POST-CONVICTION REMEDIES IN VIRGINIA

1.1 INTRODUCTION

The 21-day rule in Virginia strictly limits a trial court's ability to address errors in a conviction.[1] The Supreme Court of Virginia has stated that "[t]here are strong policy reasons favoring certainty of results in judicial proceedings. Accordingly, we attach a high degree of finality to judgments, whether obtained by default or otherwise. Rule 1:1 implements that policy, and we apply it rigorously, unless a statute creates a clear exception to its operation."[2] In most cases, 21 days after the sentencing order was entered the conviction becomes final. Therefore, any challenges to the conviction or sentence made after 21 days must be addressed through exceptions to the policy of finality contained in Rule 1:1 such as habeas corpus.[3] A court may interrupt the 21-day period only by the entry of an order "modifying, vacating, or suspending the final judgment order."[4]

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[1] Rule 1:1.

[2] *Commonwealth v. Morris*, 281 Va. 70, 77, 705 S.E.2d 503, 506 (2011) (citations omitted).

[3] This chapter does not address capital convictions—the Virginia Capital Representation Resource Center (vcrrc.org) represents inmates sentenced to death in state and federal habeas. This chapter does not address federal habeas corpus. *See* 2 R. Hertz & J. Liebman, *Federal Habeas Corpus Practice and Procedure* (6th ed. 2011); Ira Robbins, *Habeas Corpus Checklists* (2015-2016 ed.); "A Jailhouse Lawyer's Manual—Ch. 13: Federal Habeas Corpus." *Columbia Human Rights Law Review*, 10th ed., 2014. This chapter does not address a wide variety of uses of habeas corpus to challenge detention in circumstances other than a conviction, such as a young man seeking his release from military service, *United States v. Blakeney*, 44 Va. 405, 408 (1847); a father seeking custody of his son, *Burton v. Russell*, 190 Va. 339, 341, 57 S.E.2d 95, 96 (1950); or a woman challenging her status as a slave because she is "descended from a free Indian." *Hudgins v. Wrights*, 11 Va. 134, 140 (1806).

[4] *Hackett v. Commonwealth*, 293 Va. 392, 399, 799 S.E.2d 501, 505 (2017); *see* Rule 5:5(b). For example, a circuit court order that "reopened and placed back on the docket" a case was a nullity because it did not comply with Rule 1:1. *Riley v. Commonwealth*, No. 0405-17-1, 2017 Va. App. LEXIS 340, at *3, 2017 WL 6598463 (Va. Ct. App. Dec. 27, 2017).

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1.2 HABEAS CORPUS[5]

1.201 A Very Brief History. "From its earliest known appearance to the present, habeas corpus has been a judicial order directing a person to have the body of another before a tribunal at a certain time and place."[6] "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."[7] "There is no higher duty of a court, under our constitutional system, than the careful processing and adjudication of petitions for writs of habeas corpus."[8] "While the precise origin of the writ of habeas corpus is unknown, it is believed to have been in use before the date of the Magna Carta."[9] Referred to as the "most celebrated writ in the English law," it has been preserved in our federal and state constitutions.[10]

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."[11] "The writ of habeas corpus has always been regarded 'as a palladium of liberty' and recognized as one of 'the greatest and most effective remedies known to the law.'"[12] Habeas "is not now and never has been a static, narrow, formalistic remedy; its scope has grown to achieve its grand purpose—the protection of individuals against erosion of their right to be free from wrongful restraints upon their liberty."[13] The habeas corpus statutes are remedial in nature and are to be liberally construed.[14] "In the Common-

[5] A petition for a writ of habeas corpus inquiring into the lawfulness of the detention of a person who is imprisoned is technically called a petition for a writ of "habeas corpus ad subjiciendum." This may be contrasted with a petition for writ of "habeas corpus ad testificandum" which is used to transfer a witness to court who is not otherwise subject to subpoena, such as an inmate or a member of the General Assembly.

[6] *Sigmon v. Director of Dep't of Corr.,* 285 Va. 526, 530-31, 739 S.E.2d 905, 906-07 (2013) (citations omitted).

[7] *Id.*

[8] *Harris v. Nelson*, 394 U.S. 286, 292 (1969).

[9] *Sigmon*, 285 Va. at 530-31, 739 S.E.2d at 906-07.

[10] *Id.*; *see also Al-Marri v. Pucciarelli*, 534 F.3d 213, 277 (4th Cir. 2008) (Gregory, J., concurring).

[11] *Sigmon*, 285 Va. at 530-31, 739 S.E.2d at 906-07 (citing *Smyth v. Godwin*, 188 Va. 753, 760, 51 S.E.2d 230, 233 (1949)).

[12] *Id.* at 533, 739 S.E.2d at 908 (citations omitted).

[13] *Jones v. Cunningham*, 371 U.S. 236, 243 (1963).

[14] *E.C. v. Virginia Dep't of Juvenile Justice*, 283 Va. 522, 535, 722 S.E.2d 827, 834 (2012).

wealth, the writ of habeas corpus shall not be suspended unless when, in cases of invasion or rebellion, the public safety may require."[15]

1.202 Courts with the Authority to Issue a Writ of Habeas Corpus. General district courts have no authority to issue a writ of habeas corpus. "If a district court entered the original judgment or order resulting in the detention 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."[16] But the general district courts do have a broad exception to the 21-day rule, allowing that within 60 days from the date of conviction of any person in a general district court or juvenile and domestic relations district court for an offense not felonious, the case may be reopened for good cause shown.[17]

The circuit court that entered the original judgment or order resulting in the detention complained of in the petition shall have authority to issue writs of habeas corpus.[18] In most cases it is "logical and appropriate" for the trial judge to hear the petition for the writ.[19] The trial judge has the advantage of having seen the trial and heard the evidence.[20] "Absent a specific showing of bias or prejudice," the trial judge should not be disqualified from presiding over the habeas corpus proceeding.[21]

The Court of Appeals has "discretionary" jurisdiction to entertain an original petition for a writ of habeas corpus filed by an inmate who wishes to challenge the validity of his detention in "appropriate cases."[22] Va. Code § 17.1-404 provides "in such cases over which the court would have appellate jurisdiction, the court shall have original jurisdiction to issue writs of . . . habeas corpus."[23] Further, the Court of Appeals has found that "absent

[15] *Sigmon*, 285 Va. at 530-31, 739 S.E.2d at 906-07 (citing Va. Const. art. I, § 9 (1971)).

[16] Va. Code § 8.01-654(B)(1).

[17] Va. Code § 16.1-133.1.

[18] Va. Code § 8.01-654(B)(1).

[19] *Titcomb v. Wyant*, 1 Va. App. 31, 39, 333 S.E.2d 82, 87 (1985).

[20] *Id.*

[21] *Id. But see Director of Dep't of Corr. v. Kozich*, 290 Va. 502, 521 n.14, 779 S.E.2d 555, 565 n.14 (2015) (noting that "we leave for another day the question whether this practice [of having trial judges sit as the habeas judge] should be encouraged or discouraged").

[22] *White v. Garraghty*, 2 Va. App. 117, 123, 341 S.E.2d 402, 406 (1986).

[23] *See also Id.* at 122, 341 S.E.2d at 405.

exceptional circumstances" it should not consider a petition for a writ of habeas corpus when an "adequate remedy may be had in the circuit courts."[24] It is hard to conceive of a circumstance in which the Court of Appeals would entertain a petition for a writ of habeas corpus and history bears this out, as the court has yet to reach the merits of a petition since 1986.[25]

The Supreme Court of Virginia duplicates the jurisdiction of the circuit courts.[26]

Whether to file in a circuit court or the Supreme Court of Virginia is a strategic choice that counsel must make considering all the factors of the particular case. The vast majority of petitions are filed in the circuit court for three reasons. First, because the trial judge is most familiar with the case. Second, because of the perception that the circuit court is more likely to grant an evidentiary hearing and the reality that a circuit court is a more appropriate forum for the taking of evidence. And third, because if one files in the circuit court, a petitioner theoretically gets the benefit of possibly winning in either the circuit court or on appeal to the Supreme Court of Virginia.

