

A legal publication by:

HARGETT & WATSON, PLC - Attorneys and Counselors at Law

7 South Adams Street, Richmond, VA 23220 - Office Telephone (804) 788-1956 - on the web: www.hargettwatson.com

KNOW THE LAW AND EXERCISE YOUR RIGHTS

MAY 2003

New for May 2003

In this edition of *Legal Notes*, we address the fate of several bills considered by the General Assembly this year in our Legislative Update, and we have added three new sections: *In the News*, *Frequently Asked Questions*, and *Habeas Tips*.

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

In the News

Beverly A. Monroe: The Fourth Circuit Court of Appeals, regarded by many as the most conservative court in the country, has recently affirmed the habeas relief granted by the Richmond federal district court. (See *Recent Decisions* herein). The Attorney General's Office has decided not to appeal further, and the Commonwealth's Attorney in Powhatan is still deciding whether to try the case again or dismiss the charges. In *Monroe*, the prosecution withheld many different types of evidence which would have been highly favorable to the defense.

Julius E. Ruffin: While serving five life sentences, Ruffin was recently cleared by new DNA testing in a case out of Norfolk, Va. The victim in the case said she was 100% sure that Ruffin was the one who assaulted her. The Ruffin case demonstrates the widespread problem of mistaken eyewitness identification, which is the leading cause for convictions of innocent persons.

Marvin L. Anderson: Misidentification and misconduct combined in the case of Anderson, who spent 15 years in prison for the brutal rape of a woman in Hanover County, Va. The real perpetrator, Lincoln, was in the photo spread shown to the victim, but she picked Anderson instead. As it turned out, Anderson's defense attorney had also represented

Lincoln and was aware that he might be blamed for the crime. According to reports, the defense attorney never told Anderson of the conflict of interest.

More Prisons: Apparently, Virginia is currently considering proposals by private companies to build more prisons. State projections call for an additional 2,000 or 3,000 prison beds in the next three years. The current prison population in Virginia is approximately 31,000 inmates.

Legislative Update

Failed - Writ of actual innocence based on previously unknown evidence. This would have allowed a convicted and incarcerated individual to petition the Supreme Court for a writ of actual innocence based upon any new evidence, not just DNA. (SB89, SB705, SB1912, HB2787).

Passed - Change 21-day rule to a 90-day rule. Provides that final judgments in circuit court criminal cases remain under the control of the circuit court for 90 days rather than the current 21 days. The filing deadlines for appeals and the transfer of the trial record to the Court of Appeals are proportionately increased to maintain consistency with current practice. This law will be effective July 1, 2004. (Adding Va. Code § 19.2-327.01).

Passed - Notice of release on parole. Requires the Parole Board to notify the attorney for the Commonwealth in the jurisdiction where the inmate was sentenced, and the notification must be by certified mail at least 21 business days prior to release on discretionary parole of any inmate convicted of a felony and sentenced to a term of 10 or more years. Currently, the Board is required to notify of release for any type of parole, not solely discretionary parole. (Amending Va. Code § 53.1-136).

Passed - Limited exception to the 85% rule. Permits the Department of Corrections to give prisoners who have not been convicted of a violent crime and who have been sentenced to serve a term of imprisonment of at least three years the opportunity to participate in residential community programs, work release, or community-based programs approved by the Secretary of Public Safety within six months of such prisoner's projected or mandatory release date. (Adding Va. Code § 53.1-155.1).

Passed - Jail Policies. Provides that jailers shall keep a written policy stating the criteria and condition of earned credit in the facility; clarifies the rate for earning good conduct credit for prisoners convicted of misdemeanors; and provides that in order for a prisoner to work on certain properties on a voluntary basis (in order to receive credit on his sentence for the work done), orders must be specific for identified individual prisoners. (Amending Va. Code §§ 53.1-116 and 53.1-129).

Failed - Good Conduct Allowance of 15/30. Would have provided for good conduct allowance, up to a 50% credit, for prisoners serving under the "new law," (for offenses committed on or after Jan. 1, 1995). GCA level I would have been available for those prisoners with exemplary behavior who meet literacy requirements. This bill failed by a large margin in both the House and Senate. (SB1254, HB2293).

