JAIL NOTES VIRGINIA

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KNOW THE LAW AND EXERCISE YOUR RIGHTS SUMMER 2001

Facing Trial, Sentencing, Appeal, or Transfer to the Virginia DOC.

For those of you who are in jail (or even free on bond) while awaiting trial, sentencing, appeal, transfer to the DOC (Department of Corrections), etcetera, now is probably the most important time in your life. Whenever possible, you should learn your rights so you can, when appropriate, exercise your rights.

If you can make a particular claim or argument but your attorney does not present the argument to the trial court, you could lose the ability to assert such a claim in the future. The more you understand the law and your rights, the more you can protect yourself. And you should be able to fully communicate with your attorney about your case.

Generally speaking, your ability to challenge a criminal conviction can be affected and limited by many circumstances. Because each criminal case is unique, you likely will need to rely on your attorney to properly and timely assert your rights. Accordingly, you should familiarize yourself with the law so you can assist your attorney and protect yourself.

Right to Remain Silent and Right to Testify in Your Own Defense

Although the right to remain silent is well-known, many persons *say too much* when arrested and/or questioned by police. If the circumstances prompting your "alleged" statements are questionable, your attorney should file and argue a pre-trial motion to suppress the evidence of your statements. Usually, the word of the officer or investigator will carry more weight with the judge than your word, especially if you speak after being advised of your rights and/or after signing some type of Miranda waiver form. So, be careful out there.

If your motion to suppress fails or has no chance of prevailing, you should consider whether testifying in your own defense serves your best interest. You might want to testify to explain previous statements, or you might want to testify to facts in support of an alibi or some other type of defense to one or more charges. Regardless, you should know and understand the various benefits and consequences of testifying in your own defense.

Your right to testify is personal; in other words, only you can waive your right to testify. Additionally, your attorney has the primary responsibility for advising you of your right to testify and for explaining the tactical implications of testifying or not testifying.

Many factors must be considered when deciding whether to testify in your own defense. For example, if you have a jury trial, you should consider testifying simply to let the jury hear you deny the charge, but you should consider how the jury will react to the number of your prior convictions (if any) for a felony or a misdemeanor involving lying, cheating, or stealing. When deciding whether to testify, one overriding factor might be your ability to articulate your position.

Criminal Charges: the Elements and the Lesser Included Offenses

Felony charges are usually brought by serving a warrant or indictment on the accused. If you are served with a warrant, you will likely proceed with a preliminary hearing where the district court will consider whether to certify the charges to the grand jury. If the district court certifies the felony or felonies, the grand jury will simply receive the information and issue an indictment in the circuit court. If you are directly indicted by the grand jury ("direct indictment"), you will not have a preliminary hearing.

The initial charges against you can change up until the day of trial, and you could be found guilty of a lesser charge even if the evidence is insufficient to prove the offense charged in the indictment. Every criminal offense has elements that must be proven beyond a reasonable doubt. Most criminal offenses are defined in the Virginia Code, and the elements of the offenses are set forth in the applicable statutes. Some crimes, however, are known as "common law" offenses, and such offenses are not defined by statute.

You should familiarize yourself with the elements of each charge and all the lesser included offenses (if any). Furthermore, if you end up going to trial by jury, your attorney should be prepared to offer jury instructions which, among other things, inform the jury of the elements of lesser included offenses. Charges can overlap, so watch out for possible double jeopardy issues.

Basic Communication with Your Attorney

It is fundamental that your attorney should discuss with you, *long before trial*, the elements of each offense and lesser included offenses, the sentencing range for each offense, the prosecutor's theory of the case (if known), the possible defense theories in the case, the potential evidence and witnesses for you and against you, your plea options, your limited option of taking a bench trial versus a jury trial, sentencing procedures and sentencing factors (including use of sentencing guidelines), and other similar issues.

If your attorney does not discuss these issues with you, you might want to draft one or more lists of your potential witnesses and your questions. Each time you write a list and/or send a letter to your attorney, save a copy for yourself (and get it notarized if possible). Let your attorney know that you want information about your case, including the items discussed in the paragraph above.

