H&W's LEGAL NOTES VIRGINIA

A legal publication by:
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New for December 2004

In this "extended" edition of *Legal Notes*, we discuss the recent legislative changes in Virginia, the Blakely v. Washington decision, and the newly-enacted writ of actual innocence based on non-biological material. We have also included *Frequently Asked Questions*, more *Habeas Tips*, and several summaries of significant federal and state court decisions.

Legal Notes is not a monthly newsletter. Our previous edition of *Legal Notes* is dated Jan. 2004, 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 they are published.

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

The Legislative Update in Virginia and the Defeat of Attempts to Change the Time to Serve on Felonies

First, the bad news. Proposals to change the time-to-serve on felony convictions were soundly defeated again this year; most bills never made it to the floor for a "yes" or "no" vote. Additionally, many changes were made to the Virginia Code, but most changes do not have any direct impact on persons who are already serving time. The major exception is the writ of actual innocence based on non-biological material, which is fully addressed within this edition of *Legal Notes*.

The following are significant statutory changes in Virginia:

§ 18.2-12.1 – Defines mandatory minimum punishment to mean that the court shall impose the entire term of confinement, the full amount of the fine and the complete requirement of community service. (Many other sections were modified to reflect the centralization of this language).

§§ 8.01-195.10, 8.01-195.11, and 8.01-195.12 – Provide guidelines for the compensation of persons wrongfully incarcerated based on a certain formula.

§§ 16.1-266, 19.2-159, 19.2-163.7, 19.2-163.8 and 53.1-124 amended – Indigent Defense Commission established and made responsible for the criteria for court-appointed lawyers. The Public Defender Commission is abolished and all duties are assumed by the Indigent Defense Commission. (Effective 7/1/05)

§ 18.2-32.2 – Adds crime of feticide for the killing of the fetus of another. A malicious, premeditated killing is a Class 2 felony and malicious killing is punishable by not less than five nor more than 40 years.

§§ 18.2-46.1, 18.2-46.3, 18.2-460, and 19.2-215.1 amended; §§ 18.2-46.3:1 and 18.2-46.3:2 added. Adds a variety of crimes related to the recruitment of juveniles for criminal street gangs, allows for forfeiture of property used in connection with gang-related crimes, and adds gang-related activity to those that can be investigated by a multi-jurisdictional grand jury.

§ 18.2-308.2 – Amended to include possession or transportation of explosives by convicted felon among those items prohibited from those convicted of a felony (e.g. dynamite, gun powder, blasting caps, etc.).

§ 19.2-265.1 – Amends the rule requiring exclusion of witnesses in criminal trials to exempt any victim unless the presence of the victim would cause impairment of the conduct of a fair trial.

§ 19.2-256.4 – Amends the statute to permit discovery in misdemeanor cases tried in circuit court.

§ 53.1-116 – Amends the provisions governing jails and good-time policies for those convicted of misdemeanors to require written policies by the jailer

for each jail concerning programs such as work assignments, participation in classes and work force programs. (The amendments do not change the rate of good time earned for misdemeanors and do not change the prohibition of the earning of good time credit for convicted felons beyond that authorized in 53.1-202.1 et seq.)

Note: The provision passed by the 2003 General Assembly extending the time in which a criminal case remains under the control of the circuit court from 21 days to 90 days was repealed. The 21-day rule remains in effect for all Virginia criminal cases.

The U. S. Supreme Court's Decision to Strike down Sentencing Guidelines Has No Application in Virginia

The recent decision in Blakely v. Washington, 124 S. Ct. 2531 (2004), has no application to Virginia state cases because sentencing guidelines in Virginia are discretionary, not mandatory. On June 24, 2003, the United States Supreme Court issued an opinion in Blakely that overturned an enhanced sentence from the state of Washington because the jury had not made determinations of fact that were later used as the basis for an enhancement in mandatory sentencing guidelines. This case called into question the validity of certain aspects of a variety of state and federal *mandatory* sentencing guidelines.

