H&W's LEGAL NOTES VIRGINIA

A legal publication by:

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Know the Law and Exercise Your Rights October 2005

In This October 2005 Edition:

In this edition of *Legal Notes*, we discuss the recent legislative changes in Virginia, including the new law for getting delayed appeals. We have also included *Frequently Asked Questions*, updated *Habeas Tips*, a *Parole Update*, and numerous summaries of significant federal and state court decisions.

Legal Notes is not a monthly newsletter. Our previous edition of *Legal Notes* is dated December 2004, and we regret that we cannot publish *Legal Notes* on a more frequent basis. If you are already on the mailing list for *Legal Notes*, you should receive future editions when published. Please be patient with us.

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

Hargett & Watson, PLC is Relocating

In January 2006, the law firm started by attorneys David B. Hargett and W. Todd Watson will be moving from downtown Richmond to the western end of Henrico County near the professional center known as Innsbrook.

Construction on the new office should be completed by the end of 2005. The main office telephone number has already changed to 804-788-7111, and this number will continue to the new location. Clients of the firm who are calling collect from prisons and jails will be informed as to any changes to the separate inmate line for such collect calls.

The new address effective January 2006 will be: Hargett & Watson, PLC, 11545 Nuckols Road, Suite C, Glen Allen, VA 23059.

Post Conviction Remedies

After conviction and sentencing, several post-conviction options remain, but the chances of prevailing decrease each step along the way. Before the trial court loses jurisdiction over the case, several motions can be made post-trial, such as motions to vacate based on insufficient evidence or denials of mistrials, motions to withdraw a guilty plea, motions for a new trial based on newly discovered evidence or juror or prosecutorial misconduct, and motions to modify sentence. The filing of some post-trial motions can be crucial to preserve issues for appeal.

After the trial court loses jurisdiction, the direct appeal to the Virginia Court of Appeals and Virginia Supreme Court may be used to challenge certain rulings by the trial court. If the direct appeal is unsuccessful, habeas petitions may be filed to raise significant constitutional violations, including claims of ineffective assistance of counsel or previously unknown misconduct by the prosecutor or jurors. Most habeas cases are unsuccessful as courts are reluctant to rule that a constitutional violation occurred.

Beyond appeals and habeas cases, the newer laws regarding petitions for writs of actual innocence offer another possible avenue for relief. New DNA testing can lead to freedom for some inmates, but the writ of actual innocence based on non-biological evidence must be very compelling to be successful.

Last but not least, a seldom used motion to vacate for lack of jurisdiction may be filed. Questions of jurisdiction may be raised in any court at any time, but these arguments are limited to claims that the court never had jurisdiction over the case from the start.

The Legislative Update in Virginia

Once again, during the 2005 legislative session, proposed changes to the amount of time to serve on felony convictions were defeated. Senate Bill 805 *proposed* a system which would allow up to 15 days credit for each 30 days served, and the earning level would depend upon good conduct and literacy requirements. The bill was referred to a committee, where it was left. In other words, the bill never made it to the floor for a vote.

It is important to remember that a bill does not become a law until it is voted on and passes in both the Senate and the House, and the governor, who has veto power, signs the bill into law.

Here are several significant statutory changes in Virginia, (effective July 1, 2005, unless otherwise noted):

§ 18.2-431.1 creates a Class 6 felony for anyone who provides a cellular telephone to an incarcerated prisoner or for an incarcerated prisoner who possesses a cell phone.

§ 18.2-434 is amended and § 8.01-4.3 is added to permit the use of unsworn declarations in lieu of sworn affidavits and provides that it is perjury for a person to willfully subscribe as true a material matter that he does not believe to be true in a written declaration, etc.

§ 18.2-462 is amended to provide that it is a Class 6 felony for any person with actual knowledge of a commission of a felony under Chapter 4 (Crimes Against the Person) by another to willfully conceal, alter, etc. any item of physical evidence with the intent to obstruct or hinder the investigation or prosecution. Immediate family members of the offender are excluded.