Speedy Trial Rights

Although the right to speedy trial is protected by the Virginia and U.S. Constitutions, better protection comes from the Virginia statutory right to speedy trial. Virginia Code § 19.2-243 provides that if an accused is continuously incarcerated, a trial must commence within 5 months of the preliminary hearing or from the date of indictment if the preliminary hearing is waived or the case is presented directly to the grand jury. If an accused is released on bond, the time period is extended to 9 months.

Nevertheless, the statutory right to a speedy trial is not absolute. A motion by a defendant to continue the case or *failing to object to the Commonwealth's motion* to continue will waive the speedy trial requirements from the time of the motion to the new trial date. Additionally, many other exceptions apply. The current version of Virginia Code § 19.2-243 states, in part, that the provisions shall not apply to a delay caused by the defendant's insanity or hospitalization, by the witnesses for the Commonwealth being kept away, or prevented from attending by sickness or accident, by the granting of a separate trial at the request of a person indicted jointly with others for a felony, by continuance granted on the motion of the accused or his counsel, or by concurrence of the accused or his counsel in such a motion by the attorney for the Commonwealth, *or by the failure of the accused or his counsel to make a timely objection to such a motion by the attorney for the Commonwealth*, or by reason of his escaping from jail or failing to appear according to his recognizance, or by the inability of the jury to agree in their verdict. Note that a waiver of speedy trial might be a partial or complete waiver.

If your right to speedy trial is violated, you should make the appropriate motion directly before trial, or, at the very least, before the entry of the final order (usually the "sentencing order"). If you win your speedy trial motion, you will be forever discharged from prosecution for that offense. *See* Va. Code § 19.2-243.

You can expect that the prosecutor will keep an eye on the timing of the case, but prosecutors make mistakes like everyone else. The prosecutor does not have any obligation to advise you of your rights. Accordingly, you should pay close attention to the timing of your case, and, *in every case*, you should discuss your speedy trial rights with your attorney. Sometimes, your interests might be better served by seeking a continuance or even waiving your speedy trial rights, but you should *evaluate your rights* before waiving anything.

Bail: Considerations for Pre-Trial and Post-Trial Release on Bond

Bail "means the pretrial release of a person from custody upon those terms and conditions specified by order of an appropriate judicial officer." *Bond* "means the posting by a person or his surety of a written promise to pay a specific sum, secured or unsecured, ordered by an appropriate judicial officer as a condition of bail to assure performance of the terms and conditions contained in the recognizance." Va. Code § 19.2-119 (definitions).

Not surprisingly, the first priority for many defendants is getting out of jail, and pre-trial release might be available. However, there might be a presumption against release if you are charged with a

violent offense, certain types of drug distribution, or a firearm offense, and judicial officers must consider your prior record when deciding whether or not to fix bail. *See* Va. Code § 19.2-120 (bail and limitations on bail).

If you are granted bail, several conditions can be placed on your release, and you will likely be required to post bond, which will be set in an amount based on many factors. *See* Va. Code § 19.2-121 (fixing bail and setting bond amount). Obviously, posting a large bond can drain your resources, so you should evaluate your options before making any decisions.

In general, a judicial officer will consider two factors when deciding whether to permit pre-trial or post-trial release: (1) the potential risk that you will not appear in court at the appropriate times; and, (2) the potential risk of danger to the public or yourself if you are released on bond. If you are denied a pre-trial or post-trial release or if bond is excessive, you can appeal to a higher judicial officer.

Subpoenas & Witnesses

A criminal defendant has the right to use subpoenas to secure the presence of witnesses for trial or a some other hearing. A subpoena has the force of a court order which requires that the person come to court. Subpoenas are available to a defendant at no cost, and subpoena requests should be made at least a few weeks before trial. It takes time to issue and serve subpoenas, and a subpoena obtained at the last minute might not be considered a valid basis for a continuance if the witness fails to appear at trial. Usually, judges must be persuaded that the witness is necessary and material to the defense **and** that reasonable efforts have been made to secure the presence of the witness.

Indeed, you need to give your attorney the names and addresses of any potential witnesses. A good attorney will try to contact the witnesses well before trial, and frequent communication between you and the attorney is important as witnesses are interviewed and the case develops. Many attorneys stay very busy, and all too often attorneys will fail to fully investigate, discover, or present some important witnesses. Usually, before trial begins, the trial judge will ask you if all of your witnesses are present. If you answer "yes," you might be barred from later claiming that your attorney failed to present testimony from a favorable defense witness.