However, Blakely does not apply to Virginia cases. **Guidelines in Virginia are discretionary.** The Virginia statute goes further and declares that 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).

As for Blakely's impact on the federal system, most federal courts agree that the rule in Blakely is not retroactive, but courts disagree whether Blakely made certain aspects of the federal sentencing guidelines unconstitutional. Currently, there are two cases on the accelerated docket before the U.S. Supreme Court that should address some of the questions that remain following the Blakely opinion. Decisions in these cases are not expected until early 2005.

Frequently Asked Questions (FAQs)

These are still the top 3 FAQs:

Q: *Can an inmate in the DOC 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 has been transferred to the Virginia D.O.C.

Q: *Is there a remedy for a court's failure to follow Va. 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); see also discussion on Blakely herein.

Q: *Is it true that the 85% rule (a.k.a. "new law") has changed or is changing soon in Virginia?*
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 report them.

Habeas Tips

Habeas Tips #1 - #5: Please refer to *Legal Notes* from January 2004 for the full "Habeas Tips" #1 through #5. Here is a quick recap. ***#1*** - Always know and meet the deadlines! The calculation might be complicated, so, when in doubt, file early. ***#2*** - Include all possible claims in first petition. ***#3*** - Raise almost all due process claims also as claims for ineffective assistance of counsel for failure to raise the issue at trial and on appeal. ***#4*** - Appeal is required of habeas case from the circuit court to the Virginia Supreme Court. ***#5*** - The few possible exceptions in federal court to claims that are otherwise procedurally barred.

Habeas Tip #4 - Expanded - If the initial habeas petition is filed in the circuit court and is dismissed, the appeal must be filed in the Virginia Supreme Court. It has come to our attention that many habeas appeals are being dismissed by the Virginia Supreme Court for failure to comply with the 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. Therefore, study the Rules of the Virginia Supreme Court when appealing from the trial court, and pay particular attention to Rule 5:9 (requiring the filing of the notice of appeal in the circuit court within 30 days of the entry of the final order), 5:17(a)(1) (requiring the filing of the petition for appeal in the Virginia Supreme Court within 3 months of the date of the entry of the final order), and 5:17(c) (requiring "Assignments of Error" which is a list of the specific errors in the rulings below and which must be more than mere statements that the judgment is contrary to the law or the evidence).

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). Also, please keep in mind that the details ***must*** be included when filing the initial habeas petition. Dorsey v. Angelone, 261 Va. 601, 604, 544 S.E.2d 350, 352 (2001).

NEW LAW IN VIRGINIA - The Writ of Actual Innocence Based On Non-Biological Evidence

The Virginia legislature has now expanded the writ of actual innocence to allow claims which are based on new evidence other than new DNA testing. **But be extremely careful. You only get to file one time**, so make sure you have put together the best petition possible. Because there is no time limit, you should do everything you can to collect affidavits and other evidence before filing.

Some keys points in the statutes are that **(1)** the writ is not available if the defendant entered a guilty plea, including "no contest" pleas or Alford pleas; **(2)** the writ is not available based on evidence that could have been discovered before the convictions became final (21 days after final order, which is usually the sentencing order); **(3)** the petition should be filed on the form provided by the Virginia Supreme Court (but you actually need to get the form from the Virginia Court of Appeals); **(4)** you must meet the statutory requirements, including service on the prosecutor and Attorney General's office; and **(5)** the standard is very demanding in that you must show that "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 could have found proof of guilt beyond a reasonable doubt." Va. Code 19.2-327.11(A)(vii) and 19.2-327.13.

As a courtesy, we have included the new statutes below (in bold but small print), but be sure to read the notes from us immediately following the statutes.

