state habeas proceedings, only two pleadings are permitted, an application and a responsive pleading (answer); briefs may be filed only with the application and the responsive pleading; no other filings are contemplated; none are permitted except upon orders of the Court; as such, the Supreme Court of Virginia's failure to address claims raised in petitioner's state habeas opposition was in accordance with Va. Sup.Ct. R. 5:7); *Walker v. True*, 399 F.3d 315 (4th Cir. 2005) (death sentence case; Va. Code Ann. § 8.01-654.2 sets forth the procedural framework for the resolution of *Atkins v. Virginia*, 536 U.S. 304, 122 S. Ct. 2242, 153 L. Ed. 2d 335 (2002), claims filed by petitioners, such as Walker, who were sentenced to death before Apr. 29, 2003; Va. Code Ann. § 8.01-654.2 does not waive the filing deadlines of Va. Code Ann. § 8.01-654); *Green v. Johnson*, 515 F.3d 290 (4th Cir. 2008) (Virginia Supreme Court's determination in state habeas proceeding, that petitioner had failed to meet his burden, under Virginia's statutory scheme to determine capital defendants' claims of mental retardation, of proving that his claim of mental retardation was not frivolous was not an unreasonable application of decision of United States Supreme Court in *Atkins v. Virginia*); *Muhammad v. Warden of Sussex I State Prison*, 274 Va. 3, 646 S.E.2d 182 (2007) (due process and ineffective counsel claims; to the extent petitioner is reiterating the arguments raised on direct appeal, this court holds that this portion of one of his claims is barred because this issue was raised and decided in the trial court and on direct appeal from the criminal conviction and, therefore, it cannot be raised in a habeas corpus petition; to the extent petitioner is challenging any other aspect of the trial court's inquiry or warnings to petitioner, this court holds this claim is procedurally defaulted because this nonjurisdictional issue could have been raised at trial and on direct appeal and, thus, is not cognizable in a petition for a writ of habeas corpus); *Lewis v. Warden of Fluvanna Correctional Center*, 274 Va. 93, 645 S.E.2d 492 (2007) (ineffective counsel claim; when the this court refers a petition for a writ of habeas corpus involving a capital murder case to a circuit court for an evidentiary hearing, this court is bound by such findings resolving disputed issues of fact unless those findings are plainly wrong or without evidence to support them; the circuit court's recommended conclusions of law following evidentiary hearing ordered by Supreme Court for habeas corpus petition in capital case are, however, subject to de novo review); *Morrisette v. Warden of Sussex I State Prison*, 270 Va. 188, 613 S.E.2d 551 (2005) (claims

of ineffective assistance of trial and appellate counsel, and other claims; when an issue of an alleged constitutional defect could have been raised and adjudicated at trial and upon appeal to this court, a petitioner lacks standing to raise the claim in a petition for writ of habeas corpus; the failure of an indictment to include aggravating circumstances is not a jurisdictional defect and is waived by the failure to object to the indictment before trial; petitioner received ineffective assistance of counsel at sentencing hearing when his attorney failed to object to the incomplete verdict form; relief granted); *Yarbrough v. Warden of Sussex I State Prison*, 269 Va. 184, 609 S.E.2d 30 (2005) (claim that petitioner received ineffective counsel at sentencing phase; in reviewing the circuit court's findings of fact and conclusions of law submitted pursuant to Va. Code Ann. § 8.01-654(C), we defer to the court's factual findings and are bound by them unless they are plainly wrong or without evidentiary support; however, we review de novo the circuit court's recommended conclusions of law, because they involve mixed questions of law and fact); *Orbe v. True*, 267 Va. 558, 601 S.E.2d 543 (2004) (petitioner alleges that his execution by lethal injection, without first changing to a more humane protocol, will violate his rights to due process and constitute cruel and unusual punishment under the Virginia and United States Constitutions; however, petitioner acknowledges in his petition that this is not an appropriate claim to raise in a petition for a writ of habeas corpus; the reason why this is not an appropriate habeas corpus claim is that Orbe does not challenge either the fact or duration of his imprisonment, does not challenge his death sentence, and does not seek a determination that he is entitled to immediate or speedier release; consequently, we hold that this court does not have original jurisdiction to consider his petition); *Lenz v. Warden of Sussex I State Prison*, 267 Va. 318, 593 S.E.2d 292 (2004) (ineffective counsel claim; when the this court refers a petition for a writ of habeas corpus involving a capital murder case to a circuit court for an evidentiary hearing, it gives deference to the circuit court's factual findings and considers those findings binding unless they are plainly wrong or without evidence to support them).

§ 49:31 Writ of habeas corpus—Noncapital cases—Filing directly in Supreme Court—Case law

For case law on Virginia postconviction habeas corpus proceedings not involving death row inmates filing an original habeas petition directly in the state supreme court under the 1995 statute, see, e.g., *West v. Director of Dept. of Corrections*, 273 Va. 56, 639 S.E.2d 190 (2007) (original habeas corpus petition filed directly in state supreme court; defense attorney's failure to raise

double jeopardy objection was ineffective assistance of counsel; we find no merit in the commonwealth's argument that we lack jurisdiction to grant a writ of habeas corpus because our granting of the writ will not result in West's release from his immediate detention; although West is serving concurrent sentences on the two manslaughter convictions, our judgment granting a writ of habeas corpus with regard to his common law involuntary manslaughter conviction will result in his release from immediate detention on that conviction and sentence; therefore, our decision complies with the purpose and scope of the writ of habeas corpus, which is to test the legality of a prisoner's detention; relief granted); *Hines v. Kuplinski*, 267 Va. 1, 591 S.E.2d 692 (2004) (Va. Code Ann. § 8.01-654(A)(2) provides in relevant part that a habeas corpus petition attacking a criminal conviction or sentence shall be filed within two years from the date of final judgment in the trial court or within one year from either final disposition of the direct appeal in state court or the time for filing such appeal has expired, whichever is later; the statute contains no exception allowing a petition to be filed after the expiration of these limitations periods).

§ 49:32 Writ of habeas corpus—Appeals

The final judgment of a circuit court granting or denying post-conviction habeas corpus relief in a noncapital case is appealable directly to the Virginia Supreme Court. Va. Code. Ann. § 17.1-406(B) (in accordance with other applicable provisions of law, appeals lie directly to the Virginia Supreme Court from a final decision, judgment or order of a circuit court involving a petition for a writ of habeas corpus). The party seeking the appeal must within 30 days after the entry of final judgment file with the clerk of the circuit court a notice of appeal and at the same time mail or deliver a copy of such notice to all opposing counsel. Rule 5:9(a), Va. Sup. Ct. R. In addition, the party seeking the appeal must, not more than three months after entry of the judgment appealed from, file a petition for appeal with the clerk of the Virginia Supreme Court. Rule 5:17(a), Va. Sup. Ct. R.

The Virginia Court of Appeals lacks appellate jurisdiction in habeas corpus cases and therefore may not undertake appellate review of a circuit court judgment granting or denying habeas corpus relief. Va. Code. Ann. § 17.1-406(B) (appeals lie directly to the Virginia Supreme Court from a final decision, judgment or order of a circuit court involving a petition for a writ of habeas corpus).

The Virginia Court of Appeals does have original jurisdiction in habeas corpus cases. Va. Code. Ann. § 17.1-404 (in such cases

over which it would have appellate jurisdiction, the Virginia Court of Appeals shall have original jurisdiction to issue writs of habeas corpus). This jurisdiction is limited to noncapital cases; only the Virginia Supreme Court has original habeas jurisdiction in death sentence cases. Va. Code Ann. § 8.01-654(C)(1); Va. Code Ann. § 17.1-310. For several reasons, however, postconviction habeas corpus litigation in the Virginia Court of Appeals in noncapital cases is uncommon. To begin with, as a matter of self-restraint the Virginia Court of Appeals rarely exercises its original habeas corpus jurisdiction. Furthermore, under Va. Code Ann. § 8.01-654(B)(1), only circuit courts may entertain postconviction habeas petitions filed originally in noncapital cases.

§ 49:33 Writ of habeas corpus—Original and appellate jurisdiction of Virginia Court of Appeals—Case law

For postconviction habeas corpus case law in the Virginia Court of Appeals, see, e.g., *Wright v. White*, 17 Va. App. 42, 434 S.E.2d 693 (1993) (this court has original jurisdiction to issue writs of habeas corpus in such cases over which this court would have appellate jurisdiction, as where there has been a judgment of conviction; but it lacks original jurisdiction to review on habeas corpus a decision by the Virginia Department of Corrections to deny parole to a habeas corpus petitioner because review of a decision of the Department does not fall within this court's appellate jurisdiction).

§ 49:34 Writ of actual innocence based on nonbiological evidence

Another Virginia postconviction remedy is the writ of actual innocence based on nonbiological evidence, created by the Act of May 21, 2004, ch. 1024, amended by the Act of Mar. 24, 2007, ch. 824, 2007 Va. Adv. Legis. Serv. 167, and the Act of Apr. 4, 2007, ch. 883, 2007 Va. Adv. Legis. Serv. 706, and codified in Chapter 19.3 ("Issuance of Writ of Actual Innocence Based on Nonbiological Evidence") of Title 19.2 ("Criminal Procedure") of the Annotated Code of Virginia (Va. Code Ann. §§ 19.2-327.10 to 19.2-327.14). The remedy is procedurally implemented by Rule 5A:5(b), Va. Sup. Ct. R.