1.203 The Rules That Apply. Numerous rules of the Supreme Court of Virginia apply to habeas proceedings and will be cited below. Part 3 of the rules of the Supreme Court of Virginia, practice and procedure in civil actions, "shall not apply in petitions for writ of habeas corpus."[27] Part 4 of the rules of the Supreme Court of Virginia, pretrial procedures, "shall apply . . . for writs of habeas corpus."[28] There are also a number of statutes that apply; the main statutes are Va. Code §§ 8.01-654 and 8.01-655.

1.204 There Is No Right to Counsel in a Habeas Proceeding.[29] Although there is no right to counsel, "where a petition 'presents a triable

[24] *Id.* at 123, 341 S.E.2d at 406.

[25] The Court of Appeals receives several petitions for a writ of habeas corpus a year under its original jurisdiction but has no record of reaching the merits in any case. From August 14, 2015 until July 14, 2016, the Court of Appeals ruled on four habeas petitions. Each order was identical, they cited to *White,* noted that there were no exceptional circumstances, and dismissed the petition without prejudice to refiling in the appropriate circuit court.

[26] Va. Code § 17.1-310 (the court "shall also have jurisdiction to award writs of habeas corpus."); *see West v. Director of Dep't of Corr.,* 273 Va. 56, 60, 639 S.E.2d 190, 193 (2007); *see also* Rule 5:7.

[27] Rule 3:1.

[28] Rule 4:0.

[29] Until 2007, former Va. Code § 19.2-163.3(d) provided that the public defender represent inmates in habeas corpus proceedings.

issue of fact the clear presentation of which requires an ability to organize factual data or to call witnesses and elicit testimony in a logical fashion it is much the better practice to assign counsel.'"[30] In addition, most inmates have an attorney available to them pursuant to Va. Code § 53.1-40.[31] If the petition is denied, the "costs and expenses of the proceeding and the attorney fees of any attorney appointed to represent the petitioner shall be assessed against the petitioner."[32]

1.205 Indigent Petitioner Has a Right to a Copy of the Court File and Transcripts. If transcripts and the court record are *necessary* to the preparation and prosecution of the petition for a writ of habeas corpus, equal protection demands that the petitioner be furnished them without cost.[33] A motion for transcripts, therefore, should be very specific as to the need for transcripts. In practice, most courts will find it necessary to only provide "certified copies of the arrest warrants, indictment and the order of conviction at his criminal trial."[34]

1.206 Calculating the Statute of Limitations. "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."[35] The petition will be timely as long as it is filed on or before the latter of these two dates. So for a plea in which there is no appeal, the deadline will usually be two years from final judgment. Final judgment is the date that the judge signs the sentencing order.[36] In an appeal from a trial, the latter date will normally be the final disposition on direct appeal. The final disposition includes a petition

[30] *Darnell v. Peyton*, 208 Va. 675, 678, 160 S.E.2d 749, 751 (1968) (reversing dismissal of petition and remanding to circuit court to appoint counsel and hold another habeas hearing) (quoting *United States ex rel. Wissenfeld v. Wilkins*, 281 F.2d 707, 715 (2d Cir. 1960)); *see also Brown v. Warden of Va. State Penitentiary*, 238 Va. 551, 554, 385 S.E.2d 587, 588 (1989) (appointing counsel to a pro se petitioner); *Howard v. Warden of Buckingham Corr. Ctr.*, 232 Va. 16, 17, 348 S.E.2d 211, 212 (1986).

[31] *See also Peterson v. Davis*, 421 F. Supp. 1220, 1224 (E.D. Va. 1976), *aff'd*, 562 F.2d 48 (4th Cir. 1977) (finding that Virginia's failure to provide adequate legal research facilities to inmates in the Department of Corrections is not unconstitutional because the prisons provide attorneys to advise inmates).

[32] Va. Code § 8.01-662.

[33] *McCoy v. Lankford*, 210 Va. 264, 265, 170 S.E.2d 11, 13 (1969).

[34] *Id.* at 267, 170 S.E.2d at 14.

[35] Va. Code § 8.01-654(A)(2); *see also* Rule 5:7(a)(1).

[36] Rule 1:1.

for rehearing in the Supreme Court of Virginia but does not include a petition for writ of certiorari to the United States Supreme Court.

> **Trap for the Unwary**. Beware the federal habeas deadline.[37] A federal habeas petition is due one year from final disposition of the direct appeal (which *does* include a petition for certiorari). That time is tolled while a properly filed state habeas petition is pending.[38] The calculation can be complicated, and there are numerous ways that a petitioner could be time-barred in federal court. For example, if a state habeas petitioner does not appeal and uses his or her two years from the final judgment, his or her state habeas petition will be timely, but he or she will be time-barred from later filing a federal habeas petition.

Very limited exceptions exist to the Virginia statute of limitations. The only recognized exception is for claims that allege the prosecution breached its duty to disclose exculpatory material under *Brady v. Maryland*.[39] The tolling provision of Va. Code § 8.01-229(D) is applicable to the limitations period of Va. Code § 8.01-654(A)(2) where the petitioner has alleged a *Brady* violation.[40] In such cases the petitioner must bring the claim within one year of discovery of the *Brady* violation. There is an argument for time-barred petitioners that because the statute contains no other exceptions allowing a petition to be filed after the expiration of the limitations periods, the statute could violate the "bar against suspension of the writ of habeas corpus, Art. I, § 9 of the Constitution of Virginia,"[41] but the Supreme Court of Virginia has never addressed the issue.

A petitioner may litigate a habeas petition simultaneously with a direct appeal.[42]

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[37] 28 U.S.C. § 2244(d).

[38] From the day the state habeas petition is filed until the day the Virginia Supreme Court denies the appeal.

[39] 373 U.S. 83 (1963).

[40] *Hicks v. Director, Dep't of Corr.*, 289 Va. 288, 299, 768 S.E.2d 415, 420 (2015).

[41] *Hines v. Kuplinski,* 267 Va. 1, 2, 591 S.E.2d 692, 693 (2004).

[42] *Sigmon v. Director of Dep't of Corr.*, 285 Va. 526, 529, 739 S.E.2d 905, 906 (2013).

1.207 Jurisdictional Requirement—Petitioner Must Be in Custody. The "sine qua non" of habeas corpus jurisdiction is custody.[43] In Virginia "custody" is defined as "detention without lawful authority."[44] "Habeas corpus is a writ of inquiry granted to determine whether a person is illegally detained."[45] "Detention is jurisdictional in habeas corpus, and therefore a prerequisite to any consideration of a habeas petition."[46] "The statutory phrase 'detained without lawful authority' allows a petitioner to 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."[47] "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."[48] "An individual is detained so long as he was sentenced to a term of incarceration and the Commonwealth retains active power over him that could result in immediate physical detention."[49]

The petitioner must be in custody at the time the petition is filed. The court is not divested of jurisdiction, however, if the petitioner is released from custody during the pendency of the proceedings.[50]

If the petitioner was sentenced only to a fine, he or she is not in custody for purposes of habeas jurisdiction.[51] Federal immigration custody as a result of a state conviction is not sufficient for habeas jurisdiction because the petitioner must be "detained as a result of the conviction he is

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[43] *United States ex rel. Dessus v. Pennsylvania*, 452 F.2d 557, 559-60 (3d Cir. 1971).

[44] Va. Code § 8.01-654(B)(3).

[45] *Escamilla v. Superintendent, Rappahannock Reg'l Jail*, 290 Va. 374, 380, 777 S.E.2d 864, 868 (2015).

[46] *Id.*

[47] *Id.*; *see Carroll v. Johnson*, 278 Va. 683, 693, 685 S.E.2d 647, 652 (2009) (habeas jurisdiction lies even if inmate not immediately released, as long as it shortens the duration of his or her detention).

[48] *Escamilla*, 290 Va. at 380, 777 S.E.2d at 868.

[49] *Id.* at 381, 777 S.E.2d at 868 (citing *Jones v. Cunningham*, 371 U.S. 236 (1963) (explaining that constructive custody includes the potential to be "rearrested at any time the [custodial authority] believes [the petitioner] has violated a term or condition" of his suspended sentence and "be thrown back in jail to finish serving the allegedly invalid sentence with few, if any, of the procedural safeguards that normally must be and are provided to those charged with crime")).