CODE OF VIRGINIA
TITLE 19.2. CRIMINAL PROCEDURE
CHAPTER 19.3.
ISSUANCE OF WRIT OF ACTUAL INNOCENCE BASED ON NONBIOLOGICAL EVIDENCE
(Current as of July 1, 2004)

§ 19.2-327.10. Issuance of writ of actual innocence based on nonbiological evidence

Notwithstanding any other provision of law or rule of court, upon a petition of a person who was convicted of a felony upon a plea of not guilty, the Court of Appeals shall have the authority to issue writs of actual innocence under this chapter. Only one such writ based upon such conviction may be filed by a petitioner. The writ shall lie to the court that entered the conviction; and that court shall have the authority to conduct hearings, as provided for in this chapter, on such a petition as directed by order from the Court of Appeals. In accordance with §§ 17.1-411 and 19.2-317, either party may appeal a final decision of the Court of Appeals to the Supreme Court of Virginia. Upon an appeal from the Court of Appeals, the Supreme Court of Virginia shall have the authority to issue writs in accordance with the provisions of this chapter.

§ 19.2-327.11. Contents and form of the petition based on previously unknown or unavailable evidence of actual innocence

A. The petitioner shall allege categorically and with specificity, under oath, all of the following: (i) the crime for which the petitioner was convicted, and that such conviction was upon a plea

of not guilty; (ii) that the petitioner is actually innocent of the crime for which he was convicted; (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 to the petitioner or his trial attorney of record at the time the conviction became final in the circuit court; (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 by the 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 could have found proof of guilt beyond a reasonable doubt; and (viii) the previously unknown or unavailable evidence is not merely cumulative, corroborative or collateral. Nothing in this chapter shall constitute grounds to delay setting an execution date pursuant to § 53.1-232.1 or to grant a stay of execution that has been set pursuant to clause (iii) or clause (iv) of § 53.1-232.1 or to delay or stay any other post-conviction appeals or petitions to any court. Human biological evidence may not be used as the sole basis for seeking relief under this writ but may be used in conjunction with other evidence.

B. Such petition shall contain all relevant allegations of facts that are known to the petitioner at the time of filing, shall be accompanied by all relevant documents, affidavits and test results, and shall enumerate and include all relevant previous records, applications, petitions, appeals and their dispositions. The petition shall be filed on a form provided by the Supreme Court. If the petitioner fails to submit a completed form, the Court of Appeals may dismiss the petition or return the petition to the petitioner pending the completion of such form. Any false statement in the petition, if such statement is knowingly or willfully made, shall be a ground for prosecution of perjury as provided for in § 18.2-434.

C. In cases brought by counsel for the petitioner, the Court of Appeals shall not accept the petition unless it is accompanied by a duly executed return of service in the form of a verification that a copy of the petition and all attachments have been served on the attorney for the Commonwealth of the jurisdiction where the conviction occurred and the Attorney General, or an acceptance of service signed by these officials, or any combination thereof. In cases brought by petitioners pro se, the Court of Appeals shall not accept the petition unless it is accompanied by a certificate that a copy of the petition and all attachments have been sent, by certified mail, to the attorney for the Commonwealth of the jurisdiction where the conviction occurred and the Attorney General. If the Court of Appeals does not summarily dismiss the petition, it shall so notify in writing the Attorney General, the attorney for the Commonwealth, and the petitioner. The Attorney General shall have 60 days after receipt of such notice in which to file a response to the petition that may be extended for good cause shown; however, nothing shall prevent the Attorney General from filing an earlier response. The response may contain a proffer of any evidence pertaining to the guilt of the petitioner that is not included in the record of the case, including evidence that was suppressed at trial.

D. The Court of Appeals may inspect the record of any trial or appellate court action, and the Court may, in any case, award a writ of certiorari to the clerk of the respective court below, and have brought before the Court the whole record or any part of any record. If, in the judgment of the Court, the petition fails to state a claim, or if the assertions of previously unknown or unavailable evidence, even if true, would fail to qualify for the granting of relief under this chapter, the Court may dismiss the petition summarily, without any hearing or a response from the Attorney General.