The remedy, which is limited to persons convicted of a felony following a plea of not guilty, is applied for in the Virginia Court of Appeals; and only one such writ based upon a particular conviction may be filed by the convicted person. Va. Code Ann. § 19.2-327.10. The petition shall be filed on a form provided by the Virginia Supreme Court. Va. Code Ann. § 19.2-327.11(B). The

numerous, elaborate, detailed factual allegations that the petition must contain, as well as the documents that must accompany the petition, are set forth in Va. Code Ann. § 19.2-327.11(A), (B). The petition must be based upon previously unknown or unavailable evidence that could not have been discovered within 21 days following conviction. Va. Code Ann. § 19.2-327.11(A). Human biological evidence may not be used as the sole basis for seeking relief pursuant to this remedy, but may be used in conjunction with other evidence. Va. Code Ann. § 19.2-327.11(A).

Rule 5A:5(b), Va. Sup. Ct. R., which procedurally implements the remedy, provides:

Rules of the Supreme Court of Virginia

Part Five A. The Court of Appeals

B. Original Jurisdiction

RULE 5A:5. ORIGINAL PROCEEDINGS

. . .

(b) Petition for a Writ of Actual Innocence.

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

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

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

(4) Filing Fee. The petition must be accompanied by either

(i) a $25,00 check or money order for the filing fee, or

(ii) an in forma pauperis affidavit demonstrating that the petitioner cannot afford the filing fee. An affidavit seek-

ing in forma pauperis status shall list all assets and liabilities of petitioner, including the current balance of any inmate account maintained by correctional facility.

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

(6) Service of Petition and Return of Service. Prior to filing a petition, the petitioner shall serve the petition, along with all attachments, on the Attorney General and on the Commonwealth's Attorney for the jurisdiction where the conviction occurred. When represented by counsel, the petitioner shall file with the petition either

(i) a duly executed return of service in the form of a verification that a copy of the petition and all attachments have been served, or

(ii) an acceptance of service signed by either or both of the parties to be served, or

(iii) a combination of the two. When unrepresented by counsel, the petitioner shall file with the petition a certificate that a copy of the petition and all attachments have been sent, by certified mail, to the Attorney General and the Commonwealth's Attorney for the jurisdiction where the conviction occurred.

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

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

(9) Copies. An original and four copies of the petition, the Commonwealth's response, and the petitioner's reply, if any, shall be filed with the Court of Appeals. Attachments shall

be included with the original petition, response, or reply, but not with any copies of the same.

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

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

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

§ 49:35 Writ of actual innocence based on nonbiological evidence—Va. Code §§ 19.2-327.10 to 19.2-327.14—Text of statutes

The statutory provisions authorizing this Virginia postconviction remedy—the writ of actual innocence based on nonbiological evidence—provide:

Annotated Code of Virginia

Title 19.2. Criminal Procedure

Chapter 19.3. Issuance of Writ of Actual Innocence Based on Nonbiological Evidence

§ 19.2-327.10. Issuance of writ of actual innocence based on nonbiological evidence

Notwithstanding any other provision of law or rule of court, upon a petition of a person who was convicted of a felony upon a plea of not guilty, or the petition of a person who was adjudicated delinquent, upon a plea of not guilty, by a circuit court of an offense that would be a felony if committed by an adult, the Court of Appeals shall have the authority to issue writs of actual innocence under this chapter. Only one such writ based upon such conviction or adjudication of delinquency

may be filed by a petitioner. The writ shall lie to the circuit court that entered the conviction or adjudication of delinquency; and that court shall have the authority to conduct hearings, as provided for in this chapter, on such a petition as directed by order from the Court of Appeals. In accordance with §§ 17.1-411 and 19.2-317, either party may appeal a final decision of the Court of Appeals to the Supreme Court of Virginia. Upon an appeal from the Court of Appeals, the Supreme Court of Virginia shall have the authority to issue writs in accordance with the provisions of this chapter.

§ 19.2-327.10:1. Petition for writ of actual innocence joined by Attorney General; release of prisoner; bond hearing

The Attorney General may join in a petition for a writ of actual innocence made pursuant to § 19.2-327.10. When such petition is so joined, the petitioner may file a copy of the petition and attachments thereto and the Attorney General's answer with the circuit court that entered the felony conviction and move the court for a hearing to consider release of the person on bail pursuant to Chapter 9 (§ 19.2-119 et seq.). Upon hearing and for good cause shown, the court may order the person released from custody subject to the terms and conditions of bail so established, pending a ruling by the Court of Appeals on the writ under § 19.2-327.13.

§ 19.2-327.11. Contents and form of the petition based on previously unknown or unavailable evidence of actual innocence

A. The petitioner shall allege categorically and with specificity, under oath, all of the following: (i) the crime for which the petitioner was convicted or the offense for which the petitioner was adjudicated delinquent, and that such conviction or adjudication of delinquency was upon a plea of not guilty; (ii) that the petitioner is actually innocent of the crime for which he was convicted or the offense for which he was adjudicated delinquent; (iii) an exact description of the previously unknown or unavailable evidence supporting the allegation of innocence; (iv) that such evidence was previously unknown or unavailable to the petitioner or his trial attorney of record at the time the conviction or adjudication of delinquency became final in the circuit court; (v) the date the previously unknown or unavailable evidence became known or available to the petitioner, and the circumstances under which it was discovered; (vi) that the previously unknown or unavailable evidence is such as could not, by the exercise of diligence, have been discovered or obtained before the expiration of 21 days following entry of the final order of conviction or adjudication of delinquency by the circuit court; (vii) the previously unknown or unavailable evi-

dence is material and, when considered with all of the other evidence in the current record, will prove that no rational trier of fact would have found proof of guilt or delinquency beyond a reasonable doubt; and (viii) the previously unknown or unavailable evidence is not merely cumulative, corroborative or collateral. Nothing in this chapter shall constitute grounds to delay setting an execution date pursuant to § 53.1-232.1, or to grant a stay of execution that has been set pursuant to clause (iii) or (iv) of § 53.1-232.1 or to delay or stay any other appeals following conviction or adjudication of delinquency, or petitions to any court. Human biological evidence may not be used as the sole basis for seeking relief under this writ but may be used in conjunction with other evidence.

B. Such petition shall contain all relevant allegations of facts that are known to the petitioner at the time of filing, shall be accompanied by all relevant documents, affidavits and test results, and shall enumerate and include all relevant previous records, applications, petitions, and appeals and their dispositions. The petition shall be filed on a form provided by the Supreme Court. If the petitioner fails to submit a completed form, the Court of Appeals may dismiss the petition or return the petition to the petitioner pending the completion of such form. Any false statement in the petition, if such statement is knowingly or willfully made, shall be a ground for prosecution of perjury as provided for in § 18.2-434.

C. In cases brought by counsel for the petitioner, the Court of Appeals shall not accept the petition unless it is accompanied by a duly executed return of service in the form of a verification that a copy of the petition and all attachments have been served on the attorney for the Commonwealth of the jurisdiction where the conviction or adjudication of delinquency occurred and the Attorney General, or an acceptance of service signed by these officials, or any combination thereof. In cases brought by petitioners pro se, the Court of Appeals shall not accept the petition unless it is accompanied by a certificate that a copy of the petition and all attachments have been sent, by certified mail, to the attorney for the Commonwealth of the jurisdiction where the conviction or adjudication of delinquency occurred and the Attorney General. If the Court of Appeals does not summarily dismiss the petition, it shall so notify in writing the Attorney General, the attorney for the Commonwealth, and the petitioner. The Attorney General shall have 60 days after receipt of such notice in which to file a response to the petition that may be extended for good cause shown; however, nothing shall prevent the Attorney General from filing an earlier response. The response may contain a proffer of any evidence pertaining to the guilt or innocence or delinquency of the petitioner that is not included in the record of the case, including evidence that was suppressed at trial.

D. The Court of Appeals may inspect the record of any trial or appellate court action, and the Court may, in any case, award a writ of certiorari to the clerk of the respective court below, and have brought before the Court the whole record or any part of any record. If, in the judgment of the Court, the petition fails to state a claim, or if the assertions of previously unknown or unavailable evidence, even if true, would fail to qualify for the granting of relief under this chapter, the Court may dismiss the petition summarily, without any hearing or a response from the Attorney General.

E. In any petition filed pursuant to this chapter that is not summarily dismissed, the petitioner is entitled to representation by counsel subject to the provisions of Article 3 (§§ 19.2-157 et seq.) and Article 4 (§§ 19.2163.3 et seq.) of Chapter 10. The Court of Appeals may, in its discretion, appoint counsel prior to deciding whether a petition should be summarily dismissed.

§ 19.2-327.12. Determination by Court of Appeals for findings of fact by the circuit court

If the Court of Appeals determines from the petition, from any hearing on the petition, from a review of the records of the case, or from any response from the Attorney General that a resolution of the case requires further development of the facts, the court may order the circuit court in which the order of conviction or the adjudication of delinquency was originally entered to conduct a hearing within 90 days after the order has been issued to certify findings of fact with respect to such issues as the Court of Appeals shall direct. The record and certified findings of fact of the circuit court shall be filed in the Court of Appeals within 30 days after the hearing is concluded. The petitioner or his attorney of record, the attorney for the Commonwealth and the Attorney General shall be served a copy of the order stating the specific purpose and evidence for which the hearing has been ordered.