§ 19.2-169.5 is amended to require that in any felony case where the defendant obtains an expert to evaluate his sanity, the expert shall prepare a full report and provide it to the prosecutor as well.

§ 19.2-266.2 and § 19.2-398 are amended to require defense objections on speedy trial or double jeopardy grounds to be filed in writing 7 days before trial or at such time prior to trial as the grounds for such motion arose. Also, the prosecution may appeal a pre-trial dismissal of a charge based on such violations.

§ 19.2-316.2 and § 19.2-316.3 are amended to provide that a sentence to a Detention (or Diversion) Center Incarceration Program shall not be imposed in addition to an active sentence to a state correctional facility.

§ 19.2-390.02 is added to require that each department of the state police, local police, and sheriff's offices establish a written policy and procedure for conducting in-person and photographic lineups.

§ 8.01-654, the habeas statute, is amended and new sections are added to provide a separate procedure for obtaining a delayed appeal. See the following article.

§ 53.1-1.1 is added to require the Department of Corrections to offer prepaid or debit telephone systems in addition to the existing collect calling systems. This statute does not go into effect until Jan. 1, 2006.

§ 53.1-136 is amended to require that the Parole Board publish its rules for parole and eligibility and include the basis for denial of parole in its monthly published statement regarding action taken by the Board.

NEW LAW - Motion for a Delayed Appeal and Amendment to the Habeas Statute

Effective July 1, 2005, the Virginia Legislature finally has provided a separate procedure for pursuing a delayed appeal. Countless criminal appeals have been dismissed over the years due to attorney error and overly strict filing rules. Worse still was the fact that the only method to correct these errors was to file a habeas petition, and such habeas cases could ruin an inmate's chances at meaningful habeas review on the merits.

Now, the law has changed to provide a separate procedure for a Motion for a Delayed Appeal, and the habeas statute has been amended as well. The new statutes are Va. Code § 19.2-321.1 (motion for delayed appeal to the Va. Court of Appeals) and Va. Code § 19.2-321.2 (for the Va. Supreme Court). The two versions are basically the same. To be successful, the motion must allege that the appeal has been dismissed or never initiated due to error by someone other than the criminal defendant. The motion must be filed within six months after the appeal has been dismissed or the circuit court judgment has become final, whichever is later.

The new statutes give power to the prosecutors to agree (and the motion will be granted) or disagree that the defendant has met the requirements (and the motion will be denied). In the event that the motion is denied, the criminal defendant may file a habeas petition seeking a delayed appeal only. This is a major change in the law. If the habeas petition seeking a delayed appeal only is not successful, or, after the delayed appeal has concluded, a second habeas petition may be filed on other issues. In so doing, the change has modified existing case law which has served as a ridiculous procedural bar to so many habeas petitions over the years.

The amended section of the habeas statute in Va. Code § 8.01-654(B)(2), reads as follows: "The provisions of this section shall not apply to a petitioner's first petition for a writ of habeas corpus when the sole allegation of such petition is that the petitioner was deprived of the right to pursue an appeal from a final judgment of conviction or probation revocation . . . ."

The only potential downside with the changes to the law is the calculation of deadlines for substantive habeas petitions (both state and federal) could be more complicated. It is expected that the clock will stop running while a motion or habeas petition for a delayed appeal is pending, as well as while the delayed appeal (if granted) is pursued. The question will be whether the time before and after will count against the strict habeas deadlines for both state and federal court. When in doubt, file early.

Frequently Asked Questions (FAQs)

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

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 any type of collateral or post-conviction review. See Va. Code § 19.2-298.01(F). Sentencing guidelines in Virginia are merely discretionary, and a court is not required to follow these merely recommended sentencing ranges.