E. In any petition filed pursuant to this chapter that is not summarily dismissed, the defendant is entitled to representation by counsel subject to the provisions of Article 3 (§ 19.2-157 et seq.) and Article 4 (§ 19.2-163.1 et seq.) of Chapter 10 of this title. The Court of Appeals may, in its discretion, appoint counsel prior to deciding whether a petition should be summarily dismissed.

§ 19.2-327.12. Determination by Court of Appeals for findings of fact by the circuit court

If the Court of Appeals determines from the petition, from any hearing on the petition, from a review of the records of the case, or from any response from the Attorney General that a resolution of the case requires further development of the facts, the court may order the circuit court in which the order of conviction was originally entered to conduct a hearing within 90 days after the order has been issued to certify findings of fact with respect to such issues as the Court of Appeals shall direct. The record and certified findings of fact of the circuit court shall be filed in the Court of Appeals within 30 days after the hearing is concluded. The petitioner or his attorney of record, the attorney for the Commonwealth and the Attorney General shall be served a copy of the order stating the specific purpose and evidence for which the hearing has been ordered.

§ 19.2-327.13. Relief under writ

Upon consideration of the petition, the response by the Commonwealth, previous records of the case, the record of any hearing held under this chapter and, if applicable, any findings certified from the circuit court pursuant to an order issued under this chapter, the Court of Appeals, if it has not already summarily dismissed the petition, shall either dismiss the petition for failure to state a claim or assert grounds upon which relief shall be granted; or the Court shall (i) dismiss the petition for failure to establish previously unknown or unavailable evidence sufficient to justify the issuance of the writ, or (ii) only upon a finding that the petitioner has proven by clear and convincing evidence all of the allegations contained in clauses (iv) through (viii) of subsection A of § 19.2-327.11, and upon a finding that no rational trier of fact could have found proof of guilt beyond a reasonable doubt, grant the writ, and vacate the conviction, or in the event that the Court finds that no rational trier of fact could have found sufficient evidence beyond a reasonable doubt as to one or more elements of the offense for which the petitioner was convicted, but the Court finds that there remains in the original trial record evidence sufficient to find the petitioner guilty beyond a reasonable doubt of a lesser included offense, the court shall modify the order of conviction accordingly and remand the case to the circuit court for resentencing. The burden of proof in a proceeding brought pursuant to this chapter shall be upon the convicted person seeking relief.

§ 19.2-327.14. Claims of relief

An action under this chapter or the actions of any attorney representing the petitioner under this chapter shall not form the basis for relief in any habeas corpus proceeding. Nothing in this chapter shall create any cause of action for damages against the Commonwealth or any of its political subdivisions.

Notes from Hargett & Watson regarding the statutes set forth above:

We have included several reported decisions from the Virginia courts denying petitions for writs of actual innocence under the **Recent Decisions** below. These cases demonstrate the importance of meeting all of the filing requirements.

Anyone may obtain the forms necessary for filing a petition for a writ of actual innocence based on non-biological evidence by requesting the forms from the **Virginia Court of Appeals, 109 North Eighth Street, Richmond, VA 23219-2321**.

Recent Decisions:

United States Supreme Court Decisions:

● Crawford v. Washington, 541 U.S. 36 (March 8, 2004). Admission of a testimonial statement made by defendant's wife during police interrogation violated the Confrontation Clause. Where testimonial statements are at issue, the only indication of reliability sufficient to satisfy constitutional demands is confrontation.

● Banks v. Dretke, 540 U.S. 668 (Feb. 24, 2004). When police or prosecutors conceal significant exculpatory or impeaching material in the State's possession, e.g., by withholding evidence that would have allowed a defendant to discredit essential prosecution witnesses, it is ordinarily incumbent on the State to set the record straight. The Fifth Circuit erred in dismissing death row inmate's Brady claim with respect to one such witness, and in denying him a certificate of appealability with respect to another.