§ 19.2-327.13. Relief under writ

Upon consideration of the petition, the response by the Commonwealth, previous records of the case, the record of any hearing held under this chapter and, if applicable, any findings certified from the circuit court pursuant to an order issued under this chapter, the Court of Appeals, if it has not already summarily dismissed the petition, shall either dismiss the petition for failure to state a claim or assert grounds upon which relief shall be granted; or the Court shall

(i) dismiss the petition for failure to establish previously unknown or unavailable evidence sufficient to justify the issuance of the writ, or

(ii) only upon a finding that the petitioner has proven by clear and convincing evidence all of the allegations contained in clauses (iv) through (viii) of subsection A of § 19.2-327.11, and upon a finding that no rational trier of fact would have found proof of guilt or delinquency beyond a reasonable doubt, grant the writ, and vacate the conviction or finding of delinquency, or in the event that the Court finds that no rational trier of fact would have found sufficient evidence beyond a reasonable doubt as to one or more elements of the offense for which the petitioner was convicted or adjudicated delinquent, but the Court finds that there remains in the original trial record evidence sufficient to find the petitioner guilty or delinquent beyond a reasonable doubt of a lesser included offense, the Court shall modify the order of conviction or delinquency accordingly and remand the case to the circuit court that entered the conviction or adjudication of delinquency for resentencing. The burden of proof in a proceeding brought pursuant to this chapter shall be upon the convicted or delinquent person seeking relief. If a writ vacating a conviction or adjudication of delinquency is granted, and no appeal is made to the Supreme Court, or the Supreme Court denies the Commonwealth's petition for appeal or upholds the decision of the Court of Appeals to grant the writ, the Court of Appeals shall forward a copy of the writ to the circuit court, where an order of expungement shall be immediately granted.

§ 19.2-327.14. Claims of relief

An action under this chapter or the actions of any attorney representing the petitioner under this chapter shall not form the basis for relief in any habeas corpus proceeding. Nothing in this chapter shall create any cause of action for damages against the Commonwealth or any of its political subdivisions.

§ 49:36 Writ of actual innocence based on nonbiological evidence—Procedure

The procedures to be followed once the petition is filed with the Virginia Court of Appeals are set forth in Va. Code Ann. § 19.2-327.11(C) to (E), Va. Code Ann. §§ 19.2-327.12 to 19.2-327.14, and Rule 5A:5(b), Va. Sup. Ct. R. The burden of proof is on the petitioner. Va. Code Ann. § 19.2-327.13. If the petition is not summarily dismissed, the petitioner has a right to counsel. Va. Code Ann. § 19.2-327.11(E). If the court determines that a resolution of the case requires further factual development, it may order the convicting court to conduct a hearing which must be held within 90 days. Va. Code Ann. § 19.2-327.12.

§ 49:37 Writ of actual innocence based on nonbiological evidence—Forms of relief

The forms of relief which may be granted is set forth in Va. Code Ann. § 19.2-327.13. Relief may not be granted unless the petitioner proves by clear and convincing evidence that, among other things, no rational trier of fact could have found proof of guilt beyond a reasonable doubt. Va. Code Ann. § 19.2-327.13. Unless the petitioner could have been properly convicted of a lesser included offense, the court finding in favor of the petitioner shall grant the writ and vacate the conviction. Va. Code Ann. § 19.2-327.13. The final judgment of the Virginia Court of Appeals granting or denying relief may be appealed to the Virginia Supreme Court, and upon such an appeal, the Virginia Supreme Court shall have authority to issue writs of innocence. Va. Code Ann. § 19.2-327.10.

§ 49:38 Writ of actual innocence based on nonbiological evidence—Case law

For case law on the writ of actual innocence based on nonbiological evidence, see, e.g., *Montgomery v. Com.*, 62 Va. App. 656, 751 S.E.2d 692 (2013) (we have original jurisdiction under Va. Code § 19.2-327.10 to consider a petition for a writ of actual innocence based on non-biological evidence; this Court may grant the petition upon a finding that the petitioner has proven by clear and convincing evidence all of the allegations contained in clauses (iv) through (viii) of subsection A of Va. Code § 19.2-327.11, and upon a finding that no rational trier of fact could have found proof of guilt or delinquency beyond a reasonable doubt; in other words, to obtain a writ of actual innocence Montgomery must prove by clear and convincing evidence that the newly-discovered evidence: (1) was previously unknown or unavailable to him or his attorney at the time the conviction became final in the circuit court, (2) could not have been discovered through due diligence before the expiration of the 21 days following the entry of the final order of conviction, (3)(a) is material, and (b) when considered with all of the other evidence in the record, proves that no rational trier of fact could have found proof of guilt beyond a reasonable doubt, and (4) is not merely cumulative, corroborative, or collateral; here, the newly-discovered evidence that Montgomery proffers in support of his petition for a writ of actual innocence is the recantation of complaining witness Coast and her resulting perjury conviction; the petitioner's burden of proof under Va. Code § 19.2-327.11(A)(vii) in cases involving a victim's recantation is well settled; for recantation evidence to be "material," the recantation

must be true; we hold that Montgomery has met his burden of establishing that he is actually innocent of the crimes for which he was convicted; relief granted); *Haas v. Com.*, 283 Va. 284, 721 S.E.2d 479 (2012) (Court of Appeals is vested with broad discretion in determining whether the facts set forth in a petition for a writ of actual innocence based on non-biological evidence requires further development via referral of the case back to the circuit court for an evidentiary hearing); *Turner v. Com.*, 282 Va. 227, 717 S.E.2d 111 (2011) (co-perpetrator's recantation testimony that he acted alone in restraining victim and choking her to death was not "material" to the issue of the actual innocence of defendant, who had been convicted of felony murder and abduction with intent to defile, within meaning of statute governing petition for writ of actual innocence based on non-biological evidence, and, thus, dismissal of petition was justified; defendant's assignments of error and argument focused on proof of abduction with intent to defile, issue with respect to that charge was not restraint, but deception, and co-perpetrator's recantation testimony did not address deception, nor did pertinent circuit court finding that co-perpetrator acted independently in murdering the victim and that defendant had no role in the murder or in the restraining of victim; for previously unknown or unavailable evidence of actual innocence to be "material," the evidence supporting a petition must be true); *Juniper v. Warden of Sussex I State Prison*, 281 Va. 277, 707 S.E.2d 290 (2011) (assertions of actual innocence are governed by Code §§ 19.2-327.1 to 19.2-327.6, and Code §§ 19.2-327.10 to 19.2-327.14 and are outside the scope of habeas corpus review); *Johnson v. Johnson*, 2008 WL 4192715 (E.D. Va. 2008) (a freestanding claim of actual innocence is not enough to award habeas relief; a claim of actual innocence is not itself a constitutional claim but, instead, is a gateway through which a habeas petitioner must pass to have his otherwise barred constitutional claim considered on the merits; therefore, habeas petitioners may use claims of actual innocence to excuse procedural bars on their constitutional claims; to use a claim of actual innocence to remove a procedural bar to a separate constitutional claim, a petitioner must show that it is more likely than not that no reasonable juror would have convicted him in light of the new evidence; to successfully remove any procedural bars to other constitutional claims, petitioner must present new reliable evidence; the Virginia Court of Appeals remanded petitioner's case to the trial court, the trial court determined Smith's recantation was not credible, and as a result, the petition was dismissed; state court findings are given a high measure of deference when considering a federal habeas petition; during the evidentiary hearing, the trial judge observed Smith's demeanor

and determined that his testimony was neither logical nor believable; the Court of Appeals relied upon the trial judge's determination that Smith was not credible and dismissed the petition for writ of actual innocence, and the decision was affirmed by the Supreme Court of Virginia; without reliable evidence, petitioner cannot demonstrate that more likely than not that no reasonable juror would have convicted him in light of the new evidence; as a result, the new evidence presented in the claim of actual innocence is not sufficient to remove procedural bars on other constitutional claims); *Copeland v. Com.*, 52 Va. App. 529, 664 S.E.2d 528 (2008) (our fidelity to the uniform application of law precludes us from accepting concessions of law made on appeal; because the law applies to all alike, it cannot be subordinated to the private opinions of litigants; such hesitation is particularly appropriate here given the need to ensure that the writ of actual innocence does not evolve into an omnibus substitute for the carefully crafted procedures of the habeas corpus writ, Code §§ 8.01-654, et seq., or impinge upon the Governor's exclusive power over executive clemency, Code §§ 53.1-229, et seq.; we analogize the Attorney General's position in this case to a confession of error sometimes submitted on direct appellate review; in such cases, as here, the public trust reposed in the law enforcement officers of the Government requires that they be quick to confess error when, in their opinion, a miscarriage of justice may result from their remaining silent; even so, such a confession does not relieve this Court of the performance of the judicial function; the considered judgment of the law enforcement officers that reversible error has been committed is entitled to great weight, but our judicial obligations compel us to examine independently the errors confessed; the unique circumstances of this case make it prudent to accept, without 'further development of the facts' under Code § 19.2-327.12, the Attorney General's concession that defendant had met his burden of proving that after-discovered information, i.e., certificate of analysis from Department of Forensic Science excluding the item tested from the statutory definition of 'firearm,' was previously unknown or unavailable to defendant or his trial attorney of record when conviction became final in circuit court, and that neither defendant nor his trial counsel could have discovered such information by exercise of diligence; we grant the requested writ of actual innocence and vacate defendant's conviction for possessing a firearm after having been convicted of a felony in violation of Code § 18.2-308.2(A); we further remand this matter to the circuit court with instructions to enter an order of expungement pursuant to Code § 19.2-327.13); *Carpitcher v. Com.*, 273 Va. 335, 641 S.E.2d 486 (2007) (this is the first occasion we have had to state