Q: *Is it true that the 85% rule (a.k.a. "new law") has changed or is changing soon in Virginia?*
A: No. Rumors about expected changes to the "new law" are not true, and there is only a slim chance that the 85% rule will change anytime in the future. If any changes are enacted, *Legal Notes* will report them.

Habeas Tips

Because of recent changes in the laws, the following habeas tips are being included in full. Older versions of habeas tips in previous *Legal Notes* are hereby completely replaced with this version. These tips are merely suggestions based on years of experience litigating hundreds of habeas cases.

Habeas Tip #1 - Calculate your deadlines and file early if at all possible. Do not rely on others to calculate these deadlines for you. 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 case is final for federal purposes which is usually when the direct appeal has concluded or the time for pursuing the direct appeal has expired. The calculation can be tricky. 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).

Habeas Tip #2 - Except for habeas petitions with the sole allegation of a denial of the right to pursue an appeal of a conviction, the state habeas petition must include all issues that are known or could be known through due diligence. If a claim is not included but could have been, the claim probably will be barred forever.

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, habeas claim should be ineffective assistance of counsel for failure to raise the due process issue at trial and on appeal.

Habeas Tip #4 - If the initial habeas petition is filed in the circuit court and is dismissed, the appeal must be properly filed in the Virginia Supreme Court. Many habeas appeals are being dismissed by the Virginia Supreme Court for failure to comply with the strict filing requirements. If the notice of appeal or the petition for appeal is not timely filed or if the petition for appeal does not include separately titled "Assignments of Error," the appeal will be dismissed, period! Once dismissed, the chances are slim to none that the case will ever being heard on its merits. When appealing from the trial court, study the Rules of Court and particularly Rule 5:9 (notice of appeal must be filed in the circuit court within 30 days of the entry of the final order), 5:17(a)(1) (petition for appeal must be filed in the Va. Supreme Court within 3 months of the final order), and 5:17(c) ("Assignments of Error" must be included in the petition for appeal).

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.

Habeas Tip #6 - You must include the details of your claims. Once you have chosen the claim, such as ineffective assistance of counsel or prosecutorial misconduct, the most important part of the claim is the details. For instance, if you declare that the prosecution failed to disclose exculpatory evidence, you must indicate - to the best of your ability - the details of that evidence. Or, if you claim that the trial attorney failed to use a particular person as a witness for the defense, you must state what that person would have said if called to the witness stand. A list of names of people who should have been used as witnesses without a description of the information they knew will have no chance of prevailing.

See Penn v. Smyth, 188 Va. 367, 370-71, 49 S.E.2d 600 (1948).

Habeas Tip #7 - For state prisoners, exhaustion of state remedies is required before pursuing a habeas case in federal court. Tip #4 refers to the need to appeal to the Virginia Supreme Court if the initial habeas petition is filed in the circuit court. The initial habeas petition may also be filed directly in the Virginia Supreme Court. Either way, before filing a federal habeas petition under 28 U.S.C. § 2254, the Virginia Supreme Court must rule on the claims in the state habeas petition. When filing in the federal court, under the rule requiring exhaustion of remedies, the federal court will only consider those claims raised and ruled upon previously in state court.

Parole Update

Many inmates are still being reviewed by the Parole Board for offenses occurring before January 1, 1995. However, the low percentages of persons being granted parole are not encouraging. The Virginia Parole Board is continuing to deny parole release, especially for those who are serving sentences on violent offenses. Many inmates are not being released until they reach the mandatory release date.

It is nice to see that the Parole Board is now required to publish its rules for parole and eligibility and include the basis for denial of parole in its monthly published statement regarding action taken by the Board. See Va. Code § 53.1-136. However, this increased awareness of policies and practices by the Parole Board will do little to increase the number of grants in the foreseeable future.

Many lawsuits have been filed regarding Parole Board practices, but none have been successful. For instance, lawsuits regarding the overused "serious nature and circumstances of the offense" as a reason for denying parole have been met with legal resistance. The basic legal principle is that the Parole Board has extreme discretion when to grant parole, and the stated reasons are legally sufficient in the eyes of the courts.