[50] *E.C. v. Virginia Dep't of Juvenile Justice*, 283 Va. 522, 529, 722 S.E.2d 827, 831 (2012). *But see* "Mootness," *infra* ¶ 10.209.

[51] *McClenny v. Murray*, 246 Va. 132, 135, 431 S.E.2d 330, 331 (1993).

challenging at the time the petition is filed."[52] But there is a limited exception to this rule. "A petitioner currently detained under a repeat offender statute may collaterally attack the validity of a fully served sentence that is a basis for the current detention."[53] Note that the "in custody" requirement is interpreted more broadly for purposes of federal habeas corpus.[54]

1.208 Habeas Case Can Be Rendered Moot if the Petitioner Is Released from Custody While Petition Is Still Pending. Although a court retains jurisdiction over a habeas case if the petitioner is released from custody during the pendency of the litigation, the question remains whether the case is moot. "When a petitioner challenging the legality of his conviction continues to suffer a concrete and continuing injury, which is a collateral consequence of the conviction, a case or controversy remains and release from the sentence imposed does not render the case moot."[55] The sex offender registry is a sufficient collateral consequence to render a case not moot.[56] "Not all collateral consequences of a conviction will be sufficient to avoid a finding that the case is moot. Whether the collateral consequences claimed by the petitioner are sufficient to preclude a finding that the case is moot will be made on a case by case basis."[57]

1.209 "Concurrent Sentencing Doctrine" Not Applicable in Virginia. The "concurrent sentencing doctrine" is used by some states to decline review of a conviction when

> 1) a defendant has received two or more concurrent sentences on multiple counts of an indictment; 2) one or more of those convictions is not challenged or is upheld as valid;

[52] *Escamilla*, 290 Va. at 383, 777 S.E.2d at 869.

[53] *Id.* at 381 n.5, 777 S.E.2d at 868 n.5.

[54] *See, e.g., Piasecki v. Court of Common Pleas*, 917 F.3d 161, 166 (3d Cir. 2019) (noting that "a petitioner is 'in custody' if he or she files while subject to significant restraints on liberty that are not otherwise experienced by the general public" and finding that being on a sex offender registry satisfies the in custody requirement for federal habeas corpus).

[55] *Escamilla*, 290 Va. at 383, 777 S.E.2d at 869 (quoting *E.C.*, 283 Va. at 531, 722 S.E.2d at 831).

[56] *E.C.*, 283 Va. at 536, 722 S.E.2d at 835; *see Desetti v. Lee*, 87 Va. Cir. 16, 16 (Augusta 2013) (holding that suspension of a nursing license is a "'collateral consequence' of her conviction such that there is a justiciable controversy and the case is not moot.").

[57] *E.C.,* 283 Va. at 536, 722 S.E.2d at 834-35; *see Carafas v. LaVallee*, 391 U.S. 234, 237 (1968) (finding that case was not moot because of collateral consequences suffered by all felons); *see also Spencer v. Kemna*, 523 U.S. 1, 14 (1998) (providing a detailed discussion of the history of mootness and finding that courts have come to presume collateral consequences, but should not so presume when a habeas petitioners is challenging parole revocation).

> and 3) a ruling in the defendant's favor on the remaining conviction would not reduce the period of imprisonment the defendant is required to serve on the valid conviction or convictions.[58]

Virginia does not apply this doctrine because "the burden of any inconvenience in the administration of our justice system should rest on the shoulders of the judiciary rather than on those of an imprisoned petitioner."[59]

1.210 The Parties to the Petition. The respondent is "the person in whose custody the petitioner is detained."[60]

> When the petition challenges a criminal conviction sentence:
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> 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 petitioner has been committed to, or is subject to transfer to, the Department of Corrections or (ii) the sheriff or superintendent of a local or regional jail facility if the petitioner's sentence will be served in such local or regional jail facility.[61]

"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."[62]

> 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

[58] *West v. Director of Dep't of Corr.,* 273 Va. 56, 65, 639 S.E.2d 190, 196 (2007).

[59] *Id.* at 66, 639 S.E.2d at 197.

[60] Va. Code § 8.01-658(A).

[61] Va. Code § 8.01-658(B)(1).

[62] Va. Code § 8.01-658(B)(2).

> 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.[63]

While the Commonwealth is not a named party in the habeas corpus proceeding, "it is, of course, vitally interested in it," and so in such a proceeding the Commonwealth is "the real party in interest."[64]

1.211 Contents of Petition for Writ of Habeas Corpus. The petition, if "filed by a prisoner," must be filed on the form set out in Va. Code § 8.01-655(B). The form promulgated by the Attorney General is identical to the form in the statute. "By its terms, the Rule applies only to inmates who are filing *pro se*, not to petitioners who are represented by counsel."[65]

A petition must be "notarized," and "must state whether the petitioner believes that the taking of evidence is necessary."[66] A memorandum of law citing to relevant authorities must accompany a petition.[67]

At "the time of filing" the petition must contain all "allegations the facts of which are known to petitioner at the time of filing."[68] Because the petition is verified, the factual allegations by the petitioner are sworn statements for all purposes for which an affidavit is required.[69]

1.212 Cognizable Claims. "[T]he deprivation of a constitutional right of a prisoner may be raised by habeas corpus.[70] "The office of the writ of habeas corpus is not to determine the guilt or innocence of the prisoner. The only issue which it presents is whether or not the prisoner is restrained of his

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[63] Va. Code § 8.01-658(B)(3).

[64] *Smyth v. Godwin*, 188 Va. 753, 759-60, 51 S.E.2d 230, 232-33 (1949).

[65] *Lahey v. Johnson*, 89 Va. Cir. 448, 451 (Augusta 2010). *But see* Rule 5:7(a)(2) (for petitions filed in the Supreme Court of Virginia: "[a]ll petitions must comply with the requirements of Code § 8.01-655").

[66] Rule 5:7(a)(2).

[67] *Id.*

[68] Va. Code § 8.01-654(B)(2); *Dorsey v. Angelone*, 261 Va. 601, 604, 544 S.E.2d 350, 352 (2001) (prohibiting a petitioner who had filed and withdrawn a petition from refiling with new claims); *see Daniels v. Warden of Red Onion State Prison*, 266 Va. 399, 403, 588 S.E.2d 382, 384 (2003) (prohibiting a petitioner who had obtained a nonsuit from refiling with new claims).

[69] Rule 1:4(b).

[70] *Griffin v. Cunningham*, 205 Va. 349, 355, 136 S.E.2d 840, 845 (1964).

liberty by due process of law."[71] "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."[72]

Common claims include the violation of the right to the effective assistance of counsel under the Sixth Amendment. The first prong of such a claim requires a showing that trial counsel's performance fell "below an objective standard of reasonableness."[73] The prejudice prong asks whether "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome."[74] The United States Supreme Court has further elaborated that the reasonable probability standard is a standard lower than "more likely than not."[75]

"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."[76] Resolving ineffective assistance claims ordinarily requires an evidentiary hearing.[77] At an evidentiary hearing, trial counsel is not subject to the rule on witnesses.[78] Ineffective assistance of counsel claims cannot be raised on direct appeal.[79] Other common claims include prosecutorial[80] and juror misconduct.[81]

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[71] *Lacey v. Palmer*, 93 Va. 159, 163, 24 S.E. 930, 931 (1896).

[72] *Laster v. Russell*, 286 Va. 17, 23, 743 S.E.2d 272, 274-75 (2013) (citing *Lovitt v. Warden*, 266 Va. 216, 240, 585 S.E.2d 801, 815 (2003)).

[73] *Director of Dep't of Corr. v. Kozich*, 290 Va. 502, 517, 779 S.E.2d 555, 563 (2015) (citing *Strickland v. Washington*, 466 U.S. 668, 688 (1984)); *see West v. Director of Dep't of Corr.*, 273 Va. 56, 65, 639 S.E.2d 190, 196 (2007).

[74] *Kozich*, 290 Va. at 519, 779 S.E.2d at 564 (citing *Strickland*, 466 U.S. at 694).

[75] *Strickland*, 466 U.S. at 693 (holding that a petitioner "need not show that counsel's deficient conduct more likely than not altered the outcome in the case"); *Woodford v. Visciotti*, 537 U.S. 19, 22 (2002) (same).

[76] Va. Code § 8.01-654(B)(6).