The Va. General Assembly Says "Nay" to Proposed Rule Change for New Trial

The General Assembly has rejected the rule change proposed by the Va. Supreme Court which would have permitted a "motion for a new trial based upon newly discovered evidence" to be brought within a reasonable time after discovery. The rule proposed by the Court would have provided an opportunity for innocent inmates to prove their innocence. Currently, the only available avenue for actually innocent persons who have exhausted appellate and habeas remedies is to file a clemency petition with the Governor's office.

The General Assembly made a change in the 21-day rule by extending it to 90 days, but the new law will not go into effect until July 1, 2004. Fortunately,

several powerful lawmakers support the idea of making sure that those who are falsely convicted have an avenue to return their case to court; however, differences of opinion among lawmakers have left the outcome of any new rule uncertain. A variety of proposals are currently being studied by a task force of the Virginia State Crime Commission, which is chaired by Sen. Kenneth Stolle (R-Virginia Beach).

The difficulties in designing a new procedure include budgetary concerns, because every new procedure costs money by tying up additional resources, especially if an appellate procedure is permitted as well. Regardless of the difficulties, the biggest issue likely will be the appropriate burden of proof. The proposed rule change from the Virginia Supreme Court required "clear and convincing" proof, while some lawmakers are seeking a "no reasonable jurist" standard.

Ideally, the legislators will agree that there should be no time limit on presenting the after-discovered evidence and no limit on the types of evidence allowed. In other words, if a main "eyewitness" recants and admits that the inmate did not do the crime, that inmate should be able to seek a new trial based on the recantation.

Frequently Asked Questions (FAQs)

Q: *Can a DOC inmate get a sentence reduction?*

A: No. Va. Code § 19.2-303 removes a court's jurisdiction to modify or reduce a sentence after transfer to the Va. DOC.

Q: *What is the remedy for a court's failure to follow Va. sentencing guidelines?*

A: There is none. 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: *Can any person file for a writ of actual innocence or request a new trial?*

A: No. Currently, only new DNA testing can serve as the basis for a writ of actual innocence, and the General Assembly has rejected the Virginia Supreme

Court's proposed rule change for new trial based upon new non-DNA evidence.

Q: What can a prisoner do if he or she is actually innocent but beyond the direct appeals and habeas options?

A: Without new DNA testing, such a prisoner has no legal options. Instead, only a pardon (grant of clemency) from the Governor's office is available, and clemency petitions are rarely granted.

Q: Why is the Parole Board still running behind schedule and failing to notify inmates on a timely basis?

A: Don't know. The Board continues to suffer from a variety of inefficiencies, and, even worse, the Board seems determined to keep release percentages very low.

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

A: No. (See also the Legislative Update herein).

Habeas Tips

Habeas Tip #1. "Deadlines!" You must know them for both state and federal filings. An error might be fatal, even if not the fault of the inmate. The exceptions are narrow and rarely apply. (See Va. Code § 8.01-654, and the federal law, 28 U.S.C. § 2244(d)).

Habeas Tip #2. Delayed appeals can be obtained through a habeas petition, but the first habeas petition *must include all known issues*, not just a request for a delayed appeal. (See Dorsey v. Angelone, 261 Va. 601, 544 S.E.2d 350 (2001)).

Habeas Tip #3. Most claims involving due process or fair trial violations (and similar type claims) will fail if the issues could have been raised at trial and on appeal by the defense attorney; therefore, habeas petitioners should raise "parallel" claims of ineffective assistance of counsel and assert that defense counsel failed to raise the issue at trial and on appeal. (See Slayton v. Parrigan, 215 Va. 27, 205 S.E.2d 680 (1974)).

Recent Decisions:

Virginia Cases:

● Friedline v. Commonwealth, 265 Va. 273 (2003). Va. Code 8.01-654(B)(4) does not require a court to hold an evidentiary hearing in every case in which the trial counsel

did not submit an affidavit explaining his conduct. Rather, where the record afforded a sufficient basis to determine the merits of a petition, an evidentiary hearing was not required.

● In re: Commonwealth's Attorney for the City of Roanoke, 265 Va. 313 (2003). The Virginia Supreme Court refused to hold that a circuit court judge does not have discretion to take criminal matters under advisement.

● Patterson v. Commonwealth, 39 Va. App. 658 (2003). The trial court erred in refusing to strike a prospective juror for cause because of his long association with the sheriff's department, his conversation with members of that department concerning the specific case, and his initial concern about his impartiality.