With an election of a new governor this year, changes to the Parole Board might occur in the early part of 2006, but a change in personnel does not mean the change will be for the better. With much public support for "tough on crime" politicians, the outlook is not good despite the fact that courts sentenced these inmates with the understanding that if the inmate satisfied requirements of education and good behavior, they likely would be paroled well prior to their mandatory release date.

Recent Decisions:

United States Supreme Court Decisions:

● Mayle v. Felix, 125 S. Ct. 2562 (2005). Where an inmate asserted a Sixth Amendment claim in his original timely-filed habeas petition and sought to add a new Fifth Amendment claim in his amended petition after the 28 USC. § 2244(d)(1) limitation period, relation back was not warranted under Fed. R. Civ. P. 15(c)(2), because the new claim was supported by different facts.

● Miller-El v. Dretke, 125 S. Ct. 2317 (2005). Habeas relief was granted where an inference of discrimination was inescapable. Ten of eleven black venire panelists in a death penalty case were peremptorily struck, comparable white panelists were not struck, prosecution tactics sought to eliminate consideration of black jurors and provide cause for striking black jurors, and prosecution office had policy of excluding black jurors.

● Bradshaw v. Stumpf, 125 S. Ct. 2398 (2005). Appellate court erred in holding that the inconsistent theory of the case in the trial of respondent's accomplice (relating to which of the two men shot the victim) required voiding respondent's guilty plea because the precise identity of the triggerman was immaterial to respondent's conviction.

● Pace v. DiGuglielmo, 125 S. Ct. 1807 (2005). Because a federal habeas petitioner filed his federal habeas petition beyond the deadline, and because he was not entitled to statutory or equitable tolling for any of that period under 28 U.S.C. § 2244(d)(1) when his state post-conviction petition was untimely, his federal petition was barred by the statute of limitations.

● Rhines v. Weber, 125 S. Ct. 1528 (2005). A district court has discretion to stay a mixed petition for habeas relief to allow a petitioner to present his unexhausted claims to the state court in the first instance, and then to return to federal court for review of his perfected petition.

● Brown v. Payton, 125 S. Ct. 1432 (2005). The grant of habeas relief was reversed where the Ninth Circuit's decision was contrary to the limits on federal habeas review imposed by the 1996 statutory changes.

Federal Court of Appeals Decisions:

●Martin v. Grosshans, 424 F.3d 588 (7th Cir. 2005). Habeas relief was appropriate due to ineffective trial counsel, who failed to: (1) object on proper grounds to a former prosecutor's testimony regarding his behavior and emphasis on the protection of clergy members from false accusations of sexual abuse; (2) object on proper grounds to an officer's testimony regarding his exercise of his rights to counsel and silence; and (3) move for a mistrial following the prosecution's closing argument, which compared the inmate to Jeffrey Dahmer and Theodore Oswald.

●In re Lott, 424 F.3d 446 (6th Cir. 2005). A defendant's assertion of actual innocence does not effect an implied waiver of the attorney-client privilege.

●Biros v. Bagley, 422 F.3d 379 (6th Cir. 2005). The grant of plaintiff's petition for writ of habeas corpus, vacating his death sentence, was reversed where the district court improperly granted the writ as to his claim of an insufficient indictment.

●Davis v. Straub, 421 F.3d 365 (6th Cir. 2005). The trial court's decision to sustain a crucial defense witness's blanket invocation of his Fifth Amendment privilege denied the inmate a fair trial and his right to present a defense.

●Miller v. Dretke, 420 F.3d 356 (5th Cir. 2005). Inmate was entitled to habeas relief because trial counsel performed in a constitutionally deficient manner at the punishment phase where trial counsel made his decision not to call the inmate's physicians as witnesses without speaking to them, and without even procuring their names, and trial counsel offered no tactical or strategic explanation for that lack of investigation. Moreover, the inmate was prejudiced by the inadequate investigation since it permitted the State to neutralize her mitigation evidence, undermine her credibility, and portray her as an opportunistic liar to a jury charged with determining her sentence.