the standard of review we will apply in this court to an appeal of a final judgment of the state court of appeals disposing of a petition for a writ of actual innocence based on non-biological evidence; we will apply to the factual findings contained in the record of the court of appeals a standard of review similar to the standard we apply to factual findings entered in our original jurisdiction habeas corpus proceedings; we will be bound by the factual findings in the present record, as approved by the court of appeals, unless they are plainly wrong or without evidence to support them; we apply a different standard of review, however, to the court of appeals' conclusions of law and its conclusions based on mixed questions of law and fact; such conclusions, in accordance with general principles of appellate review, are subject to our de novo consideration; to obtain a writ of actual innocence under the provisions of Va. Code Ann. §§ 19.2-327.10 through 19.2-327.14, a petitioner must allege and prove, among other things, that the newly discovered evidence (1) was previously unknown or unavailable to the petitioner or his trial attorney of record at the time the conviction became final in the circuit court, (2) is such as could not, by the exercise of diligence, have been discovered or obtained before the expiration of 21 days following entry of the final order of conviction by the court, (3) is material and when considered with all of the other evidence in the current record, will prove that no rational trier of fact could have found proof of guilt beyond a reasonable doubt, and (4) is not merely cumulative, corroborative or collateral; the petitioner bears the burden of proving these four elements by clear and convincing evidence; the third element listed above, the "materiality requirement," is the only element of proof at issue in this appeal; the statutory provisions at issue reflect an obvious legislative purpose; by enacting these provisions, the General Assembly intended to provide relief only to those individuals who can establish that they did not, as a matter of fact, commit the crimes for which they were convicted; the statutes governing writs of actual innocence based on non-biological evidence considered as a whole, and § 19.2-327.11 in particular, were not intended to provide relief to individuals who merely produce evidence contrary to the evidence presented at their criminal trial; with this legislative purpose in mind, we hold that to be "material," within the meaning of § 19.2-327.11(A)(vii), evidence supporting a petition for a writ of actual innocence based on non-biological evidence must be true; manifestly, evidence that is false cannot be "material" under the terms of the statute; he type of evidence at issue here, recantation evidence, plainly illustrates the necessity of this particular construction of the statute; if we were to permit evidence that may not be true to support a writ of actual in-

nocence, we would be required to grant every petition seeking relief from a conviction when a trial witness, whose testimony was essential to establishing one or more elements of a crime, has completely recanted her trial testimony; such a construction of the statute would defeat the legislative intent of restricting relief only to those individuals who can establish that they did not commit the crime for which they have been convicted; the court of appeals is the court of original jurisdiction for consideration of petitions for a writ of actual innocence; although the General Assembly has not afforded petitioners filing such claims a statutory right to contest the circuit court's factual findings in the court of appeals before the court of appeals enters judgment in the case, the guarantee of procedural due process is nevertheless satisfied under the statutory scheme because a petitioner may request a rehearing by the panel rendering judgment on the petition, or a rehearing en banc, challenging the court of appeals' application of the circuit court's factual findings; in addition, the circuit court's factual findings may be challenged on appeal to this court, affording a petitioner another meaningful opportunity to be heard on the issue whether those findings are plainly wrong or without evidentiary support; we hold that the court of appeals did not err in concluding that Carpitcher failed to meet his statutory burden of proof and in dismissing Carpitcher's petition for a writ of actual innocence; accordingly, we will affirm the court of appeals' judgment); *Johnson v. Com.*, 273 Va. 315, 641 S.E.2d 480 (2007) (evidence alleged in support of a petition for a writ of actual innocence based on nonbiological evidence must be true to be found "material" under Va. Code Ann. § 19.2-327.11(A)(vii); because the state court of appeals cannot hold its own evidentiary hearing to assess a witness' credibility, but must ultimately determine whether a recantation is true, § 19.2-327.12 provides a mechanism to assist the court of appeals in this task; the language of § 19.2-327.12, which authorizes the court of appeals to enter such orders of referral to the circuit court, is plain and unambiguous; therefore, we apply the statutory language as written; § 19.2-327.12 gives the court of appeals broad discretion to certify to the circuit court issues of fact that must be resolved before deciding the merits of a petition; the statute does not place any restrictions on the subject matter of such referral orders; in the present case, Johnson's petition was based on the recantation of his codefendant, Smith; in order to resolve the merits of the petition, the court of appeals was required to determine whether Smith's recantation was true for purposes of meeting the materiality requirement of Code § 19.2-327.11(A)(vii); this determination depended, in large part, on whether Smith was credible in his assertion that he had lied at Johnson's trial and was now

telling the truth that Johnson had no role in the murder; this kind of inquiry plainly falls within the scope of authority given the court of appeals under § 19.2-327.12; we hold that the court of appeals did not add a credibility requirement to the statute but properly exercised its discretion in directing the circuit court to conduct an evidentiary hearing and to render factual findings on the issue of Smith's credibility; the provisions of § 19.2-327.12 do not require that the court of appeals certify the same factual issues to the circuit court in every case; the statute grants the court of appeals broad discretion in determining which issues, if any, require further development of the facts in a hearing before a circuit court); *In re Bowling*, 46 Va. App. 50, 615 S.E.2d 489 (2005) (Lewis Edward Bowling, Jr., petitioned this court for a writ of actual innocence based upon nonbiological evidence, pursuant to Chapter 19.3 of Title 19.2 of the Virginia Code Annotated; the trial court conducted a hearing in this matter and supplied this court with its certified findings of fact; upon consideration thereof, we dismiss the petition for failing to establish previously unknown or unavailable evidence sufficient to justify the issuance of the writ; Bowling's claim of actual innocence rests upon his ability to prove the alibi defense he advanced at trial—namely that he was working for Clements on a job with Stewart when the offenses occurred; however, neither Stewart nor Clements was able to provide clear evidence that Bowling was working on the date and time of the offenses; furthermore, the record does not demonstrate that any trial testimony Stewart may have been able to provide constituted unknown or unavailable evidence undiscoverable through diligence before Bowling's convictions were finalized; accordingly, Bowling's petition for a writ of actual innocence is dismissed); *In re Dicks*, 46 Va. App. 44, 614 S.E.2d 677 (2005) (Carl Dicks petitions this court for a writ of actual innocence pursuant to Chapter 19.3 of Title 19.2 of the Virginia Code Annotated; to be entitled to relief under Va. Code Ann. § 19.2-327.13, a petitioner must prove by clear and convincing evidence that the previously unknown or unavailable evidence is material and when considered with all the other evidence in the current record, will prove that no rational trier of fact could have found proof of guilt beyond a reasonable doubt; here, the newly discovered evidence is not material to establishing defendant's innocence of crimes; the petition is dismissed); *In re Pierce*, 44 Va. App. 611, 606 S.E.2d 536 (2004) (to be entitled to a writ of actual innocence, the petitioner must assert the existence of evidence, previously unknown or unavailable to him, that proves no rational trier of fact could have found proof of guilt beyond a reasonable doubt; evidence is something (including testimony, documents and tangible objects) that tends

to prove or disprove the existence of an alleged fact); *In re Lima*, 44 Va. App. 571, 605 S.E.2d 794 (2004) (Jose Antonio Lima petitions this court for a writ of actual innocence pursuant to Chapter 19.3 of Title 19.2 of the Virginia Code Annotated; in support of his request for such writ Lima contends he is actually innocent of the offenses for which he was convicted; Lima asserts instances of trial court error, prosecutorial misconduct, and ineffective assistance of counsel, as well as insufficient evidence at trial, support his claim of innocence; however, Lima does not proffer any newly discovered evidence that would prove his innocence; therefore, this petition is summarily dismissed; this court derives its power to issue writs of actual innocence pursuant to Va. Code Ann. §§ 19.2-327.10 et seq.; under these provisions, the writ of actual innocence can only be issued based on previously unknown or unavailable evidence that could not be discovered or obtained prior to the trial court's loss of jurisdiction; the remedy of the writ of actual innocence requires the late discovery of previously unknown or unavailable evidence that could not have been gained through diligent efforts at the time of trial and that would cause no rational trier of fact to find the petitioner guilty had it been available); *In re Barron*, 44 Va. App. 536, 605 S.E.2d 777 (2004) (Lynard E. Barron petitions this court for a writ of actual innocence pursuant to Chapter 19.3 of Title 19.2 of the Virginia Code Annotated; to be entitled to the issuance of a writ of actual innocence, the petitioner must prove by clear and convincing evidence that the previously unknown or unavailable evidence is not merely cumulative, corroborative or collateral; to be entitled to relief, a petitioner for a writ of actual innocence must prove by clear and convincing evidence that the previously unknown or unavailable evidence is material and when considered with all the other evidence in the current record, will prove that no rational trier of fact could have found proof of guilt beyond a reasonable doubt); *In re Newman*, 44 Va. App. 146, 603 S.E.2d 654 (2004) (Herman Cephus Newman petitions this court for a writ of actual innocence pursuant to Chapter 19.3 of Title 19.2 of the Virginia Code Annotated; Newman challenges his 1994 adjudication as an habitual offender, as well as his conviction of driving after having been declared an habitual offender in Culpeper County Circuit Court on Apr. 2, 1997; Newman is not eligible for the writ; § 19.2-371.10 permits a person who was convicted of a felony to seek a writ of actual innocence in this court; a proceeding resulting in an habitual offender adjudication is civil in nature and does not produce a felony conviction; thus, Chapter 19.3 affords Newman no basis for relief resulting from his adjudication as an habitual offender; Chapter 19.3 allows review only based on previously unknown or unavailable nonbiological

evidence); *In re Neal*, 44 Va. App. 89, 603 S.E.2d 170 (2004) (Howard Frank Neal petitions this court for a writ of actual innocence pursuant to Chapter 19.3 of Title 19.2 of the Virginia Code Annotated, and he contends he is innocent of the offenses of statutory burglary and attempted robbery; Chapter 19.3 allows review only based on previously unknown or unavailable nonbiological evidence; evidence is something (including testimony, documents and tangible objects) that tends to prove or disprove the existence of an alleged fact; a fact is an actual or alleged event or circumstance, as distinguished from its legal effect, or interpretation; the legal arguments presently advanced by Neal, which were capable of being raised on direct appeal of his convictions, are not "evidence" entitling him to relief under Chapter 19.3; to obtain relief under § 19.2-327.11(A), the evidence supporting the allegation of innocence must have been previously unknown or unavailable to the petitioner or his trial attorney of record at the time the conviction became final in the circuit court; to qualify for relief, the previously unknown or unavailable evidence, when considered with all the other evidence in the current record, must prove that no rational trier of fact could have found proof of guilt beyond a reasonable doubt); *In re Rhodes*, 44 Va. App. 14, 602 S.E.2d 408 (2004) (a plain reading of Va. Code Ann. §§ 19.2-327.10 et seq. makes it clear that the legislature intended this writ to be issued solely upon consideration of newly discovered evidence that was not available at the time of trial but that is material and when considered with all of the other evidence in the current record, will prove that no rational trier of fact could have found proof of guilt beyond a reasonable doubt; Rhodes does not ask us to consider new evidence requiring findings of fact).