[77] *United States v. Marcum*, 16 F.3d 599, 603 (4th Cir. 1994).

[78] Va. Code § 8.01-375.

[79] *Dowdy v. Commonwealth*, 278 Va. 577, 591, 686 S.E.2d 710, 717 (2009).

[80] *Hicks v. Director of Dep't of Corr.*, 289 Va. 288, 768 S.E.2d 415 (2015).

[81] *Jackson v. Commonwealth*, 267 Va. 178, 199, 590 S.E.2d 520, 532 (2004).

> **Trap for the Unwary**. Counsel for the respondent will often seek an affidavit from trial counsel in support of their motion to dismiss. Trial counsel should review Virginia Legal Ethics Opinion Number 1859[82] and its interpretation of Va. Code § 8.01-654(B)(6) and carefully consider whether, when, and how to provide evidence regarding allegations of ineffective assistance of counsel.

1.213 Claims That Are Not Cognizable in Habeas Corpus Proceedings. Claims that could have been raised at trial or appeal are waived and not cognizable in a petition for a writ of habeas corpus.[83] A "petition for a writ may not be used as a substitute for an appeal."[84] Claims that have been raised at trial or appeal cannot be re-litigated in a habeas corpus proceeding.[85] Sufficiency of the evidence cannot be raised in a habeas corpus proceeding.[86]

Because there is no right to counsel in a habeas proceeding, counsel's performance during a habeas proceeding cannot be a constitutional claim in a later state habeas proceeding.[87] The Virginia Code exempts a number of issues from habeas proceedings, including: attorney performance litigating writs of innocence;[88] attorney performance litigating biological testing;[89] and failure to follow the provisions in Va. Code § 19.2-298 in the sentencing guidelines, Va. Code § 19.2-298.01(F).

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[82] www.vsb.org/docs/LEO/1859.pdf.

[83] *Morva v. Warden of the Sussex I State Prison*, 285 Va. 511, 513, 741 S.E.2d 781, 784 (2013) (citing *Slayton v. Parrigan*, 215 Va. 27, 29, 205 S.E.2d 680, 682 (1974)).

[84] *Brooks v. Peyton*, 210 Va. 318, 321, 171 S.E.2d 243, 246 (1969).

[85] *Muhammad v. Warden of the Sussex I State Prison*, 274 Va. 3, 14, 646 S.E.2d 182, 192 (2007) (citing *Henry v. Warden*, 265 Va. 246, 249, 576 S.E.2d 495, 496 (2003)).

[86] *Pettus v. Peyton*, 207 Va. 906, 911, 153 S.E.2d 278, 281 (1967).

[87] *Howard v. Warden of Buckingham Corr. Ctr.*, 232 Va. 16, 19, 348 S.E.2d 211, 213 (1986). *But see Martinez v. Ryan*, 566 U.S. 1, 18 (2012). "Where, under state law, claims of ineffective assistance of trial counsel must be raised in an initial-review collateral proceeding, a procedural default will not bar a federal habeas court from hearing a substantial claim of ineffective assistance at trial if, in the initial-review collateral proceeding, there was no counsel or counsel in that proceeding was ineffective." *Martinez,* 566 U.S. 1.

[88] Va. Code § 19.2-327.14.

[89] Va. Code § 19.2-327.1(G).

1.214 Pleading Requirement. Unlike other civil complaints, which have notice pleading requirements, habeas petitioners are required to allege the factual underpinnings of claims.[90]

1.215 Adding Claims or Amendment of Petition. Rule 1:8 states that

> [n]o amendments shall be made to any pleading after it is filed save by leave of court. Leave to amend shall be liberally granted in furtherance of the ends of justice. . . . In granting leave to amend the court may make such provision for notice thereof and opportunity to make response as the court may deem reasonable and proper.[91]

If a petitioner wants to add claims to his or her filed habeas petition, the petitioner should file a motion asking for leave to amend the petition with a copy of the proposed amended petition.[92] If the amendment comes after the statute of limitations has passed, the issue for the court will be whether the new claims relate back to the timely filed petition.

1.216 Filing and Service Requirements. File one original signed petition with an appendix containing all affidavits and facts necessary, a certificate of service, and a verification. The best practice is to include a civil cover sheet.[93] Calculate the filing fee by going to www.courts.state.va.us/main.htm then choosing Virginia's Court System > Circuit Court > Circuit Court Civil Filing Fee Calculation. The best practice is to also call the clerk and confirm the correct fee.

> **Trap for the Unwary**. (1) It is not uncommon for a court clerk to calculate the wrong filing fee and incorrectly reject the filing of a petition. Circuit court clerks use the "FMS" computer system provided via the Supreme Court of Virginia. If the clerk puts the code "PET" (petition) into FMS they will retrieve the fee for numerous types of petitions but not a habeas petition. The clerk should use the

[90] *Penn v. Smyth*, 188 Va. 367, 370, 49 S.E.2d 600, 601 (1948); *see McFarland v. Scott*, 512 U.S. 849, 860 (1994).

[91] *See Mechtensimer v. Wilson*, 246 Va. 121, 122, 431 S.E.2d 301, 302 (1993).

[92] *Dorsey v. Angelone*, 261 Va. 601, 605, 544 S.E.2d 350, 352-53 (2001).

[93] www.courts.state.va.us/forms/circuit/cc1416.pdf.

> code "WHC" (writ of habeas corpus) because the fee for WHC is lower than the fee for PET. The correct fee must be paid at the time of filing, or you will not be properly filed.[94]
> (2) The provisions of Va. Code § 8.01-655, including that a prisoner must file an original and two copies of the petition, appear by its terms to apply to prisoners only. But the Supreme Court of Virginia has never ruled on the issue, and some clerks may ask counsel for an original and two copies.

The petition must be signed by a pro se petitioner or Virginia licensed attorney.[95]

If filing in the circuit court, then on the same day as filing one should also mail one copy to the attorney for the respondent. If the petitioner is in the custody of the Department of Corrections, service may be accomplished by mailing a copy of the petition to the Office of the Attorney General at 202 North Ninth Street, Richmond, Virginia, 23209. In addition, you may email a pdf copy to: *oagcriminallitigation@oag.state.va.us*. If the petitioner is in the custody of a local jail, mail a copy of the petition to the elected sheriff for that jail. That sheriff will provide the petition to the local law firm that represents the county.

If filing in the Supreme Court of Virginia, then you must accomplish service in compliance with Rule 5:7(a)(3). Before filing (if possible) mail a copy of the petition to the respondent's counsel with an "acceptance of service" form and ask them to sign and mail back. Then file your petition with the form.

The petition must be "verified before a notary."[96] Always include this verification with a timely filed petition. If the verification is missing, the clerk should file the petition because a pleading without a verification is not a nullity.[97] Further, Rule 1:10 of the Virginia Supreme Court provides that any

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[94] *Lahey v. Johnson*, 89 Va. Cir. 448, 462 (Augusta 2010) (dismissing with prejudice a petition filed on the last day of the statute of limitations with a fee of $32 because the correct fee was $37 and the remaining $5 was not paid until the next day).

[95] *Shipe v. Hunter*, 280 Va. 480, 483, 699 S.E.2d 519, 520 (2010) (citing Va. Code § 8.01-271.1 and Rule 1:4(c)).

[96] Va. Code § 8.01-655(B); Rule 5:7(a)(2). *But see* Va. Code § 8.01-4.3; Rule 1:10.

[97] *Taylor v. Johnson*, 11 Va. S. Ct. UNP 102408, *3 (Nov. 4, 2011). *But cf. Fardaei v. Warden*, 17 Va. S. Ct. UNP 161817, *2 (Oct. 20, 2017) (because Fardaei's motion to amend with his verification was never ruled

objection to the lack of a sworn pleading must be made within days.[98] The petitioner may remedy the defect by filing a motion to amend the petition with a signed verification.

