

THE APPELLATE PROCESS FOR A VIRGINIA NON-CAPITAL CONVICTION

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I. Direct Appeal

When a defendant has been convicted of a crime in Virginia and wants a higher court to review his conviction or sentence, the first stage of review is usually the direct appeal. The direct appeal from a circuit court judgment is an appeal "on the record," meaning that a higher court is asked to read the printed record of proceedings in the circuit court and decide if the trial judge made any errors in administering the law, and if so, whether those errors were serious enough to warrant reversal of the defendant's conviction. Unless the defendant has been sentenced to death, criminal appeals go first to the Court of Appeals of Virginia. Death sentence appeals, however, go directly to the Supreme Court of Virginia.

A defendant sentenced in circuit court must file a notice of intention to appeal within thirty days after the sentencing order has been entered. This notifies the clerk of court to prepare the record of trial and forward it to the appellate court, a process which usually takes up to two months.

A. Petitioning the Court of Appeals of Virginia

Once the Court of Appeals has received the record of trial, the defendant has forty days to file a written "petition for appeal" there, explaining why he thinks the Court should hear his appeal. The petition for appeal cannot present any evidence or facts not appearing in the record of trial, and normally can raise only those arguments that were previously presented to and rejected by the circuit court judge. The arguments made in the petition for appeal are the only ones the defendant will be allowed to raise for the duration of the direct appeal process.

The local Commonwealth's Attorney who prosecuted the case can then file a "brief in opposition," explaining why the Commonwealth believes the judgment below was correct, and the appeal need go no further. The defendant's lawyer then has the opportunity to argue before a panel of three appellate judges, to try to convince at least one of them that the court should hear the appeal. The Commonwealth's Attorney is not allowed to argue orally at this stage of the proceedings. If any judge on the panel thinks that there may have been prejudicial error in the circuit court's rulings, he or she can order that the Court of Appeals grant the petition and give full consideration to the appeal.

B. Granted Appeals in the Court of Appeals of Virginia

When a petition for appeal has been granted, responsibility for representing the Commonwealth in the appeal shifts from the local Commonwealth's Attorney to the Attorney General of Virginia, in Richmond. The case will then be assigned to one of the Assistant Attorneys General in our Criminal Litigation Section, who will ordinarily handle all future post-conviction litigation in that case. Within a few months of the granting of the appeal, the defendant will file a new brief in the Court of Appeals, the Attorney General will file a brief for the Commonwealth, and the defendant can then file a reply brief. When all briefs have been filed, the Court of Appeals will schedule the case for oral argument before a panel of three judges.

Oral argument is very formalized, with each side having a set amount of time, usually fifteen minutes, to discuss what happened in the lower court and whether it warrants reversal of the judgment. No new evidence or facts not appearing in the record of trial can be presented to the court. The defendant will, of course, be represented by his or her attorney, and the Commonwealth will be represented by an Assistant Attorney General. Defendants confined in prison are not brought to court for oral arguments. The oral arguments are open to the public, and you are welcome to attend. Defendants who are at liberty may attend, and members of the defendant's family are always permitted to attend. When oral argument has been scheduled in the case in which you have indicated an interest, we will notify you of the time and place so that you may attend if you are able and desire to do so. Appellate courts do not announce what their decisions will be at oral argument.

After oral argument in the Court of Appeals, there is no set time period in which we can expect a decision from the court. Cases have been decided in as little as three weeks and as much as a year after oral argument, although delays of more than a few months are very rare nowadays. We will notify you as soon as we have received a decision in the case in which you are interested. Usually, the Court of Appeals will issue a written explanation of its decision, which is called the "opinion" of the court, and we will send you a copy of that opinion.