§ 49:39 Motion to correct void sentence

The motion to correct void sentence, which may be filed in the convicting court at any time, is a postconviction remedy in Virginia. This remedy exists because in that state, under case law, a trial court may correct a void or illegal sentence at any time. Thus, a convicted person may, without time limitation, file in the convicting court a motion to correct a void sentence. See, e.g., *Rawls v. Com.*, 278 Va. 213, 683 S.E.2d 544 (2009) (Rawls filed a motion to vacate his sentence on the basis that the sentence for the murder conviction was void because it exceeded the statutory range provided by law; a circuit court may correct a void or unlawful sentence at any time).

§ 49:40 Motion to modify or suspend sentence

The motion to modify or suspend sentence, pursuant to Va.

Code Ann. § 19.2-303, is a postconviction remedy in Virginia. Under the sixth paragraph of Va. Code Ann. § 19.2-303, where a person has been sentenced for a felony to the Department of Corrections but has not actually been transferred to a receiving unit of the Department, the court which heard the case, if it appears compatible with the public interest and there are circumstances in mitigation of the offense, may, at any time before the person is transferred to the Department, suspend or otherwise modify the unserved portion of such a sentence; and the court may place the person on probation for such time as the court shall determine. Under the fifth paragraph of Va. Code Ann. § 19.2-303, where a person is sentenced to jail upon conviction of a misdemeanor or a felony, the court may, at any time before the sentence has been completely served, suspend the unserved portion of any such sentence, place the person on probation for such time as the court shall determine, or otherwise modify the sentence imposed.

§ 49:41 Motion to modify or suspend sentence—Case law

For case law on the modification or suspension of sentence under Va. Code Ann. § 19.2-303, see, e.g., *Murry v. Com.*, 762 S.E.2d 573 (Va. 2014) (pursuant to Code § 19.2-303, after conviction, whether with or without jury, the court may suspend imposition of sentence or suspend the sentence in whole or part and in addition may place the defendant on probation under such conditions as the court shall determine; statute authorizes a trial court to impose such reasonable terms and conditions of probation as it deems appropriate; only statutory limitation on the court's exercise of its discretion is one of reasonableness; probation conditions must be reasonable in light of the nature of the offense, the defendant's background, and the surrounding circumstances; probation is one point on a continuum of possible punishments ranging from solitary confinement in a maximum-security facility to a few hours of mandatory community service; inherent in the very nature of probation is that probationers do not enjoy the absolute liberty to which every citizen is entitled, but only conditional liberty properly dependent on observance of special probation conditions); *Stokes v. Com.*, 61 Va. App. 388, 736 S.E.2d 330 (2013) (it is uncontested that as of the Dec. 22, 2011, hearing on appellant's § 19.2-303 motion, appellant had already been transferred to the Department of Corrections; the only issue is whether the fact that appellant was transferred in violation of the court order allows the trial court to modify appellant's sentence; we recognize that the purposes of § 19.2-303 are rehabilitative in nature, and the statute should be liberally construed; this does not mean, however, that appellant is entitled to an interpretation of § 19.2-303 that is inconsistent with the

statute's plain language; we have no basis to conclude that the legislature did not mean what it unambiguously wrote in § 19.2-303; it created an absolute event when a trial court can no longer modify a sentence; it clearly limits the authority of the trial court to do so; the statute contains no exceptions; we affirm denial of the § 19.2-303 motion); *Burrell v. Com.*, 283 Va. 474, 722 S.E.2d 272 (2012) (statute governing the suspension or modification of a sentence did not confer jurisdiction on the trial court to change the offense of conviction in the sentencing order more than 21 days after order was entered; the statute did not authorize a trial court to reduce a conviction from a felony to a misdemeanor after a defendant had served the active portion of a sentence, rather, it authorizes the court to suspend or otherwise modify the unserved portion of such a sentence); *Heiderscheidt v. Com.*, 2009 WL 1585985 (Va. Ct. App. 2009) (after conviction, whether with or without jury, the court may suspend imposition of sentence or suspend the sentence in whole or part and in addition may place the defendant on probation under such conditions as the court shall determine; this statute places wide discretion in the trial court to determine what conditions are to be imposed in each particular case); *Howell v. Com.*, 274 Va. 737, 652 S.E.2d 107 (2007) (the statutes dealing with probation and suspension are remedial and intended to give the trial court valuable tools to help rehabilitate an offender through the use of probation, suspension of all or part of a sentence, and/or restitution payments); *Monk v. Com.*, 2007 WL 2915028 (Va. Ct. App. 2007) (once the defendant has been transferred to the Department of Corrections and twenty-one days have passed since the court's last order, the court can no longer modify a sentence; for the trial court to modify a sentence, it is the defendant's burden to prove jurisdiction, specifically that either twenty-one days have not yet elapsed, or that the defendant has not yet been transferred to the Department of Corrections; Monk failed to provide the court with any evidence from which it could determine that it had jurisdiction to modify his sentence, pursuant to Code § 19.2-303); *Neely v. Com.*, 44 Va. App. 239, 604 S.E.2d 733 (2004), on reh'g en banc, 45 Va. App. 399, 611 S.E.2d 627 (2005) and judgment aff'd, 271 Va. 1, 624 S.E.2d 657 (2006) (inmate, who was in federal custody due to conviction in federal court, filed in trial court a motion to modify sentence for possession of cocaine; § 19.2-303 is an exception to Rule 1.1, Va. Sup. Ct. R., provision that a court may not modify its final judgment more than 21 days after its entry; since inmate had not actually been transferred to a receiving unit of the state Department of Corrections while he was serving sentence in federal prison, trial court had jurisdiction to hear motion); *Baldwin v. Com.*, 43 Va. App. 415, 598 S.E.2d 754

(2004) (§ 19.2-303 is one of the exceptions to Rule 1:1, Va. Sup. Ct. R.; this is so because, by its express terms, § 19.2-303 permits the trial court, in cases where the defendant has been sentenced for a felony to the Department of Corrections but has not actually been transferred to the Department, to retain jurisdiction beyond the twenty-one-day limit of Rule 1:1 to suspend or otherwise modify the unserved portion of such a sentence).

§ 49:42 Writ of error coram nobis

The writ of error coram nobis is a postconviction remedy in Virginia.

The writ of error coram nobis—in Virginia, called the writ of error coram vobis—has been recognized by case law in Virginia since the 18th century. See, e.g., *Gordon v. Frazier*, 2 Va. 130, 2 Wash. 130, 1795 WL 518 (1795) (first known coram nobis proceeding in America). Moreover, Va. Code Ann. § 8.01-677, which dates back to an 1819 Virginia statute, provides: "For any clerical error or error in fact for which a judgment may be reversed or corrected on writ of error coram vobis, the same may be reversed or corrected on motion, after reasonable notice, by the court." Thus, in Virginia, coram nobis (to use the traditional terminology) unquestionably exists.

§ 49:43 Writ of error coram nobis—Extremely limited

As a postconviction remedy, however, coram nobis is extremely limited in Virginia. Indeed, there do not appear to be any reported cases where postconviction coram nobis relief was granted in Virginia, although there are several cases where relief was denied. The motion to vacate conviction, filed in the convicting court, is a remedy not infrequently used in Virginia in recent years which appears to be substantially identical to the coram nobis remedy authorized by Va. Code Ann. § 8.01-677.