1.217 Show Cause Order. If the petitioner is in the custody of the Department of Corrections and the petition is filed in a circuit court, the Office of the Attorney General will not respond to a petition for writ of habeas corpus until the court issues a "show cause order." Best practice is for the petitioner to provide a proposed show cause order to the court with his petition. Appendix D of the "Circuit Court Clerk's Manual—Civil"[99] provides a sample order that gives the respondent 40 days to respond to a petition for writ of habeas corpus. If a petition is filed in the Supreme Court of Virginia, the respondent has 40 days to respond.[100]

1.218 Burden of Proof. The petitioner has the burden of proving factual allegations by a preponderance of the evidence.[101]

1.219 Reply to the Responsive Pleading. "If the responsive pleading is a motion to dismiss, the court should give the petitioner an opportunity to reply."[102]

> **Trap for the Unwary**. There are no timeframes delineated in the Virginia Code or Rules of the Supreme Court for how quickly a circuit court must adjudicate a habeas petition; if a petitioner intends to file a response to the motion to dismiss, then it would be best practice to put the respondent and court on notice as soon as possible.

on by the circuit court or by the time the statute of limitations expired, his petition was not properly filed. Note that *Fardaei* seems to directly contradict *Taylor*).

[98] *Eavey v. Lee*, 94 Va. Cir. 383, 388 (Augusta 2016) (noting that the Commonwealth failed to object to the lack of a verification to the habeas petition within seven days).

[99] www.courts.state.va.us/courts/circuit/resources/manuals/cc_manual_civil/appendix_d.pdf at D-22.

[100] Rule 5:7(a)(4).

[101] *Sigmon v. Director of Dep't of Corr.,* 285 Va. 526, 535, 739 S.E.2d 905, 909 (2013).

[102] Virginia Criminal Benchbook for Judges and Lawyers § 12.11[2] (2018-2019); *see also Davis v. Johnson*, 274 Va. 649, 653, 652 S.E.2d 114, 116 (2007) (finding Davis' claim that the circuit court failed to consider his opposition to the Warden's motion to dismiss without merit because the record reflected that the court did consider that pleading in reaching its decision). See also Rule 5:7(a)(4) as to deadline for a reply to a responsive pleading in habeas corpus proceedings filed in the Virginia Supreme Court under its original jurisdiction.

1.220 Argument. Oral argument "shall" be heard on the request of either party in the circuit court.[103] No argument will be scheduled in the Supreme Court of Virginia unless the court orders argument.[104]

1.221 Discovery, Affidavits, and Evidentiary Hearings. A habeas petitioner is not entitled to conduct discovery as a matter of right. "No discovery shall be allowed in any proceeding for a writ of habeas corpus . . . without prior leave of the court, which may deny or limit discovery in any such proceeding."[105] This rule gives the habeas court discretion to grant or deny discovery.[106]

> Code § 8.01-654(B)(4) authorizes the consideration of 'recorded matters,' including records from the prior criminal trial that resulted in the challenged conviction. Virginia Code § 8.01-657 [§ 8.01-657 was repealed in 2019; this is now incorporated in Va. Code § 8.01-658(D) by amendment] permits the habeas court to take evidence of 'unrecorded matters of fact relating to any previous judicial proceeding,' which would include *ore tenus* testimony presented at an evidentiary hearing. Finally, Virginia Code § 8.01-660 grants the habeas court discretion to consider 'affidavits of witnesses' as substantive evidence.[107]

"In cases in which the allegation concerns ineffective assistance of counsel, the input of trial counsel may be critical."[108] Typically, this evidence will be in the form of an affidavit from trial counsel explaining the relevant events. If counsel, or the respondent, elects not to provide the court with an affidavit, or the affidavit does not sufficiently refute the petitioner's allegations, the circuit court should conduct an evidentiary hearing to resolve any material factual disputes.[109]

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[103] Rule 4:15(d); *see* Rule 4:0(a) (specifically applying these rules to habeas corpus proceedings).

[104] Rule 5:7(d).

[105] Rule 4:1(b)(5).

[106] *Yeatts v. Murray*, 249 Va. 285, 289, 455 S.E.2d 18 (1995).

[107] *Smith v. Brown*, 291 Va. 260, 263, 781 S.E.2d 744, 747 (2016).

[108] *See generally Mu'Min v. Commonwealth*, 239 Va. 433, 452, 389 S.E.2d 886, 898 (1990) (acknowledging the importance of input from counsel).

[109] *Smith*, 291 Va. at 264, 781 S.E.2d at 747 n.3.

An evidentiary hearing is not required if the affidavits are sufficient to make a decision and the petition can be "fully determined on the basis of recorded matters."[110] When "a habeas petition makes prima facie allegations that are not sufficiently resolved on this basis, a circuit court should receive additional evidence and decide any genuine issues of material fact."[111]

1.222 There Is No Right to a Jury Trial for an Evidentiary Hearing in a Habeas Case. The common law writ of habeas corpus "did not historically (and does not now) entitle the petitioner or respondent to a trial by jury."[112]

1.223 Court Reporters. The court is authorized to appoint a court reporter for an evidentiary hearing at the Commonwealth's expense.[113]

1.224 The Court Order. "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."[114]

> Any Order of a circuit court denying a petition for a writ of habeas corpus shall include findings of fact and conclusions of law as required by Code § 8.01-654(B)(5). The order shall identify the substance of the claims asserted in the petition, and state the specific reason for the denial of each claim. Any such order may adopt a trial court's written opinion explaining its decision or a transcribed explanation of the court's ruling from the bench; however, an order shall not

[110] Va. Code § 8.01-654(A), (B)(4); *Smith*, 291 Va. at 264, 781 S.E.2d at 747. See also Rule 5:7(d) as to evidentiary hearings in habeas corpus proceedings filed in the Virginia Supreme Court under its original jurisdiction.

[111] *Smith*, 291 Va. at 264, 781 S.E.2d at 747.

[112] *See* 8 James W. Moore et al., Moore's Federal Practice § 38.33[11], at 38-148 (3d ed. 2013) ("Neither the petitioner nor the respondent has a constitutional or statutory right to jury trial in a habeas corpus proceeding. There was no common law right of jury trial in habeas corpus proceedings, so there is no such right preserved by the Seventh Amendment."); Paul D. Halliday, *Habeas Corpus: From England to Empire* 7 (2010) (noting the "core principle" of habeas corpus is "*that* the judge judges" and the "central fact of habeas corpus" is "that a judge should hear the sighs of all prisoners"); *id.* at 74 (describing the "king's nearly divine power to command the bodies of his subjects . . . through his judges using habeas corpus"); *Ingram v. Commonwealth*, 62 Va. App. 14, 28 n.8, 741 S.E.2d 62, 69 n.8 (2013).

[113] Va. Code § 19.2-166.

[114] Va. Code § 8.01-654(B)(5).

> deny the petition without explanation, or rely upon incorporation by reference of a pleading filed in the case.[115]

1.225 Appeal. File a notice of appeal in the trial court within 30 days of entry of judgment.[116]

> Trap for the Unwary: some clerks interpret Va. Code § 17.1-275(A)(32) as a right to condition the filing of the notice of appeal on payment of $20.

The notice must identify the judgment from which you are appealing and state whether transcripts are needed.[117] File a petition for appeal with seven copies in the Supreme Court of Virginia within 90 days of entry of judgment together with a $50 filing fee made payable to the "Clerk of the Supreme Court of Virginia."[118]

It is within the "sound discretion of the trial court" whether to appoint counsel for the appeal of a denial of a habeas petition.[119] The appeal is directly to the Supreme Court of Virginia.[120] A petitioner has an equal protection right to habeas transcripts if necessary for the appeal.[121]

When a habeas court dismisses the petition based only upon a review of the pleadings, the Supreme Court of Virginia reviews the decision to dismiss the petition de novo.[122] Otherwise, whether an inmate is entitled to habeas relief is a mixed question of law and fact.[123] The habeas court's findings and conclusions are not binding on appeal but are subject to review to determine whether the habeas court correctly applied the law to the facts.[124]

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[115] Rule 3A:24.

[116] Rule 5:9(a).

[117] Rule 5:9(b).

[118] Rule 5:17(a)(1), (e).

[119] *Cooper v. Haas*, 210 Va. 279, 281, 170 S.E.2d 5, 7 (1969); *see Darnell v. Peyton*, 208 Va. 675, 676, 160 S.E.2d 749, 750 (1968).

[120] Va. Code § 17.1-406(B).

[121] *Cooper*, 210 Va. at 280, 170 S.E.2d at 6 (citing *Long v. District Court of Iowa*, 385 U.S. 192, 194 (1966)).