● United States v. Patane, 124 S. Ct. 2620 (June 28, 2004). The failure to give a suspect full Miranda warnings does not require the suppression of the physical fruits of the suspect's unwarned, voluntary statements.

● Missouri v. Seibert, 124 S. Ct. 2601 (June 28, 2004). Where an officer intentionally withheld Miranda warnings, obtained a confession, then issued Miranda warnings and elicited a second confession, the U.S. Supreme Court found that both confessions were inadmissible as violating the defendant's Fifth Amendment rights.

● Dretke v. Haley, 124 S. Ct. 1847 (May 3, 2004). The U.S. Supreme Court declined to decide whether the actual innocence exception extends to noncapital sentencing errors.

● Pliler v. Ford, 124 S. Ct. 2441 (June 21, 2004). A district court is not required to warn a *pro se* habeas petitioner that it could not consider motions to stay unless plaintiff dismissed unexhausted claims, or that if he chose to dismiss the claims, they would be time-barred if raised in the future.

● Yarborough v. Alvarado, 124 S. Ct. 2140 (June 1, 2004). In reversing the granting of habeas relief, the U.S. Supreme Court held that, while it was arguable whether the inmate was in custody during the interrogation, the state court's determination that the inmate was not in custody was based on a proper application of Supreme Court precedent. The state court's failure to consider the inmate's subjective characteristics, such as his age and inexperience, was not an unreasonable application of clearly established federal law.

● Baldwin v. Reese, 541 U.S. 27 (March 2, 2004). A state prisoner ordinarily does not "fairly present" a federal claim to a state court if that court must read beyond a petition, a brief, or similar papers to find material, such as a lower court opinion in the case, that will alert it to the presence of such a claim. Accordingly, the prisoner seeking habeas relief in the instant case failed to exhaust available state remedies.

● Groh v. Ramirez, 540 U.S. 551 (Feb. 24, 2004). The search of plaintiffs' ranch was clearly unreasonable under the Fourth Amendment. The warrant was plainly invalid, failing to describe with particularity the items to be seized; because it did not describe these items at all, the search was presumptively unreasonable; defendant, who prepared and executed the warrant, is not entitled to qualified immunity because no reasonable officer could believe such a warrant to be valid.

Federal Court of Appeals Decisions:

● United States v. White, 366 F.3d 291 (4th Cir. May 4, 2004). Habeas petitioner was granted an evidentiary hearing to determine if his plea agreement should be reformed to allow an appeal of a suppression issue. Trial counsel was ineffective for advising petitioner that he could appeal. Nothing in the colloquy alerted the inmate to disregard his counsel's representation concerning the inmate's appellate rights.

● James v. Harrison, 389 F.3d 450 (4th Cir. Nov. 17, 2004). Denial of plaintiff's writ of habeas corpus is affirmed over his

challenge that he was denied effective assistance of counsel when his attorneys failed to appear during voir dire and jury selection.

●U.S. v. Rogers, 387 F.3d 925 (7th Cir. Nov. 5, 2004). Defendant's drug conviction is reversed where the in-court identification by a witness was unduly suggestive and improperly admitted into evidence.

●United States v. Rodriguez-Marrero, 01-1647 (1st Cir. Nov. 5, 2004). Defendant's conviction for conspiracy to commit murder is reversed where the district court erred in admitting testimonial hearsay against him in violation of Crawford v. Washington, 124 S.Ct. 1354 (2004).

●Davis v. Lambert, 388 F.3d 1052 (7th Cir. Nov. 4, 2004) Denial of defendant's habeas petition is reversed where defendant has satisfied the requirements for an evidentiary hearing, and his case cannot be properly reviewed without more detailed information.

●Gibbs v. Frank, 387 F.3d 268 (3rd Cir. Oct. 14, 2004). Habeas relief is granted where petitioner's 5th Amendment privilege against self-incrimination was violated when psychiatric testimony relating incriminating statements made by petitioner was introduced during his retrial.

