H&W's LEGAL NOTES VIRGINIA

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KNOW THE LAW AND EXERCISE YOUR RIGHTS JANUARY 2004

New for January 2004

In this edition of *Legal Notes*, we discuss the current legislative session in Virginia, the fate of the writ of actual innocence, and other topics. We also have added or changed some of the information contained in the sections started last year, namely *Frequently Asked Questions* and *Habeas Tips*. Last but not least, we have included our usual quick summary of many recently decided cases.

Legal Notes is not a monthly newsletter. In fact, we have not been able to publish another *Legal Notes* since the May 2003 edition, and we regret that we cannot publish *Legal Notes* on a more frequent basis. If you are already on the mailing list to receive *Legal Notes*, you should receive future editions whenever published.

Legal Notes will remain free to inmates, and anyone can contact HARGETT & WATSON to be added to, or removed from, the mailing list.

Virginia General Assembly Is Back In Session, and They Have a Full Plate

The 100 delegates and 40 state senators of the General Assembly will consider over 2,600 bills and resolutions during this year's 60-day legislative session. Not surprisingly, the budget will consume much of the legislature's time, and many significant proposals will receive much attention, such as changes to the selection of judges and tort reform in Virginia.

This year, bills being reviewed include suggested changes to the Virginia criminal code, which would require a complete replacement of section 18.2 with a new section 18.3. The changes to the criminal code would include an improved structure for the classification of felonies and clarification of some mandatory minimums. However, it is important to note that any changes will not affect the convictions or sentences of anyone convicted for an offense occurring before the effective date of any such legislation.

Many inmates wonder if legislative changes will include a change or modification to the current "new law" requiring that an inmate serve at least 85% of a sentence for offenses occurring on or after January 1, 1995. Each year there are a few proposals which could decrease the time-to-serve for some inmates, but the legislation usually meets much resistance. This year is no different, and *Legal Notes* will attempt to report on the fate of such legislation later this year.

One bright spot is that the General Assembly is considering expanding the writ of actual innocence beyond just new DNA testing. For more information on this legislation, see the article herein on the Fate of the Writ of Actual Innocence.

In the next edition of *Legal Notes*, we will attempt to report any approved changes to Virginia law which could impact inmates.

Frequently Asked Questions (FAQs)

Q: *Can a DOC inmate get a sentence reduction?*
A: No. Virginia Code § 19.2-303 removes a court's jurisdiction to modify or reduce a sentence after an inmate is transferred to the Virginia DOC.

Q: *Is there a remedy for a court's failure to follow Virginia sentencing guidelines or a mistake in the calculation?*
A: No. Mistakes in, or deviations from, sentencing guidelines are not a basis for relief on direct appeal, habeas, or any other post-conviction remedy. See Va. Code § 19.2-298.01(F).

Q: *When will a federal court consider, on its merits, a late-filed or procedurally barred federal habeas petition?*

A: Only in extremely rare cases will a federal court consider the merits of a habeas petition that is untimely or otherwise procedurally barred. For more information, see Habeas Tips, especially #5.

Q: *Is it true that the 85% rule (a.k.a. "new law") has changed or is changing soon?*
A: No. The prisons are full of rumors about alleged or expected changes to the "new law," but there is only a small chance that the 85% rule will change anytime soon. If any changes are enacted, *Legal Notes* will attempt to report them.

Habeas Tips

Habeas Tip #1 - Deadlines! Know them; meet them. For non-capital cases in Virginia, the state habeas deadline is one year after the direct state appeal concludes or two years after the sentencing order is entered, whichever is later. See Va. Code § 8.01-654(A)(2). The federal deadline is one year after the direct appeal has concluded. The federal clock usually starts to run before a state habeas petition is filed. The federal clock stops running while the state habeas case is pending, but resumes after the state habeas case concludes. See 28 U.S.C. § 2244(d). The calculation for specific cases can be tricky. Do not rely on others; read the law for yourself. When in doubt, file early!

Habeas Tip #2 - The first habeas petition must include all issues that are known or could be known through due diligence, regardless of the circumstances. If a claim is not included, but could have been, it is probably barred forever. See Dorsey v. Angelone, 261 Va. 601, 544 S.E.2d 350 (2001).

Habeas Tip #3 - Many due process claims should be raised at trial and on appeal by defense counsel. If counsel could have raised the issue but did not, the due process claim is barred on habeas review by Slayton v. Parrigan, 215 Va. 27, 205 S.E.2d 680 (1974). Thus, the proper claim to raise in the habeas petition is ineffective assistance of counsel for failure to raise the due process issue at trial and on appeal.