The appellate court's decision will generally fall into one of three categories. If the appellate court concludes that the lower court's decision was correct or was harmless error, it will affirm the judgment of the lower court. If it concludes that the lower court has committed prejudicial error, it will usually reverse and remand for a new trial or other proceedings, meaning that the defendant can be tried over again for the crimes of which he was convicted. In such cases, the Commonwealth's Attorney will take over the case again and make any future decisions regarding prosecution. However, if the appellate court concludes that the evidence was insufficient to support the conviction, or that the defendant was not given a speedy trial, or that his conviction constitutes double jeopardy, it will reverse the judgment of the lower court and dismiss the case, which has the general effect of a finding of not guilty.

Whichever side loses before a panel of the Court of Appeals can sometimes petition for rehearing before the panel or before the full court. Rehearing before the panel simply involves a second oral argument to try to convince the court to change its mind. If rehearing before the full court is granted, a new round of briefs will be filed, oral argument before all ten judges of the Court of Appeals will be scheduled in Richmond, and a new opinion will be issued, either affirming or modifying the opinion of the panel.

C. Petitioning the Supreme Court of Virginia

Once the Court of Appeals has disposed of an appeal, the losing side can seek further appellate review in the Supreme Court of Virginia. This is done by filing a notice of appeal and a petition for appeal within thirty days of the final decision in the Court of Appeals. Petitions in the Supreme Court of Virginia can be

filed even when the Court of Appeals has refused the petition for appeal. In cases where the Attorney General's Office has handled the appeal in the Court of Appeals, we will continue to do so in the Supreme Court. If the petition was not granted in the Court of Appeals, the Commonwealth's Attorney will oppose the petition for appeal in the Supreme Court of Virginia, and the Attorney General will become involved only if the petition is granted.

The appellant's attorney will have the opportunity to argue before a panel of three justices of the Supreme Court to try to convince them that the full court should consider the appeal. The other side is not allowed the opportunity to argue orally at this juncture. As in the Court of Appeals, the appellant need only convince one justice that there may be prejudicial error in the judgment in order to get the full court to consider the case.

The procedures of the Supreme Court of Virginia are very much like those of the Court of Appeals, except that, if the petition for appeal is granted, the case is automatically heard by the full court, rather than by a panel of three justices. All oral arguments before the Supreme Court of Virginia are heard in Richmond. We will notify you of the time of oral argument so that you may attend if you are able. After oral argument in the Supreme Court, a decision can usually be expected within approximately six weeks. The Supreme Court has the same range of dispositions available to it as those available to the Court of Appeals, discussed above.

D. Petitions for Certiorari Review in the United States Supreme Court

If an appeal involves a question of federal constitutional law, the losing side can request that the United States Supreme Court review the decision of the Supreme Court of Virginia. In order to do so, a petition for a writ of certiorari must be filed within ninety days after the decision of the Supreme Court of Virginia. In non-capital cases, such petitions are rarely filed. Moreover, cases in which the United States Supreme Court agrees to become involved and review the state court's decision are extremely rare.

HABEAS CORPUS FOR A VIRGINIA NON-CAPITAL CONVICTION

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II. Habeas Corpus Petitions

Another way in which defendants who are in custody because of convictions of crimes frequently try to overturn their convictions is by filing petitions for a writ of habeas corpus. These petitions are civil suits, technically brought against the state official who has custody of the defendant, usually the prison warden or the Director of the Department of Corrections. They can only raise claims that the pretrial, trial, sentencing, or appeal were not properly conducted; they cannot simply claim that the defendant is innocent. The major difference between habeas corpus review and direct appeals is that habeas corpus petitions can and for the most part must raise complaints based on facts which do not appear in the written record of trial. Examples of such claims are allegations of errors by defense counsel or misconduct by the prosecutor in suppressing evidence favorable to the defense or coaching witnesses.

Although such suits are usually not brought until after the direct appeal has been concluded, they are sometimes filed before or during the direct appeal, or even in cases in which no direct appeal has been pursued. Habeas corpus petitions can be filed in either state or federal courts, but federal courts will generally not consider claims that have not previously been considered by the Supreme Court of Virginia, either in a direct appeal or in a state habeas corpus proceeding. In all habeas corpus proceedings, except those brought against a local sheriff by a defendant who has only been sentenced to serve time in the local jail, the Attorney General's Office will represent the state official and the interests of the Commonwealth.