●Richie v. Mullin, 417 F.3d 1117 (10th Cir. 2005). The grant of habeas corpus relief was reversed where the district court erred when it found that counsel was ineffective in cross-examining a medical examiner.

●Smith v. Dretke, 417 F.3d 438 (5th Cir. 2005). Trial counsel's failure to call witnesses who could corroborate petitioner's statements was ineffective assistance.

●Tenny v. Dretke, 416 F.3d 404 (5th Cir. 2005). Inmate received ineffective assistance of counsel since counsel's deficient performance was conceded and counsel's failure to present available evidence of self-defense was clearly prejudicial. Omitted evidence indicated that the victim made several threats on the inmate's life, the victim was agitated and argumentative on the day of the incident, the victim previously stabbed the inmate and threatened to burn down their house, the victim had violent tendencies and sufficient strength to overcome the inmate, and the inmate's physical condition after the incident indicated a violent struggle in which the inmate nearly lost his life.

●Lave v. Dretke, 416 F.3d 372 (5th Cir. 2005). Denial of habeas petition was reversed to determine whether inmate's Sixth Amendment rights were violated under the Confrontation Clause.

●Frasch v. Peguese, 414 F.3d 518 (4th Cir. 2005). State prisoner's federal habeas petition was not time-barred under 28 U.S.C. §2244(d)(1)(A) as the limitations period did not begin to run until the Court of Special Appeals of Maryland denied his belated application for leave to appeal his conviction and sentence in a subsequent proceeding, which was considered direct review under the federal statutes.

●Howell v. Crosby, 415 F.3d 1250 (11th Cir. 2005). "Equitable tolling is appropriate when a movant untimely files because of extraordinary circumstances that are both beyond his control and unavoidable even with diligence." Here, inmate was not entitled to exception because attorney negligence is not a basis for equitable tolling.

●Madrigal v. Bagley, 413 F.3d 548 (6th Cir. 2005). Habeas relief was warranted on the prisoner's claim that his rights under the Confrontation Clause of the Sixth Amendment were violated by the admission of a co-perpetrator's statements that he had driven the getaway car and the prisoner had committed the robbery and murder of the restaurant employee.

●United States v. McCoy, 410 F.3d 124 (3rd Cir. 2005). Denial of an inmate's habeas corpus petition was reversed and remanded for an evidentiary hearing because, without the opportunity to evaluate the rationale given by trial counsel for alleged "strategic choice," the issue of possible

ineffectiveness could not be determined. Courts have been highly deferential to counsel's strategic decisions; however, merely labeling a decision as "strategic" will not remove it from an inquiry of reasonableness

●Henry v. Poole, 409 F.3d 48 (2nd Cir. 2005). Habeas relief was granted where inmate received ineffective assistance of counsel when his trial attorney elicited and emphasized an alibi that was clearly given for the wrong day, and there was a lack of any evidence to connect the inmate to the crime other than his selection from an arguably suggestive lineup, and the subsequent identification at trial, by a victim whose initial description of the robber differed from the inmate as to age, height, weight, and hair length.

●Howard v. Walker, 406 F.3d 114 (2nd Cir. 2005). Inmate was entitled to habeas relief because his Sixth Amendment rights were violated by the trial court's ruling allowing the medical examiner to testify to an opinion based in relevant part on the otherwise inadmissible hearsay confession of a co-conspirator, and the trial court's limitations on cross-examination of the medical examiner violated his Sixth Amendment rights because the ruling barred areas of cross-examination that went to the reliability of the medical examiner's conclusion as well as the basis of her opinion.