Habeas Tip #4 - If a state habeas petition is filed in the circuit court and is dismissed, the appeal must be pursued in the Virginia Supreme Court before going to federal court. Plus, all requirements must be met while appealing to the Virginia Supreme Court or the case could be procedurally barred in the Virginia Supreme Court. Significantly, if a claim is barred in state court, the procedural bar probably will be applied by a federal court as well.

Habeas Tip #5 - If a federal habeas petition is filed too late or is otherwise procedurally barred, there are only a few valid exceptions to the very strict habeas rules. A claim that someone gave incorrect advice or that the prison library is lacking in materials will not succeed. Instead, consider one of the five basic types of exceptions: (i) "new information" which could not have been discovered previously–see 28 U.S.C. § 2254(d) for other similar concepts; (ii) "equitable tolling" for missing a deadline; (iii) "cause and prejudice" for a procedural bar; (iv) "miscarriage of justice" a.k.a. actual innocence; and, (v) structural error, referring to a very small class of issues that require reversal despite any applicable procedural bar.

The Fate of the Writ of Actual Innocence

As reported in the last edition of *Legal Notes*, the Virginia legislature has been considering expanding the writ of actual innocence to allow claims which are based on new evidence other than new DNA testing.

During this 2004 legislative session, the Virginia General Assembly is, once again, considering a proposal for a writ of actual innocence based on non-biological evidence. Currently, only new DNA evidence can provide the basis for the writ of actual innocence.

As the new proposal is written currently, there will be no time limit and no limit on the type of evidence, but there will be other limitations. The writ will not be available to challenge convictions involving a guilty plea, including "no contest" pleas or Alford pleas. Also, the writ will not be available based on evidence that could have been discovered before the convictions became final. This will eliminate the possibility that inmates could file based on evidence that the defense attorney could have discovered through the exercise of due diligence.

Additionally, there will be a very demanding standard by which the courts will consider petitions for

a writ of actual innocence based on newly discovered non-biological evidence. The standard, as proposed, is whether no reasonable trier of fact would have found the person guilty if the new evidence had been presented at trial. In other words, the new evidence of innocence will have to overcome any and all evidence of guilt or essentially provide conclusive proof of actual innocence.

The General Assembly is still debating the procedure for filing and litigating a petition for a writ of actual innocence, and the current proposal calls for such petitions to be filed in the Virginia Court of Appeals. It is too soon to tell if an appeal will be available to either the inmate or the Commonwealth, but *Legal Notes* will report on the fate of this legislation, and other bills affecting inmates, sometime after the veto session during April 2004.

Recent Decisions:

●Castleberry v. Brigano, 349 F.3d 286 (6th Cir. 2003): After convictions for murder and robbery, defendant argued that the prosecution withheld (a) statement by victim describing assailant in a way inconsistent with defendant's appearance, (b) statement to detectives indicating that the prosecution's key witness had been plotting to rob the victim, and (c) statements by neighbors of the victim describing suspicious individuals in the vicinity of the shooting who did not match defendant's appearance. The state court ruled that no single item of withheld evidence was material. The federal district court also denied relief. However, the Sixth Circuit held that the state court acted contrary to U.S. Supreme Court precedent when, instead of determining the materiality of the withheld evidence collectively, it applied only an item-by-item determination. The Sixth Circuit found a reasonable probability of a different outcome of the trial had the withheld material been available.

●Moore v. Bryant, 348 F.3d 238 (7th Cir. 2003). The Seventh Circuit agreed that a state court decision rejecting the inmate's ineffective assistance claim was an unreasonable application of established U.S. Supreme Court law, and that the inmate's counsel's inaccurate advice regarding the inmate's potential sentence was a material factor that in all probability impacted his decision to plead guilty.

●Hampton v. Leibach, 347 F.3d 219 (7th Cir. 2003). The Seventh Circuit found that, in a sexual assault case, counsel was ineffective for failing to investigate and interview exculpatory eyewitnesses, and for making promises to the jury in opening statements that were not kept.

●Fellers v. United States, 72 U.S.L.W. 4150 (2004). The U.S. Supreme Court concluded that police officers violated indicted suspect's Sixth Amendment rights by interrogating him without first advising him of his Miranda rights.

●Castro v. United States, 124 S. Ct. 786 (2003). The U.S. Supreme Court held that district court failed to give proper warnings before re-characterizing *pro se* litigant's motion for new trial as §2255 habeas petition, and subsequent §2255 claim was not a second or successive habeas claim.

●Yarborough v. Gentry, 124 S. Ct. 1 (2003). The U.S. Supreme Court ruled that criminal defense attorney's failure to highlight all potential exculpatory evidence during closing argument did not constitute ineffective assistance of counsel.