§ 49:44 Writ of error coram nobis—Case law

For case law on the availability of postconviction coram nobis relief in Virginia, see, e.g., *Com. v. Morris*, 281 Va. 70, 705 S.E.2d 503 (2011) (as a common law writ, coram vobis has been substantially limited by the General Assembly through Code § 8.01-677, which states that for any clerical error or error in fact for which a judgment may be reversed or corrected on writ of error coram vobis, the same may be reversed or corrected on motion, after reasonable notice, by the court; Supreme court specifically recognized the restriction of a writ of error coram vobis only to clerical errors and certain errors of fact; alleged ineffective as-

sistance of counsel consisting of misinformation provided by counsel to defendant in response to defendant's indication of his immigration status and the failure of defendant's counsel to make trial court aware of fact that defendant was not born in United States and was not citizen of United States, prior to defendant's entry of guilty plea, were not an "errors of fact"; trial court still had authority to render judgment, although it might have been inclined to impose lesser sentence based on non-citizen status); *Neighbors v. Com.*, 274 Va. 503, 650 S.E.2d 514 (2007) (as a common law writ, coram nobis has been substantially limited by the General Assembly through Code § 8.01-677; the limited purpose of a writ of coram nobis is to correct only clerical error or certain error in fact; there is no restriction to an appeal of a petition for a writ of error coram nobis from the general district court to the circuit court because it is a non-monetary civil proceeding; appeal of a general district court's denial of a writ of coram nobis is within the jurisdiction of a circuit court; purpose of the writ of coram nobis does not involve correcting errors of fact where the facts complained of were known before or at the trial, or where at the trial the accused or his attorney knew of the existence of such facts but failed to present them; general allegation that petitioner suffered from lack of capacity due to medication at the time of his guilty plea was not a clerical error that would support challenge to plea by petition for writ of coram nobis).

§ 49:45 Postconviction DNA testing statute under Va. Code §§ 19.2-327.1 to 19.2-327.6—Specifics of statute

The specifics of the Virginia Postconviction DNA testing statute are as follows. First, in order to invoke the statute a motion for scientific investigation of human biological evidence must be made in the convicting court. Va. Code Ann. § 19.2-327.1(A). Second, in any motion filed in the convicting court under the statute the convicted person has a right to counsel. Va. Code Ann. § 19.2-327.1(H). Third, after the results of the scientific tests have been given, the convicted person may apply to the Virginia Supreme Court for a writ of actual innocence, Va. Code. Ann. § 19.2-327.2, and the numerous, elaborate, detailed factual allegations that the petition filed with that court must contain, as well as the documents that must accompany the petition, are set forth in Va. Code Ann. § 19.2-327.3(A), (B). Fourth, proceedings in the Virginia Supreme Court on a petition for a writ of actual innocence based on human biological evidence are governed not only by the statute but also by Rule 5:7B, Va.Sup. Ct. R. Fifth, in any petition filed in the Virginia Supreme Court under the statute the convicted person has a right to counsel. Va.

Code Ann. § 19.2-327.3(E). Sixth, if the Virginia Supreme Court determines that resolution of the case requires further factual development, it may order the convicting court to conduct a hearing, which must be held within 90 days after the Supreme Court's order. Va. Code Ann. § 19.2-327.4. Seventh, if the Virginia Supreme Court determines that there is clear and convincing evidence that no rational trier of fact could have found proof of guilt beyond a reasonable doubt, it may grant the writ and vacate the conviction. Va. Code Ann. § 19.2-327.5.

§ 49:46 Postconviction DNA testing statute under Va. Code §§ 19.2-327.1 to 19.2-327.6—Text of statute

Virginia's postconviction DNA testing statute, codified in Chapters 19.1 and 19.2 of the Annotated Code of Virginia, provides:

Annotated Code of Virginia

Title 19.2. Criminal Procedure

Chapter 19.1. Scientific Analysis of Newly Discovered or Untested Scientific Evidence

§ 19.2-327.1. Motion by a convicted felon or person adjudicated delinquent for scientific analysis of newly discovered or previously untested scientific evidence; procedure

A. Notwithstanding any other provision of law or rule of court, any person convicted of a felony or any person who was adjudicated delinquent by a circuit court of an offense that would be a felony if committed by an adult may, by motion to the circuit court that entered the original conviction or the adjudication of delinquency, apply for a new scientific investigation of any human biological evidence related to the case that resulted in the felony conviction or adjudication of delinquency if: (i) the evidence was not known or available at the time the conviction or adjudication of delinquency became final in the circuit court or the evidence was not previously subjected to testing because the testing procedure was not available at the Department of Forensic Science at the time the conviction or adjudication of delinquency became final in the circuit court; (ii) the evidence is subject to a chain of custody sufficient to establish that the evidence has not been altered, tampered with, or substituted in any way; (iii) the testing is materially relevant, noncumulative, and necessary and may prove the convicted person's actual innocence of the convicted person or the person adjudicated delinquent; (iv) the testing requested involves a scientific method employed by the Department of Fo-

rensic Science; and (v) the convicted person convicted or adjudicated delinquent has not unreasonably delayed the filing of the petition after the evidence or the test for the evidence became available at the Department of Forensic Science.

B. The petitioner shall assert categorically and with specificity, under oath, the facts to support the items enumerated in subsection A and (i) the crime for which the person was convicted or adjudicated delinquent; (ii) the reason or reasons the evidence was not known or tested by the time the conviction or adjudication of delinquency became final in the circuit court, and (iii) the reason or reasons that the newly discovered or untested evidence may prove the actual innocence of the person convicted or adjudicated delinquent. Such motion shall contain all relevant allegations and facts that are known to the petitioner at the time of filing and shall enumerate and include all previous records, applications, petitions, and appeals and their dispositions.

C. The petitioner shall serve a copy of such motion upon the attorney for the Commonwealth. The Commonwealth shall file its response to the motion within 30 days of the receipt of service. The court shall, no sooner than 30 and no later than 90 days after such motion is filed, hear the motion. Motions made by a petitioner under a sentence of death shall be given priority on the docket.

D. The court shall, after a hearing on the motion, set forth its findings specifically as to each of the items enumerated in subsections A and B and either (i) dismiss the motion for failure to comply with the requirements of this section or (ii) dismiss the motion for failure to state a claim upon which relief can be granted or (iii) order that the testing be done by the Department of Forensic Science based on a finding of clear and convincing evidence that the requirements of subsection A have been met.

E. The court shall order the tests to be performed by the Department of Forensic Science and prescribe in its order, pursuant to standards and guidelines established by the Department, the method of custody, transfer, and return of evidence submitted for scientific investigation sufficient to insure and protect the Commonwealth's interest in the integrity of the evidence. The results of any such testing shall be furnished simultaneously to the court, the petitioner and his attorney of record and the attorney for the Commonwealth. The Department of Forensic Science shall give testing priority to cases in which a sentence of death has been imposed. The results of any tests performed and any hearings held pursuant to this section shall become a part of the record.

F. Nothing in this section shall constitute grounds to delay

setting an execution date pursuant to § 53.1-232.1 or to grant a stay of execution that has been set pursuant to clause (iii) or (iv) of § 53.1-232.1.

G. An action under this section or the performance of any attorney representing the petitioner under this section shall not form the basis for relief in any habeas corpus proceeding or any other appeal. Nothing in this section shall create any cause of action for damages against the Commonwealth or any of its political subdivisions or any officers, employees or agents of the Commonwealth or its political subdivisions.

H. In any petition filed pursuant to this chapter, the petitioner is entitled to representation by counsel subject to the provisions of Article 3 (§ 19.2-157 et seq.) of Chapter 10 of this title.

Annotated Code of Virginia

Title 19.2. Criminal Procedure

Chapter 19.2. Issuance of Writ of Actual Innocence

§ 19.2-327.2. Issuance of writ of actual innocence based on biological evidence

Notwithstanding any other provision of law or rule of court, upon a petition of a person who was convicted of a felony upon a plea of not guilty or who was adjudicated delinquent upon a plea of not guilty by a circuit court of an offense that would be a felony if committed by an adult, or for any person, regardless of the plea, sentenced to death, or convicted or adjudicated delinquent of (i) a Class 1 felony, (ii) a Class 2 felony, or (iii) any felony for which the maximum penalty is imprisonment for life, the Supreme Court shall have the authority to issue writs of actual innocence under this chapter. The writ shall lie to the circuit court that entered the felony conviction or adjudication of delinquency and that court shall have the authority to conduct hearings, as provided for in § 19.2-327.5, on such a petition as directed by order from the Supreme Court.

§ 19.2-327.2:1. Petition for writ of actual innocence joined by Attorney General; release of prisoner; bond hearing

The Attorney General may join in a petition for a writ of actual innocence made pursuant to § 19.2-327.2. When such petition is so joined, the petitioner may file a copy of the petition and attachments thereto and the Attorney General's answer with the circuit court that entered the felony conviction and move the court for a hearing to consider release of the person on bail pursuant to Chapter 9 (§ 19.2-119 et seq.). Upon hearing and for good cause shown, the court may order the person

released from custody subject to the terms and conditions of bail so established, pending a ruling by the Supreme Court on the writ under § 19.2-327.5.

§ 19.2-327.3. Contents and form of the petition based on previously unknown or untested human biological evidence of actual innocence

A. The petitioner shall allege categorically and with specificity, under oath, the following: (i) the crime for which the petitioner was convicted or the offense for which the petitioner was adjudicated delinquent, and that such conviction or adjudication of delinquency was upon a plea of not guilty or that the person is under a sentence of death or convicted of (a) a Class 1 felony, (b) a Class 2 felony or (c) any felony for which the maximum penalty is imprisonment for life; (ii) that the petitioner is actually innocent of the crime for which he was convicted or adjudicated delinquent; (iii) an exact description of the human biological evidence and the scientific testing supporting the allegation of innocence; (iv) that the evidence was not previously known or available to the petitioner or his trial attorney of record at the time the conviction or adjudication of delinquency became final in the circuit court, or if known, the reason that the evidence was not subject to the scientific testing set forth in the petition; (v) the date the test results under § 19.2-327.1 became known to the petitioner or any attorney of record; (vi) that the petitioner or his attorney of record has filed the petition within 60 days of obtaining the test results under § 19.2-327.1; (vii) the reason or reasons the evidence will prove that no rational trier of fact would have found proof of guilt or delinquency beyond a reasonable doubt; and (viii) for any conviction or adjudication of delinquency that became final in the circuit court after June 30, 1996, that the evidence was not available for testing under § 9.1-1104. The Supreme Court may issue a stay of execution pending proceedings under the petition. Nothing in this chapter shall constitute grounds to delay setting an execution date pursuant to § 53.1-232.1 or to grant a stay of execution that has been set pursuant to clause (iii) or (iv) of § 53.1-232.1.