[122] *Escamilla v. Superintendent, Rappahannock Reg'l Jail*, 290 Va. 374, 380, 777 S.E.2d 864, 867-68 (2015).

[123] *Hash v. Director*, 278 Va. 664, 672, 686 S.E.2d 208, 212 (2009).

[124] *Id.*; *Laster v. Russell*, 286 Va. 17, 22, 743 S.E.2d 272, 274 (2013).

1.226 Writ Granted. If the writ is granted, the charges (whether by warrant or indictment) remain and a trial date is to be set. Bail is allowed if the state appeals.[125] Bond may be required before a grant of the writ.[126]

1.3 MOTION FOR A DELAYED APPEAL IN CRIMINAL CASES

Normally an appellant who is not at fault and whose appeal was dismissed due to procedural error by counsel may reinstate his or her appeal by statute.

> When, due to the error, neglect, or fault of counsel representing the appellant, or of the court reporter, or of the circuit court or an officer or employee thereof, an appeal in a criminal case has (i) never been initiated; (ii) been dismissed for failure to adhere to proper form, procedures, or time limits in the perfection of the appeal; or (iii) been denied or the conviction has been affirmed, for failure to file or timely file the indispensable transcript or written statement of facts as required by law or by the Rules of the Supreme Court; then a motion for leave to pursue a delayed appeal may be filed in the Court of Appeals within six months after the appeal has been dismissed or denied, the conviction has been affirmed, or the circuit court judgment sought to be appealed has become final, whichever is later.[127]

If outside the six-month time limit, an appellant may seek to vindicate his or her right to a direct appeal via a petition for writ of habeas corpus.[128]

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[125] Va. Code § 8.01-665; Virginia Criminal Benchbook for Judges and Lawyers § 12.08[9] at 12-11 (2018-2019).

[126] Va. Code § 8.01-656.

[127] Va. Code § 19.2-321.1 (Court of Appeals); Va. Code § 19.2-321.1 (Supreme Court).

[128] Va. Code § 8.01-654(B)(2) ("The provisions of this section [demanding that a petitioner state all facts which are known] 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 . . . ."); *see Davis v. Johnson*, 274 Va. 649, 652, 652 S.E.2d 114, 115 (2007) (the discretionary nature of the circuit court's authority permits a circuit court to evaluate a petitioner's additional claims, if any are brought) (*citing Bowman v. Washington*, 269 Va. 1, 605 S.E.2d 585 (2004)); *Brown v. Warden of Va. State Penitentiary*, 238 Va. 551, 556, 385 S.E.2d 587, 590 (1989) (granting the petition for writ of habeas corpus and awarding Brown a delayed appeal).

In addition, a defendant always has the right to request his or her release on bail pending appeal.[129] "Although post-conviction bail is generally less liberally accorded than in the pretrial stage, the statute requires the trial judge to exercise . . . a sound judicial discretion."[130] "The primary test for determining whether a defendant should be released following a felony conviction still requires the trial court to consider questions essential to all bail decisions—whether the defendant will appear for [court] and whether the defendant's liberty will constitute an unreasonable danger to himself and the public."[131] Filing a notice of appeal and a petition for appeal does not divest the circuit court of jurisdiction to consider a request for bail.[132]

1.4 WRIT OF ACTUAL INNOCENCE[133]

1.401 In General. The actual innocence statutes were created as an exception to the 21-day rule.[134] Unlike a "motion to vacate" or a habeas corpus petition, which are collateral attacks and civil proceedings, writs of actual innocence are criminal proceedings.[135] The petitioner must prove by a preponderance of the evidence all elements of the writ, and that *no* rational trier of fact would have found proof of guilt beyond a reasonable doubt. In other words, a petitioner's evidence must do more than establish the theoretical possibility that a rational fact finder would choose to acquit; it must establish such a high probability of acquittal, that the Court is reasonably certain that no rational fact finder would have found him guilty.[136]

1.402 Preservation and Retention of Human Biological Evidence in Felony Cases. A person convicted of a felony may move the circuit court to store, preserve, and retain for up to 15 years specifically identified biological evidence.[137]

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[129] Va. Code § 19.2-319.

[130] *Dowell v. Commonwealth*, 6 Va. App. 225, 228, 367 S.E.2d 742, 744 (1988).

[131] *Id.* at 229, 367 S.E.2d at 744.

[132] *Askew v. Commonwealth*, 49 Va. App. 127, 638 S.E.2d 118 (2006).

[133] These statutes were substantially amended as of July 1, 2020.

[134] *In re Phillips*, 296 Va. 433, 444, 822 S.E.2d 1, 6 (2018).

[135] *Id.* at 445, 822 S.E.2d at 7.

[136] *In re Watford*, 295 Va. 114, 124, 809 S.E.2d 651, 657 (2018); *see* Va. Code § 19.2-327.5.

[137] Va. Code § 19.2-270.4:1.

1.403 Motion for Scientific Analysis of Previously Untested Newly Discovered Evidence. Any person convicted of a felony may move the circuit court for a "new scientific investigation" of evidence if (i) the evidence was not known and available at time of conviction; (ii) the evidence is subject to a sufficient chain of custody; (iii) the testing is "materially relevant, noncumulative, and necessary and may prove the actual innocence"; (iv) the testing request is provided by the Department of Forensic Science; and (v) the person requesting the testing has not unreasonably delayed.[138] A petitioner has a right to counsel to pursue testing.[139]

1.5 WRIT OF ACTUAL INNOCENCE BASED ON *BIOLOGICAL* EVIDENCE

A writ of innocence based on biological evidence may be requested in the Supreme Court of Virginia by any person convicted of a felony regardless of plea.[140] The petitioner must allege: (i) the crime for which the petitioner was convicted; (ii) that the petitioner is actually innocent; (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 or her trial attorney at the time the conviction, or if known, the reason that the evidence was not subject to scientific testing; (v) the date the test results under became known; (vi) that the petitioner has filed the petition within 60 days of obtaining the test results; (vii) the reason or reasons the evidence will prove that no rational trier of fact would have found proof of guilt 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.[141]

The petition must be on the form provided by the Supreme Court.[142] Ten copies of the petition must be filed in the Supreme Court of Virginia.[143] The filing fee is $50. The petition must be served on the Attorney General

[138] Va. Code § 19.2-327.1(A).

[139] Va. Code § 19.2-327.1(H).

[140] Va. Code § 19.2-327.2; Rule 5:7B(a).

[141] Va. Code § 19.2-327.3; Rule 5:7B(b)-(c).

[142] Va. Code § 19.2-327.3(B).

[143] Rule 5:7B(h).

and on the commonwealth's attorney.[144] The Attorney General must file a response within 30 days, and the petitioner may file a reply within 20 days.[145]

1.6 WRIT OF ACTUAL INNOCENCE BASED ON *NONBIOLOGICAL* EVIDENCE[146]

A writ of innocence based on nonbiological evidence may be requested in the Court of Appeals by any person convicted of a felony.[147] The petitioner must allege: (i) the crime for which the petitioner was convicted; (ii) that the petitioner is actually innocent of the crime; (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; (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 evidence 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.[148]

The petition must be on the form provided by the Supreme Court.[149] The filing fee is $25.[150] An original and four copies must be filed.[151] The petitioner must serve the commonwealth's attorney and the Attorney General.[152]

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[144] Rule 5:7B(d).

[145] Rule 5:7B(f)-(g).

[146] From 2004-2015 approximately 284 petitions were filed in the Court of Appeals and six were granted.

[147] Va. Code § 19.2-327.10; Rule 5A:5.

[148] Va. Code § 19.2-327.11(A).

[149] Va. Code § 19.2-327.11(B); Rule 5A:5(b)(2).

[150] Rule 5A:5(b)(4).

[151] Rule 5A:5(b)(9).

[152] Va. Code § 19.2-327.11(C); Rule 5A:5(b)(6).