● Hudson v. Commonwealth, 39 Va. App. 240 (2002). Agreeing to a proposed trial date beyond the statutory speedy trial deadline is a waiver of statutory speedy trial rights under the relevant statute, Va. Code § 19.2-243(4).

● Bradbury v. Commonwealth, 40 Va. App. 176 (2003). The trial court erred in refusing to strike a juror for cause in a rape trial where the juror indicated that she felt that a defendant would have to prove that the accuser consented, even though the law was at odds with that belief.

● Jackson v. Commonwealth, 579 S.E.2d 375 (Va. App. 2003) (en banc). Circuit court abused its discretion in failing to recuse itself from a revocation proceeding where the judge in the proceeding was the elected Commonwealth's Attorney at the time of the original offense and trial, and the court's failure to recuse necessarily resulted in a situation seriously undermining the integrity of the judicial system.

Federal Decisions:

● Monroe v. Angelone, 323 F.3d 286 (4th Cir. 2003). Where the prosecution failed to disclose material exculpatory and impeachment evidence and there is a reasonable probability that petitioner would not have been convicted of first-degree murder had the habeas evidence been properly disclosed, the district court's award of habeas relief is affirmed.

● U.S. v. Brown, 326 F.3d 1143 (10th Cir. 2003). Psychological or psychiatric evidence that negates the essential element of specific intent can be admissible. The admission of such evidence will depend upon whether the defendant demonstrates how such evidence would negate

intent rather than “merely present a dangerously confusing theory of defense more akin to justification and excuse.”

● Wade v. Robinson, 327 F.3d 328 (4th Cir. 2003). When filing a federal habeas petition, any “person in custody pursuant to the judgment of a State court,” including an inmate serving time on a parole revocation, is subject to a 1-year period of limitation that runs from the date of the alleged constitutional violation.

● In Re: Fowlkes, 326 F.3d 542 (4th Cir. 2003). Motion for authorization of successive federal habeas petition was denied as claims had been raised, considered, and decided in previous proceedings. Evidence of ineffective counsel could have been discovered earlier through due diligence.

● Smith v. Doe, 123 S. Ct. 1140 (2003). Statute requiring convicted sex offenders to register with state was not *ex post facto* law since statute was intended as non-punitive civil means of protecting the public, and adverse effects to offenders did not render statute effectively punitive.

● Whitley v. Senkowski, 317 F.3d 223 (2nd Cir. 2003). A federal habeas case that was denied as time-barred is remanded for determination of whether the petitioner has presented a credible claim of actual innocence.

● Channer v. Brooks, 320 F.3d 188 (2nd Cir. 2003). Even where the state's eyewitnesses recanted their trial testimony, the denial of a federal habeas petition is affirmed because the state court's legal conclusions were consistent with federal law, its factual findings at the post-conviction hearing were reasonable, and all material facts were developed during the course of that proceeding.

● Robertson v. Cain, 324 F.3d 297 (5th Cir. 2003). AEDPA's restrictions on federal review of state habeas decisions do not alter the *Brecht v. Abrahamson*, 507 U.S. 619 (1993), mandate for harmless error analysis by federal courts when state courts have failed to address the harmless-error question.

● Brown v. Shannon, 322 F.3d 768 (3rd Cir. 2003). An attorney's withdrawal of representation after failing to file a federal habeas petition did not warrant equitable tolling of the statutory limitation period under 28 U.S.C. § 2244(d)(2).

● Cook v. McKune, 323 F.3d 825 (10th Cir. 2003). In a murder case, petitioner was entitled to habeas corpus relief where the State failed to make a good-faith effort to secure

the testimony of the only witness who had previously testified that petitioner was the shooter.

About *Legal Notes*

Legal Notes is intended to provide basic information regarding important issues in criminal law. Legal proceedings can be very complex. It is advisable to seek the assistance of counsel whenever possible, and *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--the founding members 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 staff: Michelle Apple, Mike West, and Kim Hargett. 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 or a response. 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:

HARGETT & WATSON, PLC

Attorneys and Counselors at Law

7 South Adams Street

Richmond, VA 23220

Office Phone: (804) 788-1956

Facsimile: (804) 788-1982

Web Site: www.hargettwatson.com

E-Mail: DavidHargett@hargettwatson.com

ToddWatson@hargettwatson.com