It is the unusual habeas case which results in any relief in favor of the prisoner. Of the ones that do, the most common form of relief is to order only that the prisoner be allowed a new direct appeal.

A. State Habeas Corpus

State habeas petitions in non-capital cases can be filed either in the Supreme Court of Virginia or in the circuit court in which the defendant was convicted. In either case, most such petitions are dismissed based on written legal arguments filed by the Attorney General in the habeas court, without the need of an evidentiary hearing. In some cases, the habeas court will decide that it is necessary to take evidence to decide if the prisoner's claim is valid, and will order an evidentiary hearing. Regardless of whether the habeas petition was filed in the circuit court or the Supreme Court of Virginia, if an evidentiary hearing is necessary, it will be held in the circuit court where the defendant was convicted, usually before the same judge who presided at trial. Such hearings are open to the public, and we will notify you if a hearing is ordered in the case in which you are interested, so that you may attend.

When a circuit court has entered its final judgment disposing of a habeas case, the losing side can petition directly to the Supreme Court of Virginia for an appeal. The appellate procedure in such cases is the same as for a direct appeal in the Supreme Court of Virginia.

If habeas corpus relief is granted, the court can order a new trial if the decision is based on a defect in the pretrial or trial procedure, a new sentencing hearing if the defect was in sentencing, or a new or delayed appeal if the defect was in the appeal. In rare instances, an adverse habeas judgment can order that the conviction be reversed and the charges dismissed.

B. Federal Habeas Corpus Petitions

Federal habeas petitions must be filed in the United States District Court. Such petitions can raise claims of Constitutional defects in the pretrial, trial, sentencing, or appeal procedures, and can challenge the sufficiency of the evidence to support the convictions. Generally, however, the federal courts will not consider any claims which have not previously been considered by the Supreme Court of Virginia, either on direct appeal or in state habeas proceedings. Federal petitions must be filed within one year after the direct appeal has been concluded, but the time during which a state habeas corpus proceeding is pending is not counted in the calculation of this one-year period.

As in state habeas, the Attorney General of Virginia represents the interests of the Commonwealth in federal habeas. We will usually file legal arguments explaining why the case should be dismissed without an evidentiary hearing. Occasionally, an evidentiary hearing will be necessary. Such hearings are held before a federal district court judge. They are open to the public, and we will notify you if a hearing is to be held in the case in which you are interested, so that you may attend if you are able.

The federal courts have the same range of dispositions available to them as do the state courts in habeas review, but in addition, they can reverse and dismiss cases for insufficient evidence. Federal law requires, however, that the federal courts give considerable deference to the earlier decisions of the state courts in rejecting a prisoner's claims, and successful federal habeas petitions are quite rare.

Once the district court has disposed of a habeas case, the losing side can appeal to the United States Court of Appeals for the Fourth Circuit in Richmond. Most such appeals are disposed of in a summary fashion based only on the written arguments filed, but occasionally the Fourth Circuit will order full briefing and oral argument. We will, of course, notify you if that should happen in the case in which you are interested, so that you may attend the oral argument in Richmond if you are able to do so. Appellate proceedings in the Fourth Circuit are conducted much like those in the Court of Appeals of Virginia, with a panel of three judges deciding the case first, and possible reconsideration later by the full court.

When the Fourth Circuit has finished with a federal habeas appeal, the losing side can again petition the United States Supreme Court for certiorari review. As with certiorari after the direct appeal, the Supreme Court rarely agrees to hear and consider such cases.

C. Successive Habeas Petitions

Prisoners serving long sentences often file successive habeas petitions in the state and federal courts, but the law places severe restrictions on the circumstances under which such petitions may even be considered by the courts. This office will continue to represent the interests of the Commonwealth in all such proceedings, and we will try to have the same Assistant Attorney General handle the case whenever that is possible.