The Guilty Plea

If you enter a guilty plea, you waive (or give up) many rights, such as the right to trial and appeal, and you might waive your right to challenge your conviction and sentence through any legal proceeding. It follows that before pleading guilty you should consider the evidence against you, the possible outcomes of trial, your level of innocence or guilt, and, if applicable, the agreement between you and the prosecutor.

All too often, defendants plead guilty "straight up" without understanding that the judge can impose any sentence permitted by statute, up to and including the statutory maximum. Although Virginia uses sentencing guidelines, the guidelines are simply a "guide." There is no requirement in state court that the judge stay within the guidelines. Additionally, the rules say that a judge must state his reasons for going outside the guidelines, but the judge's failure to do so is not grounds for relief by any means including direct appeal or habeas actions.

Some defendants might plead guilty without understanding the agreement with the prosecutor. The rules require that plea agreements be in writing in the circuit court, and you should carefully review the agreement before signing anything. You should also ask your attorney questions until you feel certain that a guilty plea is best for you.

If necessary, you can file a motion to withdraw your guilty plea, but courts are reluctant to grant such motions unless you can present compelling reasons for the withdrawal. Your chance of winning the right to withdraw a guilty plea will vary depending upon the reasons for withdrawal, the answers you provided to the court's questions when the court accepted your guilty plea, and the timing of your motion to withdraw. *See* Va. Code § 19.2-296.

Post-Trial Motion for New Trial Based on Newly Discovered Evidence

Several motions can be made post-trial, such as motions to vacate based on insufficient evidence, double jeopardy violations, speedy trial violations, or motions for a new trial based on newly discovered evidence, juror misconduct, prosecutorial misconduct, or motions to modify sentence. The filing of some post-trial motions can be crucial to preserve issues for appeal.

This edition of *Jail Notes* will discuss motions for new trial based on newly discovered evidence. A motion for a new trial based on newly discovered evidence must be filed within 21 days after the final order (usually the sentencing order) is signed by the judge. Four requirements must be met for a new trial to be granted upon a claim of newly discovered evidence: (1) the evidence was discovered after trial; (2) it could not have been obtained prior to trial through the exercise of reasonable diligence; (3) it is not merely cumulative, corroborative or collateral; and (4) it is material, and as such, should produce an opposite result on the merits at another trial.

Direct Appeal: Many Rules

Every criminal defendant has a right to file a Petition for Appeal in both the Court of Appeals and the Supreme Court of Virginia. However, there are many important rules that must be followed, and your rights might be trampled if other persons do not do their jobs.

Most important, an issue on appeal must be addressed at trial or the argument usually cannot prevail on appeal. Even if the evidence is insufficient to support the conviction, you could lose your appeal if your trial attorney fails to make the specific legal argument at the appropriate time. Accordingly, if you are convicted, you should evaluate your potential appellate issues and take the necessary steps to preserve certain issues for appeal (provided that it is not too late).

Many appeals have a reasonable chance of success, but only a few appeals are actually successful. Success on appeal can come in the form of winning a new trial or new sentencing hearing, or, depending upon the case, even a complete dismissal of the charges.

About *Jail Notes*

Jail Notes is intended to provide defendants, inmates, family members, and others with information regarding important issues in criminal law. Legal proceedings can be very complex. It is advisable to seek the assistance of counsel whenever possible, and *Jail Notes* is not intended as a substitute for legal advice. Despite the public's negative attitude toward criminal defense attorneys, some attorneys perform as professionals by using a combination of skill, experience, and concern for the best interests of the client.

Jail Notes is 100% free, so please share with others.

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Tips for Contacting HARGETT & WATSON, PLC

HARGETT & WATSON, PLC welcomes letters and phone calls. If possible, HARGETT & WATSON, PLC will attempt to answer your questions, but not all letters can be answered and not all phone calls can be accepted.

You might be able to call from a local or regional jail (such as Riverside Regional Jail). Or, you can write. If you write, please provide information regarding your case such as the charges, the jurisdiction, and the status of the case. If you have trouble contacting HARGETT & WATSON, PLC, you might ask a friend or family member to call the office on your behalf.

If you have questions or would like to be placed on the mailing list for *Jail Notes*, please contact HARGETT & WATSON, PLC as follows:

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