B. Such petition shall contain all relevant allegations of facts that are known to the petitioner at the time of filing and shall enumerate and include all previous records, applications, petitions, and appeals and their dispositions. A copy of any test results shall be filed with the petition. The petition shall be filed on a form provided by the Supreme Court. If the petitioner fails to submit a completed form, the court may dismiss the petition or return the petition to the prisoner pending the completion of such form. The petitioner shall be responsible for all

statements contained in the petition. Any false statement in the petition, if such statement is knowingly or willfully made, shall be a ground for prosecution and conviction of perjury as provided for in § 18.2-434.

C. The Supreme Court shall not accept the petition unless it is accompanied by a duly executed return of service in the form of a verification that a copy of the petition and all attachments has been served on the attorney for the Commonwealth of the jurisdiction where the conviction or adjudication of delinquency occurred and the Attorney General or an acceptance of service signed by these officials, or any combination thereof. The Attorney General shall have 30 days after receipt of the record by the clerk of the Supreme Court in which to file a response to the petition. The response may contain a proffer of any evidence pertaining to the guilt or delinquency of the petitioner that is not included in the record of the case, including evidence that was suppressed at trial.

D. The Supreme Court may, when the case has been before a trial or appellate court, inspect the record of any trial or appellate court action, and the Court may, in any case, award a writ of certiorari to the clerk of the respective court below, and have brought before the Court the whole record or any part of any record.

E. In any petition filed pursuant to this chapter, the defendant is entitled to representation by counsel subject to the provisions of Article 3 (§§ 19.2-157 et seq.) of Chapter 10 of this title.

§ 19.2-327.4. Determination by the Supreme Court for findings of fact by the circuit court

If the Supreme Court determines from the petition, from any hearing on the petition, from a review of the records of the case, including the record of any hearing on a motion to test evidence pursuant to § 9.1-1104, or from any response from the Attorney General that a resolution of the case requires further development of the facts under this chapter, the court may order the circuit court to conduct a hearing within 90 days after the order has been issued to certify findings of fact with respect to such issues as the Supreme Court shall direct. The record and certified findings of fact of the circuit court shall be filed in the Supreme Court within 30 days after the hearing is concluded. The petitioner or his attorney of record, the attorney for the Commonwealth and the Attorney General shall be served a copy of the order stating the specific purpose and evidence for which the hearing has been ordered.

§ 19.2-327.5. Relief under writ

Upon consideration of the petition, the response by the Commonwealth, previous records of the case, the record of any hear-

ing held under this chapter and the record of any hearings held pursuant to § 19.2-327.1, and if applicable, any findings certified from the circuit court pursuant to § 19.2-327.4, the Supreme Court shall either dismiss the petition for failure to state a claim or assert grounds upon which relief shall be granted; or upon a hearing the Court shall (i) dismiss the petition for failure to establish allegations sufficient to justify the issuance of the writ, or (ii) only upon a finding of clear and convincing evidence that the petitioner has proven all of the allegations contained in clauses (iv) through (viii) of subsection A of § 19.2-327.3, and upon a finding that no rational trier of fact would have found proof of guilt or delinquency beyond a reasonable doubt, grant the writ, and vacate the conviction or adjudication of delinquency, or in the event that the Court finds that no rational trier of fact would have found sufficient evidence beyond a reasonable doubt as to one or more elements of the offense for which the petitioner was convicted or adjudicated delinquent, but the Court finds that there remains in the original trial record evidence sufficient to find the petitioner guilty or delinquent beyond a reasonable doubt of a lesser included offense, the court shall modify the conviction or adjudication of delinquency accordingly and remand the case to the circuit court for resentencing. The burden of proof in a proceeding brought pursuant to this chapter shall be upon the convicted or delinquent person seeking relief. If a writ vacating a conviction or adjudication of delinquency is granted, the Court shall forward a copy of the writ to the circuit court, where an order of expungement shall be immediately granted.

§ 19.2-327.6. Claims of relief

An action under this chapter or the performance of any attorney representing the petitioner under this chapter shall not form the basis for relief in any habeas corpus or appellate proceeding. Nothing in this chapter shall create any cause of action for damages against the Commonwealth or any of its political subdivisions or any officers, employees or agents of the Commonwealth or its political subdivisions.

§ 49:47 Postconviction DNA testing statute under Va. Code §§ 19.2-327.1 to 19.2-327.6—Virginia Supreme Court Rule 5:7B—Text of Rule

Rule 5:7B, Va.Sup.Ct.R., adopted in 2003, last amended by Order dated June 21, 2013; effective July 1, 2013, which regulates proceedings in the Virginia Supreme Court on a petition for a writ of actual innocence in a case involving human biological evidence, provides:

Rule 5:7B. Petition for a Writ of Actual Innocence. (a) Who may File a Petition. A petition for a writ of actual innocence based upon previously unknown or untested human biological evidence may be filed by any person who has been convicted of a felony upon a plea of not guilty, or who was adjudicated delinquent upon a plea of not guilty by a circuit court of an offense that would be a felony if committed by an adult, or by any person, regardless of plea, who has been sentenced to death, or convicted or adjudicated delinquent of a class 1 felony, a class 2 felony or any felony for which the maximum penalty is imprisonment for life.

(b) Time for Filing. A petition under this Rule shall be filed in the office of the Clerk of this Court within 60 days after the date upon which exculpatory test results are obtained by the petitioner or his counsel of record from the Department of Forensic Science for any tests conducted on human biological evidence pursuant to Code § 19.2-327.1.

(c) Contents of the Petition. Each petition for a writ of actual innocence shall be filed on a form provided by this Court and shall be verified under oath. The petition must state categorically and with specificity:

(i) the offense or offenses for which petitioner was convicted or adjudicated delinquent, including all previous records, applications, petitions, and appeals relating to these convictions or adjudications of delinquency, and their dispositions;

(ii) that the petitioner is actually innocent of the crime or crimes for which he was convicted or adjudicated delinquent;

(iii) an exact description of the human biological evidence and the scientific testing supporting the allegation of innocence, attaching a copy of the test results;

(iv) that the human biological evidence was not known or available to the petitioner or his attorney at trial, or if it was known, why it was not subject to scientific testing;

(v) the earliest date the test results described in the petition became known to the petitioner or any attorney of record;

(vi) that the petitioner or his attorney has filed the petition within 60 days of obtaining the test results;

(vii) an explanation of the reason or reasons the evidence will prove that no rational trier of fact would have found the petitioner guilty or delinquent beyond a reasonable doubt of the offense or offenses for which the petitioner was convicted or adjudicated delinquent; and

(viii) if the conviction or adjudication of delinquency

became final in the circuit court after June 30, 1996, that the evidence was not available for testing under Code § 9.1-1104.

(d) Service of the Petition and Return of Service. Prior to filing a petition, the petitioner shall serve the petition, along with all attachments, on the Attorney General and on the Commonwealth's Attorney for the jurisdiction where the conviction or adjudication of delinquency occurred. The petitioner shall file with the petition either (i) a duly executed return of service in the form of a verification that a copy of the petition and all attachments have been served, or (ii) an acceptance of service signed by either or both of the parties to be served, or (iii) a combination of the two.

(e) Filing Fee. The petition must be accompanied by either (i) a check or money order for the filing fee required by statute, or (ii) an in forma pauperis affidavit demonstrating that the petitioner cannot afford the filing fee.

(f) Response. The Attorney General shall respond to the petition as follows:

(1) Within 30 days after service of the petition, the Attorney General shall file with the clerk of this Court a pleading in the form of a declaration stating, in the opinion of the Attorney General, with an explanation of the reasons therefor, whether the record of any trial or appellate proceedings involving the conviction or convictions, or adjudication or adjudications of delinquency, or of any proceedings under Code § 19.2-327.1, is necessary for preparation of a response to the petition. If the Attorney General asserts that the record, or any part thereof, of any trial or appellate court proceedings is necessary, the Attorney General shall request the production of such record by this Court, and shall describe with specificity, including the court, docket number and date of judgment, each and every record or part thereof which is requested.

(2) If the Attorney General asserts in the declaration required by subparagraph (f)(1) of this Rule that no trial or appellate court record, or any part thereof, is necessary for the preparation of a responsive pleading to the petition, the Attorney General shall file with the clerk of this Court within 30 days thereafter a pleading in response to the petition. Any pleading in response filed by the Attorney General may include a motion to dismiss. The response shall include citation to any relevant legal authorities, and may contain a proffer of any evidence pertaining to the guilt of the petitioner that is not included in the record of the case, including any evidence that was suppressed at trial.

(3) If the Attorney General asserts in the declaration required by subparagraph (f)(1) of this Rule that a trial or

appellate court record, or any part thereof, is necessary for the preparation of a response to the petition, the court shall issue the writ of certiorari described in Code § 19.2-327.3(D) to the clerk of the respective court below for the production of the record forthwith to the clerk of this Court. Upon receipt of the record by the clerk of this Court, the clerk shall immediately notify in writing the petitioner, any attorney for the petitioner, the Attorney General, and the attorney for the Commonwealth of the jurisdiction where the conviction or convictions or adjudication or adjudications of delinquency occurred, of the date of receipt of the record. Within 30 days after receipt of the record by the clerk of this Court, the Attorney General shall file the responsive pleading described in subparagraph (f)(2) of this Rule.