●Ruimveld v. Birkett, 404 F.3d 1006 (6th Cir. 2005). Requiring an inmate to be shackled during an entire trial which took place in prison caused significant harm to the presumption of innocence and was not warranted by security concerns, and the case against the inmate for poisoning a prison guard was close and based on purely circumstantial evidence.

●Jackson v. Edwards, 404 F.3d 612 (2nd Cir. 2005). Habeas relief was affirmed where petitioner was entitled to a jury instruction on justification. The trial court's failure to give such an instruction violated the petitioner's due process rights, and the trial court's contrary conclusion constituted an unreasonable application of federal law.

●Murillo v. Frank, 402 F.3d 786 (7th Cir. 2005). Habeas relief was granted on murder case where testimony was improperly admitted in violation of the Constitution's confrontation clause, and admission was not harmless.

●Franklin v. McCaughtry, 398 F.3d 955 (7th Cir. 2005). Inmate was entitled to habeas relief because his trial judge was actually biased since the only inference that can be drawn from the facts of record is that the judge decided that inmate was guilty before he conducted the trial.

●Souter v. Jones, 395 F.3d 577 (6th Cir. 2005). Where an inmate's habeas corpus petition was time-barred, he established a gateway actual innocence claim, such that he was entitled to equitable tolling, based upon recanted expert testimony and other new evidence.

●United States v. Hedgepeth, 418 F.3d 411 (4th Cir. 2005). In an appeal handled by Hargett & Watson, the Fourth Circuit affirmed a Richmond city council member's convictions on multiple offenses arising from a bribery and extortion scheme. The court held that the potential prejudice from a statement made by a cooperating witness that he thought the defendant might be in the "kickback business" far outweighed the probative value. But, admitting the statement was harmless error.

Virginia Decisions on Petitions for Writs of Actual Innocence Based On Non-Biological Evidence:

●In re Bowling, 46 Va. App. 50, 615 S.E.2d 489 (2005). Petition for a writ of actual innocence failed to establish previously unknown or unavailable evidence sufficient to justify the issuance of the writ.

●In re Dicks, 46 Va. App. 44, 614 S.E.2d 677 (2005). Petition for writ of actual innocence dismissed as the interrogation and petitioner's accompanying affidavit in no way affect the sufficiency of the evidence to support petitioner's convictions and petitioner has not demonstrated that no rational trier of fact could have found him guilty.

●In re Pierce, 44 Va. App. 611, 606 S.E.2d 536 (2005). Petition for writ of actual innocence dismissed where petitioner alleges testing of destroyed swabs would prove his innocence as "human biological evidence may not be used as the sole basis for seeking relief."

Other Virginia Decisions:

●Jackson v. Washington, 270 Va. 269, 619 S.E.2d 92 (2005). Counsel was ineffective in failing to object to defendant being tried before jury while wearing jail-issued "jumpsuit." Nothing supported finding that failure to object was "tactical," and since case was based primarily on circumstantial evidence, defendant was prejudiced.

●Rose v. Commonwealth, 270 Va. 3, 613 S.E.2d 454 (2005). In an appeal from a capital murder conviction based on a killing committed in the commission of robbery or attempted robbery, the circuit court and the Court of Appeals erred in concluding that evidence that the defendant had committed an assault and a "purse-snatching" robbery several weeks before the murder was admissible. However, the error was harmless because the evidence of defendant's guilt was overwhelming.

●Charles v. Commonwealth, 270 Va. 14, 613 S.E.2d 432 (2005). A defendant's participation in the Detention Center Incarceration Program is incarceration pursuant to Virginia Code § 19.2-316.2 and not merely a condition of probation.

●Shivaee v. Commonwealth, 270 Va. 112, 613 S.E.2d 570 (2005). In considering appeals from two different trial court judgments of civil commitment, it was held that the Sexually Violent Predator Act comports with all constitutional requirements of due process and is not unconstitutional.