The Attorney General must respond within 60 days.[153] Appeal may be taken to the Supreme Court of Virginia.[154]

1.7 EXECUTIVE CLEMENCY

> The Governor shall have power to remit fines and penalties under such rules and regulations as may be prescribed by law; to grant reprieves and pardons after conviction except when the prosecution has been carried on by the House of Delegates; to remove political disabilities consequent upon conviction for offenses committed prior or subsequent to the adoption of this Constitution; and to commute capital punishment.[155]

Thus, "the Governor is vested with the power to (1) grant reprieves; (2) grant pardons; and (3) commute capital punishment."[156] "A pardon may be full or partial, absolute or conditional."[157] A conditional pardon is "[a] pardon that does not become effective until the wrongdoer satisfies a prerequisite or that will be revoked upon the occurrence of some specified act."[158] A partial pardon is "[a] pardon that exonerates the offender from some but not all of the punishment or legal consequences of a crime."[159] "When granted it is the determination of the ultimate authority that the public welfare will be better served by inflicting less than what the judgment fixed."[160] "The only limitation to its exercise is that pardon [sic] shall not be granted before conviction."[161]

A petitioner may request a "simple pardon" which is a "statement of official forgiveness."[162] While it does not remove a conviction from the official

[153] Va. Code § 19.2-327.11(C); Rule 5A:5(b)(7).

[154] Va. Code § 19.2-327.10; Rule 5A:5(b)(12).

[155] Va. Const. art. V, § 12.

[156] *Blount v. Clarke*, 291 Va. 198, 205, 782 S.E.2d 152, 155 (2016).

[157] *Id.* (quoting *Lee v. Murphy*, 63 Va. (22 Gratt.) 789, 794 (1872)).

[158] *Id.* at 206, 782 S.E.2d at 155.

[159] *Id.*

[160] *Id.* at 206, 782 S.E.2d at 156 (quoting *Biddle v. Perovich*, 274 U.S. 480, 486-87 (1927)).

[161] *Lee*, 63 Va. (22 Gratt.) at 793.

[162] https://commonwealth.virginia.gov/judicial-system/pardons/. Petitioners may apply for a pardon using the information and forms at this website.

record, it can help the petitioner, especially with employment. A petitioner may not apply until free of all conditions (prison time, probation, etc.) for five years. From 2008-2013 governors in Virginia granted 149 simple pardons.

Partial and medical pardons are available to reduce the sentence of incarcerated offenders upon certain conditions. From 2008-2013 governors in Virginia granted seventeen partial pardons and eighteen medical pardons.

An absolute pardon is rare because it eliminates all aspects of a conviction. From 2008-2013 governors in Virginia granted four absolute pardons.

There is no appeal from the denial of a petition for a pardon.

1.8 MOTION TO VACATE A JUDGMENT AS VOID MAY BE FILED AT ANYTIME

An order is void ab initio (meaning to be treated as void from the outset), rather than merely voidable, if "the character of the judgment was not such as the court had the power to render, or because the mode of procedure employed by the court was such as it might not lawfully adopt."[163] "An order that is void ab initio is a complete nullity that may be impeached directly or collaterally by all persons, anywhere, at any time, or in any manner."[164] A sentencing order that purported to change a conviction from a felony to a misdemeanor was void ab initio.[165] A sentence in excess of the statutory maximum was also void ab initio.[166] A conviction for driving after being adjudged a habitual offender was void when the defendant was not properly served with the notice of the habitual offender hearing because a "court acquires no jurisdiction over the person of a defendant until process is served in the manner provided by statute, and a judgment entered by a court which lacks jurisdiction over a defendant is void as against that defendant."[167] Further, "[a] court lacks jurisdiction to enter a criminal judgment if the judgment is predicated upon an unconstitutional or otherwise

[163] *Collins v. Shepherd*, 274 Va. 390, 402, 649 S.E.2d 672, 678 (2007).

[164] *Id.*; *see Morse v. Commonwealth*, 6 Va. App. 466, 468, 369 S.E.2d 863, 864 (1988) ("a party may assail a void judgment at any time, by either direct or collateral assault.").

[165] *Burrell v. Commonwealth*, 283 Va. 474, 480, 722 S.E.2d 272, 275 (2012).

[166] *Rawls v. Commonwealth*, 278 Va. 213, 221, 683 S.E.2d 544, 549 (2009).

[167] *Slaughter v. Commonwealth*, 222 Va. 787, 791, 284 S.E.2d 824, 826 (1981).

invalid statute or ordinance."[168] But there is long-standing distinction between subject-matter jurisdiction, which cannot be granted or waived by the parties and the lack of which renders an act of the court void, and territorial jurisdiction or venue. Venue goes to the authority of the court to act in particular circumstances or places and is waived if not properly and timely raised. The judgment of a court which is defective in venue is thus only voidable and not void.[169] A motion attacking a conviction or sentence as void is a civil proceeding filed in the circuit court of conviction.[170]

1.9 ANCIENT WRITS—*CORAM NOBIS*[171] AND *AUDITA QUERELA*

The "writ of *audita querela* and Code § 8.01-677 (error *coram vobis*) [] provide exceptions to Rule 1:1" under limited circumstances.[172] However, "[a]s a common law writ, coram vobis has been substantially limited by the General Assembly through Code § 8.01-677."[173] "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."[174] The "proper test is whether the alleged error constitutes 'an error of fact not apparent on the record, not attributable to the applicant's negligence, and which if known by the court *would have prevented* rendition of the judgment.'"[175] Such errors of fact include cases such as where "judgment is rendered against a party after his death, or who is an

[168] *Herrera v. Commonwealth*, 24 Va. App. 490, 493, 483 S.E.2d 492, 494 (1997) (quoting *Fraser v. Commonwealth*, 16 Va. App. 775, 777, 433 S.E.2d 37, 38 (1993)); *see also Ex parte Siebold*, 100 U.S. 371, 376-77 (1880) ("An unconstitutional law is void and is not law. An offense created by it is not a crime. A conviction under it is not merely erroneous, but is illegal and void, and cannot be a legal cause of imprisonment."); *Anthony v. Kasey*, 83 Va. 338, 340, 5 S.E. 176, 177 (1887) (recognizing that lack of subject matter or personal jurisdiction "is not all, for both of these essentials may exist and still the judgment or decree may be void . . . .").

[169] *Porter v. Commonwealth*, 276 Va. 203, 215, 661 S.E.2d 415, 419 (2008).

[170] *Commonwealth v. Southerly*, 262 Va. 294, 299, 551 S.E.2d 650, 652-53 (2001).

[171] "The writ of error *coram vobis,* or *coram nobis,* is an ancient writ of the common law. It was called *coram nobis* (before us) in King's Bench because the king was supposed to preside in person in that court. It was called *coram vobis* (before you—the king's justices) in Common Pleas, where the king was not supposed to reside." *Neighbors v. Commonwealth*, 274 Va. 503, 508, 650 S.E.2d 514, 516 (2007).

[172] *Commonwealth v. Morris*, 281 Va. 70, 77, 705 S.E.2d 503, 506 (2011).

[173] *Id.* at 78, 705 S.E.2d at 506.

[174] Va. Code § 8.01-677.

[175] *Id.* at 80, 705 S.E.2d at 508 (quoting *Dobie v. Commonwealth*, 198 Va. 762, 769, 96 S.E.2d 747, 752 (1957)).

infant."[176] Significantly, an allegation of ineffective assistance of counsel is not such an error of fact because it renders the judgment voidable, not void.[177]

"The writ of audita querela is not available to seek post-conviction relief from criminal sentences in Virginia."[178]

1.10 NUNC PRO TUNC

> The purpose of a *nunc pro tunc* entry is to correct mistakes of the clerk or other court officials, or to settle defects or omissions in the record so as to make the record show what actually took place. It is not the function of such entry by a fiction to antedate the actual performance of an act which never occurred, to represent an event as occurring at a date prior to the time of the actual event, "or to make the record show that which never existed."[179]

1.11 INDEPENDENT ACTION FOR FAILURE TO RECEIVE NOTICE OF A FINAL ORDER

> If counsel, or a party not represented by counsel, who is not in default in a circuit court is not notified by any means of the entry of a final order and the circuit court is satisfied that such lack of notice (i) did not result from a failure to exercise due diligence on the part of that party and (ii) denied that party an opportunity to pursue post-trial relief in the circuit court or to file an appeal therefrom, the circuit court may, within 60 days of the entry of such order, modify, vacate, or suspend the order or grant the party leave to appeal.[180]

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[176] *Morris*, 281 Va. at 78, 705 S.E.2d at 506.

[177] *Id.*

[178] *Id.* at 83, 705 S.E.2d at 509.