●Virginia Dep't of State Police v. The Washington Post, 386 F.3d 567 (4th Cir. Oct. 1, 2004). The district court properly decided to unseal certain documents related to police department's criminal investigation of a murder where the release of the documents would not affect the integrity of the investigation.

●Miller v. Webb, 385 F.3d 666 (6th Cir. Sept. 22, 2004). Defendant's conviction for murder is reversed where his counsel's performance was objectively unreasonable and the impaneling of a biased juror prejudiced defendant.

●U.S. v Roane, 378 F.3d 382 (4th Cir. Aug. 9, 2004). District court's grant of habeas corpus relief to defendant on his claim of ineffective assistance of counsel, vacating his conviction for murder, is reversed where defense counsel's representation was not constitutionally unreasonable.

●Soffar v. Dretke, 368 F.3d 441 (5th Cir. 2004). In a capital murder case, court granted defendant's habeas petition based on ineffective assistance of counsel and violations of his right to counsel during interrogation.

●Bigelow v. Williams, 367 F.3d 562 (6th Cir. May 10, 2004). Remanded to the district court to determine whether habeas relief should be granted given defense counsel's failure to conduct any additional investigation after the sudden appearance of an alibi witness four days before trial.

●Harris v. Cotton, 365 F.3d 552 (7th Cir. April 2, 2004). Given that the defense to the murder charge was self-defense, the victim's behavior was of critical importance, and counsel's failure to obtain the toxicology report, which showed that the victim was drunk and cocaine-high, requires habeas relief.

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

●In re Walker, 44 Va. App. 12, 602 S.E.2d 407 (2004). Petition for writ of actual innocence dismissed as two psychological reports upon which petitioner bases his claim were known to and provided to petitioner's trial attorney at the time convictions became final in the trial court.

●In re Wilson, 44 Va. App. 13, 602 S.E.2d 408 (2004). Petition for writ of actual innocence dismissed where documentation accompanying petition indicates that petitioner pled guilty to the charges pursuant to a plea agreement.

●In re Rhodes, 44 Va. App. 14, 602 S.E.2d 408 (2004). Petition for writ of actual innocence dismissed where petitioner's argument pertains to the legal effect to his case of one of this Court's opinions issued subsequent to his conviction rather than previously unknown or unavailable non-biological evidence.

●In re Neal, 44 Va. App. 89, 603 S.E.2d 170 (2004). Petition for writ of actual innocence dismissed where legal arguments advanced by petitioner are not "evidence" entitling him to relief under statute and certificate of analysis was not evidence previously unknown or unavailable to petitioner.

●In re Bui, 44 Va. App. 91, 603 S.E.2d 171 (2004). Petition for writ of actual innocence is dismissed where matters presented for consideration were matters that could have been raised on appellate review and petitioner has not demonstrated that no rational trier of fact could have found him guilty.

●In re Newman, 44 Va. App. 146, 603 S.E.2d 654 (2004). Petition for writ of actual innocence is dismissed where civil adjudication as an habitual offender does not qualify under statute as a felony conviction and petitioner's argument

challenging validity of statutes leading to his adjudication is not evidence justifying relief.

●In re Adams, 604 S.E.2d 746 (2004). Petition for writ of actual innocence is dismissed where petitioner has proffered no evidence that was previously unknown or unavailable as required by Code § 19.2-327.11.

●In re Barron, Va. App. Record No. 1916-04-2 (2004). Petition for a writ of actual innocence dismissed where petitioner did not prove by clear and convincing evidence that "the previously unknown or unavailable evidence is not merely cumulative, corroborative or collateral."

●In re Joshua, Va. App. Record No. 2690-04-1 (2004). Petition for writ of actual innocence dismissed where petitioner alleges DNA testing of destroyed swab would prove his innocence as "human biological evidence may not be used as the sole basis for seeking relief."

●In re Lima, Va. App. Record No. 2710-24-4 (2004). Petition for writ of actual innocence dismissed as petitioner did not proffer evidence that was previously unknown or unavailable as required by Code Section 19.2-327.11.