(g) Reply. Within 20 days after the Attorney General's responsive pleading is filed pursuant to subparagraph (f) of this Rule, the petitioner may file a reply.

(h) Copies to be Filed. Ten copies of the petition, and the Attorney General's responsive pleading, and the petitioner's reply, if any, shall be filed in the office of the clerk of this Court.

(i) Further Proceedings by Order of this Court. Further proceedings shall be conducted in accordance with the orders of this Court. If this Court determines that an evidentiary hearing is necessary for the proper disposition of the petition, this Court may order that the circuit court conduct a hearing within 90 days after the order has been issued to certify findings of fact with respect to such issues as this Court shall direct. The record and certified findings of fact of the circuit court shall be filed with the clerk of this Court within 30 days after the hearing is concluded.

(j) Appointment of Counsel. In any petition filed pursuant to and in compliance with this Rule, petitioner shall be entitled to the appointment of counsel subject to the provisions of Code § 19.2-157 et seq. Any request for counsel in this Court must be made on the form provided by this Court, entitled Request for Counsel—Petition for a Writ of Actual Innocence, and must include: (i) all the information required by the in forma pauperis affidavit attached to the request for appointment of counsel, and (ii) an attested copy of the order of the circuit court ordering that testing of human biological evidence on the petitioner's behalf be conducted by the Department of Forensic Science pursuant to Code § 19.2-327.1.

(k) Duty of Counsel. Any attorney(s) appointed to represent a petitioner pursuant to Code § 19.2-327.1 shall be deemed to be counsel of record for petitioner for all purposes and proceedings under this Rule until a final order of this Court is issued pursuant to Code § 19.2-327.5, or until counsel is relieved or replaced by other counsel by leave of this Court.

§ 49:48 Postconviction DNA testing statute under Va. Code §§ 19.2-327.1 to 19.2-327.6—Case law

For case law on Virginia's postconviction DNA testing statute, see, e.g., *Harvey v. Warden of Coffeewood Correctional Center*, 268 Va. 5, 597 S.E.2d 58 (2004) (original habeas corpus petition filed directly in state supreme court; in January 2002, after exhausting his opportunities for state and federal direct and collateral review of his convictions, Harvey filed a motion in the Circuit Court of Fairfax County, pursuant to § 19.2-327.1, seeking posttrial scientific analysis of certain evidence; on Mar. 1, 2002, the circuit court ordered the Division of Forensic Science to test the DNA from the human biological evidence obtained from Harvey, another codefendant, and the victim; on May 15, 2002, after testing was completed, the Division of Forensic Science filed a certificate of analysis stating that Harvey could not be eliminated as a possible contributor to the sperm fractions found on the victim; on Sept. 24, 2002, Harvey filed a petition for a writ of habeas corpus in this court, challenging the validity of the certificate of analysis and related test results; we conclude that this court does not have jurisdiction to consider the habeas petition; § 19.2-327.1 expressly states, in pertinent part, that "[a]n action under this section . . . shall not form the basis for relief in any habeas corpus proceeding or any other appeal;" this statutory language means that circuit court proceedings under § 19.2-327.1 are not subject to review in this court, whether by direct appeal or a petition for a writ of habeas corpus; consequently, Harvey's petition is dismissed for lack of jurisdiction, the rule is discharged, and the respondent shall recover of the petitioner his costs expended about his defense herein).

§ 49:49 Erroneous Convictions Act

Virginia has an erroneous convictions act, enacted by the Act of Apr. 14, 2004, ch. 818, 2004 Va. Adv. Legis. Serv., and the Act of Apr. 14, 2004, ch. 840, 2004 Va. Adv. Legis. Serv., and codified at Va. Code Ann. §§ 8.01-195.10 through 8.01-195.12. Prior to enactment of the act, the Virginia state legislature occasionally would, by special statute, grant compensation to an innocent convicted person. See, e.g, *Cox v. Geary*, 271 Va. 141, 624 S.E.2d 16 (2006) (in 2002, the Virginia legislature enacted a statute, Act of Apr. 7, 2002, ch. 746, 2002 Va. Acts, granting $350,000 in compensation to Jeffrey D. Cox, an innocent man wrongly convicted of murder, sentenced to life imprisonment, and incarcerated for eleven years).

As codified, Virginia's erroneous convictions act provides:

Annotated Code of Virginia

Title 8.01. Civil Remedies and Procedure

Chapter 3. Actions

Article 18.2 Compensation for Wrongful Incarceration for a Felony Conviction

§ 8.01-195.10. Purpose; action by the General Assembly required; definitions

A. The purpose of this article is to provide directions and guidelines for the compensation of persons who have been wrongfully incarcerated in the Commonwealth. Compensation for wrongful incarceration is governed by Article IV, Section 14 of the Constitution of Virginia, which prohibits the General Assembly from granting relief in cases in which the courts or other tribunals may have jurisdiction and any individual seeking payment of state funds for wrongful incarceration shall be deemed to have waived all other claims. The payment and receipt of any compensation for wrongful incarceration shall be contingent upon the General Assembly appropriating funds for that purpose. This article shall not provide an entitlement to compensation for persons wrongfully incarcerated or require the General Assembly to appropriate funds for the payment of such compensation. No estate of or personal representative for a decedent shall be entitled to seek a claim for compensation for wrongful incarceration.

B. As used in this article:

"Incarceration" or "incarcerated" means confinement in a local or regional correctional facility, juvenile correctional center, state correctional facility, residential detention center, or facility operated pursuant to the Corrections Private Management Act (§§ 53.1-261 et seq.).

"Wrongful incarceration" or "wrongfully incarcerated" means incarceration for a felony conviction for which (i) the conviction has been vacated pursuant to Chapter 19.2 (§ 19.2-327.2 et seq.) or 19.3 (§ 19.2-327.10 et seq.) of Title 19.2, or the person incarcerated has been granted an absolute pardon for the commission of a crime that he did not commit,

(ii) the person incarcerated must have entered a final plea of not guilty, or regardless of the plea, any person sentenced to death, or convicted of a Class 1 felony, a Class 2 felony, or any felony for which the maximum penalty is imprisonment for life, and

(iii) the person incarcerated did not by any act or omis-

sion on his part intentionally contribute to his conviction for the felony for which he was incarcerated.

§ 8.01-195.11. Compensation for wrongful incarceration

A. Any person who is convicted of a felony by a county or city circuit court of the Commonwealth and is wrongfully incarcerated for such felony may be awarded compensation in an amount equal to 90 percent of the inflation adjusted Virginia per capita personal income as reported by the Bureau of Economic Analysis of the United States Department of Commerce for each year of incarceration, or portion thereof.

B. Any compensation computed pursuant to subsection A and approved by the General Assembly shall be paid by the Comptroller by his warrant on the State Treasurer in favor of the person found to have been wrongfully incarcerated. The person wrongfully incarcerated shall be paid an initial lump sum equal to 20 percent of the compensation award with the remaining 80 percent of the principal of the compensation award to be used by the State Treasurer to purchase an annuity from any A+ rated company, including any A+ rated company from which the Virginia Lottery may purchase an annuity, to provide equal monthly payments to such person for a period certain of 25 years commencing no later than one year after the effective date of the appropriation. The annuity shall provide that it shall not be sold, discounted, or used as securitization for loans and mortgages by the person awarded compensation. The annuity shall, however, contain beneficiary provisions providing for the annuity's continued disbursement in the event of the death of the person awarded compensation. All payments or costs of annuities under this section shall be made by check issued by the State Treasurer on warrant of the Comptroller.

C. Any person who is convicted of a felony by a county or city circuit court of the Commonwealth and is wrongfully incarcerated for such felony shall receive a transition assistance grant of $15,000 to be paid from the Criminal Fund, which amount shall be deducted from any award received pursuant to subsection B. In addition, such person shall be entitled to receive reimbursement up to $10,000 for tuition for career and technical training within the Virginia community college system contingent upon successful completion of the training. Reimbursement for tuition shall be provided by the community college at which the career or technical training was completed.

§ 8.01-195.12. Conditions for continued compensation

A. Any person awarded compensation under this article who is subsequently convicted of a felony shall, immediately upon such conviction, not be eligible to receive any unpaid amounts

from any compensation awarded and his beneficiaries shall not be eligible to receive any payments under an annuity purchased pursuant to subsection B of § 8.01-195.11. Any unpaid amounts remaining under any annuity shall become the property of the Commonwealth and shall be deposited into the general fund of the state treasury.

A1. Any person awarded compensation under this article who is subsequently incarcerated upon the revocation of parole or probation resulting from the commission of an act that constitutes a crime shall, during the period of such incarceration, forfeit any payments under an annuity purchased pursuant to subsection B of § 8.01-195.11. Any forfeited amounts under any annuity shall become the property of the Commonwealth and shall be deposited into the general fund of the state treasury.

B. As a condition of receiving any compensation under this article, a person shall execute a release and waiver forever releasing

(i) the Commonwealth or any agency, instrumentality, officer, employee, or political subdivision thereof,

(ii) any legal counsel appointed pursuant to § 19.2-159, and

(iii) all other parties of interest, from any present or future claims the person receiving compensation may have against such enumerated parties and arising out of the factual situation in connection with the conviction for which compensation is being sought under this article. In addition, the person receiving compensation shall not have been awarded a finally adjudicated judgment in a court of law against or received any funds pursuant to a settlement agreement with any person or entity described in this subsection for compensation or damages arising out of the factual situation in connection with the conviction.