[179] *Hutchins v. Carrillo*, 27 Va. App. 595, 611, 500 S.E.2d 277, 285 (1998) (quoting *Council v. Commonwealth*, 198 Va. 288, 293, 94 S.E.2d 245, 248 (1956)).

[180] Va. Code § 8.01-428(C).

1.12 INDEPENDENT ACTION TO SET ASIDE JUDGMENT

Under Va. Code § 8.01-428(D), the court is empowered to set aside a judgment or decree for fraud upon the court at any time. When conduct by a party or counsel prevents the "fair submission of the controversy to the court," extrinsic fraud exists, and the subsequent judgment is rendered void and may be attacked at any time.[181] Va. Code § 8.01-428 is applicable to criminal proceedings.[182]

1.13 SUSPENSION OR MODIFICATION OF SENTENCE

After conviction and before both the completion of the sentence and the transfer of the defendant to the receiving unit of the department of corrections the court may suspend in whole or in part the sentence of a defendant upon the defendant's motion.[183] Va. Code § 19.2-303 operates as a statutory exception to the 21-day rule.[184] The statute is "rehabilitative in nature" and should be "liberally construed."[185] The transfer of the defendant to the Department of Corrections is a strict bar to the circuit court's jurisdiction to rule on a motion to suspend or modify a sentence. So when a motion to suspend or modify a sentence is filed, a motion and proposed order to hold the defendant in the local jail must also be filed. Still, when a trial court orders that a defendant remain in the jail but the jail mistakenly transfers the defendant to the Department of Corrections, the court loses jurisdiction to rule on the motion.[186] If an inmate is transferred out of the jail but not to the Department of Corrections, the trial court still has jurisdiction to rule on a motion to suspend or modify a sentence.[187]

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[181] *Peet v. Peet*, 16 Va. App. 323, 326, 429 S.E.2d 487, 490 (1993).

[182] *D'Alessandro v. Commonwealth*, 15 Va. App. 163, 168, 423 S.E.2d 199, 202 (1992) (citing *Lamb v. Commonwealth*, 222 Va. 161, 165, 279 S.E.2d 389, 392 (1981)).

[183] Va. Code § 19.2-303.

[184] *Commonwealth v. Morris*, 281 Va. 70, 77, 705 S.E.2d 503, 506 (2011).

[185] *Stokes v. Commonwealth*, 61 Va. App. 388, 393, 736 S.E.2d 330, 333 (2013).

[186] *Id.* at 398, 736 S.E.2d at 335.

[187] *Neely v. Commonwealth*, 44 Va. App. 239, 240, 604 S.E.2d 733, 733 (2004) (finding that the trial court still had jurisdiction because the defendant had been transferred to the bureau of prisons, not the department of corrections).

The court has the power to modify a period of incarceration but does not have the power to modify only a suspended sentence.[188] The court does not have the power to change the conviction, just the sentence.[189]

The defendant has a right to counsel if the motion to suspend or modify is filed within 21 days of the judge signing the sentencing order and is necessary.[190]

In 2018 the General Assembly enacted Va. Code § 19.2-303.01, which is similar to Rule 35 of the Federal Rules of Criminal Procedure concerning correcting or reducing a sentence. A court may at any time reduce a defendant's sentence upon motion of the Commonwealth for substantial assistance.[191]

1.14 CONDITIONAL RELEASE OF GERIATRIC PRISONERS

Any person serving a sentence imposed upon a conviction for a felony offense, other than a Class 1 felony, (i) who has reached the age of 65 or older and who has served at least five years of the sentence imposed or (ii) who has reached the age of 60 or older and who has served at least 10 years of the sentence imposed may petition the Parole Board for conditional release.[192]

1.15 EXPUNGEMENTS

If a person is acquitted of a charge or the charge is otherwise dismissed, including an accord and satisfaction pursuant to Va. Code § 19.2-151, then he or she may file a petition asking expungement of the police and court records.[193]

The petition, available as a fillable form,[194] must include a copy of the charging document, and provide the date of arrest and the name of the

[188] *Patterson v. Commonwealth*, 39 Va. App. 610, 620, 575 S.E.2d 583, 588 (2003).

[189] *Burrell v. Commonwealth*, 283 Va. 474, 479, 722 S.E.2d 272, 274 (2012).

[190] *Director of Dep't of Corr. v. Kozich*, 290 Va. 502, 517, 779 S.E.2d 555, 563 (2015).

[191] Va. Code § 19.2-303.01.

[192] Va. Code § 53.1-40.01.

[193] Va. Code § 19.2-392.2(A).

[194] www.courts.state.va.us/forms/circuit/cc1473.pdf.

arresting agency.[195] The petition must list the criminal charge to be expunged, the date of final disposition, the petitioner's date of birth, and the full name used by the petitioner at the time of arrest.[196] The petition must contain a complete set of fingerprints from law enforcement.[197] The petition should be filed in the circuit court and served on the Commonwealth.[198]

A possession of marijuana charge, amended to a reckless driving charge, was "otherwise dismissed" pursuant to Va. Code § 19.2-392.2 and thus expungement was possible.[199] But a petitioner who was convicted of lesser included misdemeanors of the felonies with which he was charged cannot expunge the felony charges.[200] A petitioner who was charged with reckless driving but convicted of improper driving could expunge the reckless driving charge because improper driving was not a lesser included offense.[201]

A petitioner who obtains a dismissal after a court finds facts sufficient for conviction and a deferred disposition cannot expunge his or her record because he or she is not "innocent" regardless of his or her plea.[202] But if a case is continued to be dismissed without a plea and without a finding of facts sufficient for conviction, a petitioner may seek an expungement.[203]

"A person who has been found 'not guilty by reason of insanity' of a criminal charge has not been acquitted in the sense that he [or she] has been determined to be innocent of the commission of the criminal act charged" so he or she may not seek expungement.[204]

Because a person qualifying for expungement "occupies the status of innocent" the facts of the alleged crime are "irrelevant to the resolution of the

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[195] Va. Code § 19.2-392.2(C).

[196] *Id.*

[197] Va. Code § 19.2-392.2(D).

[198] Va. Code § 19.2-392.2(C), (D), (G).

[199] *Dressner v. Commonwealth*, 285 Va. 1, 3, 736 S.E.2d 735, 735 (2013).

[200] *Necaise v. Commonwealth*, 281 Va. 666, 669, 708 S.E.2d 864, 866 (2011).

[201] *MacDonald v. Commonwealth*, 83 Va. Cir. 485, 488 (Fairfax 2011).

[202] *Commonwealth v. Jackson*, 255 Va. 552, 557, 499 S.E.2d 276, 279 (1998); *see Daniel v. Commonwealth*, 268 Va. 523, 530, 604 S.E.2d 444, 447 (2004) (assault charge); *Commonwealth v. Dotson*, 276 Va. 278, 284, 661 S.E.2d 473, 476 (2008) (marijuana charge).

[203] *Brown v. Commonwealth*, 278 Va. 92, 95, 677 S.E.2d 220, 221 (2009).

[204] *Eastlack v. Commonwealth*, 282 Va. 120, 124, 710 S.E.2d 723, 725 (2011).

expungement petition."[205] The focus of the expungement hearing is thus on the impact of an existing record, so the "manifest injustice" standard is forward looking, turning on whether the continued existence of the record *may* cause the petitioner a manifest injustice in the future.[206] A petitioner need not show "actual prejudice," instead, a petitioner need only show "a reasonable possibility of a manifest injustice."[207] "A reasonable possibility of a hindrance to obtaining employment, an education, or credit" can serve as a basis for a finding of manifest injustice.[208] An individual with a "lengthy unexpungeable criminal record" will have a harder time making the showing than one with no record.[209]

Those documents eligible to be expunged include all court records related to the charge, including, potentially, protective order paperwork when an assault and battery charge is expunged.

[205] *A.R.A. v. Commonwealth*, 295 Va. 153, 159, 809 S.E.2d 660, 663 (2018).

[206] *Id.* at 160, 809 S.E.2d at 663.

[207] *Id.* at 161, 809 S.E.2d at 664.

[208] *Id.* at 161-62, 809 S.E.2d at 664.

[209] *Id.* at 162, 809 S.E.2d at 664.

¶ 1.15