●Commonwealth v. Hilliard, 270 Va. 42, 613 S.E.2d 579 (2005). A criminal suspect was questioned by law enforcement personnel after his arrest and after he invoked his right to counsel. His motion to suppress an incriminating statement, made after at least one unequivocal request for the presence of an attorney, should have been granted by the trial court.

●Muhammad v. Commonwealth, 269 Va. 451, 611 S.E.2d 537 (2005). No error was found in capital murder convictions and death sentences arising out of a portion of defendant's conduct in a series of 16 shootings in Virginia and other states resulting in 10 deaths. Evidence proved that defendant gave sufficient direction in the killings that even if he were a criminal actor ordinarily demonstrating culpability as a principal in the second degree, he was nonetheless guilty of capital murder.

●Commonwealth v. Hudgins, 269 Va. 602, 611 S.E.2d 362 (2005). Defendant was tried and acquitted of robbery and later charged with grand larceny from the person. The Supreme Court held that grand larceny from the person is not a lesser-included offense of robbery.

●Yarbrough v. Warden, 269 Va. 184, 609 S.E.2d 30 (2005). In a capital murder case, the inmate failed to demonstrate that his defense was prejudiced by trial counsel's failure to investigate and present available mitigation evidence introduced at the habeas hearing. The record did not show that, but for his trial counsel's alleged failure, there was a reasonable probability that the result would have been different.

●Emmett v. Warden, 269 Va. 164, 609 S.E.2d 602 (2005). In a habeas corpus petition, the error in a verdict form was not a structural error under governing law. Accordingly, the prejudice analysis set forth in Strickland v. Washington, 466 U.S. 668 (1984) is applied, and the petitioner has failed meet the test.

●Morrisette v. Warden, 264 Va. 386, 613 S.E.2d 551 (2005). Habeas corpus relief was granted because counsel failed to object to the verdict form which failed to include express language telling the jury that it could impose a life sentence with or without a fine even if it concluded that the Commonwealth had proven either or both of the aggravating factors within Va. Code Ann. § 19.2-264.4.

●Townes v. Commonwealth, 269 Va. 234, 609 S.E.2d 1 (2005). A prisoner who had completed serving his sentence for a rape conviction at the time proceedings were begun by the Commonwealth to have him civilly committed as a sexually violent predator was no longer "incarcerated for a sexually violent offense" despite his incarceration on other matters.

●McCloud v. Commonwealth, 269 Va. 242, 609 S.E.2d 16 (2005). In a petition seeking involuntary civil commitment of a prisoner as a sexually violent predator, the trial court did not err in admitting evidence of the prisoner's prior convictions for abduction and indecent liberties as the abduction conviction was inextricably connected with rape conviction and the conviction for indecent liberties occurred in relative proximity to other convictions for sexual offenses. Also, consideration of prison infractions was not improper, and the finding that no less restrictive alternatives to involuntary confinement were suitable did not impermissibly shift the burden of proof to the inmate.

●Lewis v. Commonwealth, 269 Va. 209, 608 S.E.2d 907 (2005). The prosecutor's questioning of an alibi witness in a murder and robbery prosecution implying that the witness and the defendant engaged in drug sales together prejudiced the defendant's right to a fair trial. The prosecutor's repeated questioning was prejudicial where it interjected an impermissible speculation and risked that the jury would conclude that the defendant was more

likely to have committed this crime because of his earlier alleged illegal activity.

● Commonwealth v. Allen, 269 Va. 262, 609 S.E.2d 4 (2005). The trial judge did not err in ruling that the Commonwealth failed to meet its burden of proof in a petition pursuant to Code § 37.1-70.6(A) to civilly commit a prisoner nearing the end of his prison term as a sexually violent predator, and the trial court did not err in admitting testimony of the defense expert witness.

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.

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We wish to express special appreciation to our legal assistants Pam Hash and Mary Beth Rider for their devotion and hard work, and 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.

Please note that we have changed the office telephone number recently, and our new address is listed below. Mail sent to our old address will be forwarded for some time, but please try to start using the new address.

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

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