Other Important Virginia Decisions:

●Bowman v. Washington, Va. Supreme Ct. Record No. 040213 (2004). In an appeal handled by HARGETT & WATSON, PLC, the Virginia Supreme Court rules that upon finding that a habeas petitioner is entitled to a belated appeal, the trial court must dismiss the remaining claims *without prejudice* so that the petitioner may pursue the belated appeal.

●Peyton v. Commonwealth, 604 S.E.2d 17 (2004). The trial court abused its discretion in revoking the suspended sentence of a defendant who had been placed in an alternative sentencing program pursuant to Code § 19.2-316.2 and who was unable to complete that program due to an unforeseen medical condition. Such inability cannot reasonably be considered willful behavior on defendant's part.

●Billups v. Carter, 268 Va. 701, 604 S.E.2d 414 (2004). In two related actions under 42 U.S.C. § 1983 alleging assault and battery by a prison employee who demanded unconsented sexual conduct, the trial court erred in sustaining the defendants' demurrers, pleas and motions to dismiss, dismissing the actions on statute of limitations and exhaustion of administrative remedies grounds, and denying a plaintiff's motion to add the Commonwealth as a party defendant. The final orders in both cases are reversed and the cases are remanded to the trial court for further proceedings.

●Riner v. Commonwealth, 268 Va. 296, 601 S.E.2d 555 (2004) (4-to-3 decision). On appeal, Riner asserted that the trial court erred in admitting a witness' testimony about his threat to kill the victim because the testimony contained double hearsay. The Virginia Supreme Court agreed that testimony contained double hearsay but found that Riner's attorney failed to renew his objection after the trial court ruled on the first level of hearsay only. The dissent opined that the attorney had properly objected at first and did not need to re-object.

●Barrett v. Commonwealth, 268 Va. 170, 597 S.E.2d 104 (2004). In another case handled by HARGETT & WATSON, PLC, the Virginia Supreme Court upheld a conviction based on a new indictment brought following an appeal and reversal of earlier criminal charges against the defendant. The court reasoned that there was insufficient evidence of actual vindictiveness, nor did a presumption of vindictiveness apply, where the new indictment was brought based on a new examination of the evidence and the new charge concerned a different victim than the original charges.

●Lenz v. Warden of the Sussex I State Prison, 267 Va. 318, 593 S.E.2d 292 (2004). On rehearing, the Virginia Supreme Court concluded that trial counsel were not ineffective in failing to object to a verdict form in the sentencing phase of petitioner's capital murder trial.

●Jerman v. Director Dept. of Corrections, 267 Va. 432, 593 S.E.2d 255(2004). In another case handled by HARGETT & WATSON, PLC, the Virginia Supreme Court denied the habeas claims alleging ineffective counsel with regard to the petitioner's conviction for abduction and ruled that there was not a reasonable probability of a different outcome.

●Jaccard v. Commonwealth, 268 Va. 56, 597 S.E.2d 30 (2004). Overturning precedent from the Virginia Court of Appeals, the Virginia Supreme Court held that a probation revocation was not part of the record of a defendant's prior criminal convictions for the purpose of introduction during the penalty phase of a bifurcated criminal jury trial; therefore, the sentence imposed was vacated and the case was remanded for new sentencing.

●Hudgins v. Commonwealth, 43 Va. App. 219, 597 S.E.2d 221 (2004) (en banc). Following an acquittal of robbery, the Commonwealth sought to prosecute the defendant with larceny from the person. Based upon principles of double

jeopardy, the charge was dismissed. The court held that larceny from the person, whether grand or petit, was a lesser-included offense of robbery, and to the extent that Graves v. Commonwealth, 21 Va. App. 161, 462 S.E.2d 902 (1995), was inconsistent with this holding, it was overruled.

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, who is working part-time and staying home with her new-born child. Good luck Michelle! We welcome our newest assistant, Pam Hash, 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.

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

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