●Lawrence v. Texas, 123 S. Ct. 2472 (2003). Texas statute criminalizing intimate sexual conduct between two persons of same sex violated Due Process Clause.

●Price v. Vincent, 538 U.S. 634 (2003). The U.S. Supreme Court found no double jeopardy violation where trial judge initially granted motion for directed acquittal as to first degree murder, and subsequently submitted charge to the jury resulting in a guilty verdict.

●Kaupp v. Texas, 538 U.S. 626 (2003). A 17-year-old defendant was awakened at 3 a.m. by at least three police officers; he was removed in handcuffs, without shoes, dressed only in underwear in January, placed in a patrol car, driven to the scene of a crime and then to the sheriff's offices, where he was taken into an interrogation room and questioned. No reasonable person would have felt free to leave. Although Miranda warnings were given before confession, there was no probable cause for arrest. U.S. Supreme Court found that a confession obtained by exploitation of an illegal arrest must be suppressed.

●Massaro v. United States, 538 U.S. 500 (2003). A 28 U.S.C. §2255 claim of ineffective assistance of counsel was not foreclosed for failure of the petitioner to have previously raised the claim on direct appeal.

●Virginia v. Black, 538 U.S. 343 (2003). A Virginia statute criminalizing cross-burning with the intent to intimidate did not violate respondents' right to freedom of speech, since the statute banned intentional intimidating conduct rather than expression.

Important Virginia Habeas Cases:

●Hines v. Kuplinski, Record No. 022678 (Va. Sup. Ct. Jan. 16, 2004). Habeas petition was properly dismissed where it was filed after limitations period. Had the inmate timely acted on claimed newly discovered evidence, ineffective assistance of counsel claim would have been discovered within two years of the conviction.

●Daniels v. Warden, 266 Va. 399, 588 S.E.2d 382 (2003). The Court reaffirmed Dorsey v. Angelone, 261 Va. 601, 544 S.E.2d 350 (2001), and found no significant distinction between a habeas petition which was "withdrawn" and one which was the subject of a voluntary nonsuit by the inmate. The allegations of fact that formed the basis of his claims unquestionably were known to the inmate at the time he filed his first habeas petition in the trial court.

●Ripley v. Warden, Va. Sct. Record 030728 (Dec. 5, 2003). In an unpublished opinion, where the appellant attorney timely filed the petition for appeal in the Va. Supreme Court but failed to file the notice of appeal in the Va. Court of Appeals, the habeas limitations period started to run from date the notice of appeal should have been filed in the Court of Appeals, not from the later date when the Va. Supreme Court dismissed the petition for appeal.

●Lovitt v. Warden, 266 Va. 216, 585 S.E.2d 801 (2003). Petition for a writ of habeas corpus was dismissed because the court clerk's destruction of evidence was not done in bad faith, inmate failed to show a Brady violation, and inmate was not denied effective assistance of counsel.

●Miles v. Sheriff, 266 Va. 110, 581 S.E.2d 191 (2003). Although an inmate pleaded guilty, his trial counsel's failure to file an appeal after having been instructed to do so constituted deficient performance, and the inmate was entitled to delayed appeal.

●Johnson v. Warden, Va. Sct. Record 021760 (March 2003). In an unpublished opinion, the Court held that, based on particular facts, the inmate was entitled to a delayed appeal back to the three-judge panel stage of the Court of Appeals rather than only an appeal to the Va. Supreme Court.

About *Legal Notes*

Legal Notes is intended to provide basic information on important criminal law topics. Legal proceedings can be very complex. It is advisable to seek the assistance of counsel whenever possible, and *Legal Notes* is not intended as a substitute for legal advice.

Legal Notes is solely the creation of HARGETT & WATSON, PLC, with all rights protected. David B. Hargett and W. Todd Watson of HARGETT & WATSON, PLC, devote the majority of their practice to criminal litigation, criminal appeals, habeas cases, parole hearings, and other post-conviction remedies.

We wish to express special appreciation to our office manager and legal assistant, Michelle Apple Priddy. We also wish to thank the many inmates throughout the system who continue to spread the word about *Legal Notes*.

Contacting Our Firm

At HARGETT & WATSON, PLC, we welcome letters and phone calls, but please understand that we cannot respond to all letters or accept every phone call. When writing to us, please be clear and brief. Do not send documents unless we request such paperwork from you. We make no guarantee that we can return your documents or respond to your requests for information. If you are having trouble corresponding with us, you might ask a friend or family member to call the office on your behalf.

If you have questions or want to request more information, please contact us as follows:

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