H&W's LEGAL NOTES VIRGINIA

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 NOV. 2002

New for November 2002

Legal Notes by HARGETT & WATSON have continued to receive positive responses from the public, and we appreciate the numerous letters, e-mails, and telephone calls that we have received over the years. We also greatly appreciate the extreme patience demonstrated by those who have written.

Please note another change to the Subscription Policy for *Legal Notes*: starting next year, we will no longer require a $5 subscription fee. Our decision is based on the extra paperwork and accounting involved. Any $5 fees paid in advance for next year will be returned, and please contact us if necessary.

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

DNA Update

As reported in the Dec. 2001 and May 2002 editions of *Legal Notes*, a constitutional amendment was proposed which would give the Virginia General Assembly the power to create legislation to address claims of actual innocence by inmates. Thankfully, the constitutional amendment has passed, and the "writ of actual innocence based on new DNA testing" is now law as of November 15, 2002.

The Virginia Supreme Court has implemented a new rule, Rule 5:7B, which establishes the procedure for filing and litigating petitions for a writ of actual innocence. The new rule is available from HARGETT & WATSON upon request, and it should be reviewed, in conjunction with the statutes, by anyone who intends to file the petition based on new DNA testing.

Proposed New Rule 3A:15A Would Allow New Trial Based on Favorable Evidence Discovered *Anytime* After Conviction

In a surprising development, the Virginia Supreme Court has proposed a new rule which would allow a "motion for a new trial based upon newly discovered evidence" to be brought within a reasonable time after discovery. Proposed Rule 3A:15A would be a major change to Virginia's current 21-day rule, which requires, among other things, that motions for a new trial be brought within 21 days of the date of the final order, pursuant to Rule 1:1 of the Va. Supreme Court.

Proposed Rule 3A:15A requires that the defendant prove "by clear and convincing evidence" that the evidence is newly discovered, could not have been discovered before trial, and "should produce opposite results on the merits in another trial." One major problem with the rule as proposed is that the newly discovered evidence could not be "offered solely to discredit or impeach a witness' prior testimony."

It is too soon to tell if the proposed rule will become law, but most proposed rules are approved in some form. Importantly, the proposed rule should apply retroactively to all cases, old and new. Currently, the proposed rule reads as follows:

****caution: the following is a proposed rule****

Proposed Rule 3A:15A. Motion for New Trial Based on Newly Discovered Evidence.

(a) Not withstanding the provisions of Rule 1:1, a defendant may file a motion for a new trial in the circuit court in which the trial was held based on newly discovered evidence at any time after the entry of a final order by the

trial court but the motion must be filed within a reasonable time after the discovery of the evidence. Newly discovered evidence for purposes of this Rule does not include human biological evidence subject to statutes and rules governing procedures for writs of actual innocence.

(b) A motion filed under this Rule must be verified by the defendant and must specifically describe the newly discovered evidence and when such evidence was discovered. The motion must also specifically explain why the newly discovered evidence (i) was not known or available to the movant or the movant's attorney at the time of trial; (ii) could not have been discovered for use at the trial in the exercise of reasonable diligence; (iii) is not merely cumulative, corroborative, or collateral; (iv) is not offered solely to discredit or impeach a witness' prior testimony; and (v) is material, as such as should produce opposite results on the merits in another trial.

(c) If, upon review of the motion, the circuit court determines the motion complies with the requirements of subsection (b) of this Rule, it shall hear and determine the motion within 60 days after the motion is filed. The circuit court may hold an evidentiary hearing. If the court grants a continuance, the continuance may not extend the time of disposition more than 90 days from the date the motion for new trial based on newly discovered evidence was filed.

(d) If a direct appeal from the final order of conviction is pending in the courts of this Commonwealth when a motion under this Rule is filed, the motion shall identify the appellate court and docket number of the appeal. If the trial court determines that the motion complies with the requirements of subsection (b) of this Rule, the clerk of the circuit court shall notify the clerk of the appellate court of the motion. The appellate court, in its discretion, may stay its consideration of the direct appeal of the original conviction pending a final determination on the motion for new trial.

(e) The movant must prove the allegations of his motion by clear and convincing evidence. If the circuit court finds that the movant is not entitled to relief, it shall deny the motion. If the circuit court finds that the movant is entitled to relief and no direct appeal of the original conviction is pending in the courts of this Commonwealth, the circuit court may vacate the judgment and set the matter for a new trial.

(f) The circuit court's order disposing of the motion is a final order and may be appealed in accordance with the provisions applicable to civil appeals. The order shall be suspended while any such appeal is pending.

(g) If a direct appeal of the original conviction is pending in the courts of this Commonwealth at the time the circuit court enters an order disposing of a motion filed under this Rule, the circuit court shall certify its disposition of the motion to the appellate court. The appellate court, in its discretion, may stay further consideration of the direct criminal appeal pending disposition of any appeal of the circuit court's order disposing of the motion.

(h) If an order of the circuit court that the movant is entitled to relief is not appealed or that order has been affirmed on appeal, the appellate court in which the direct appeal of the original conviction is pending shall remand the case to the circuit court for further proceedings.

(i) Circuit and appellate courts shall cooperate in facilitating access to the record of the original conviction when needed in a proceeding conducted pursuant to this rule. **** thus ends the current language of the Proposed Rule 3A:15A of the Rules of the Supreme Court of Virginia****

Parole Update

The parole system is undergoing more changes, and many inmates feel lost or forgotten. The current system is far from perfect, and the Virginia Parole Board is implementing unwritten rules designed to reduce the amount of time the Board spends reviewing individual cases.

The biggest change so far is that the Board will not allow family members or other representatives (including lawyers) to schedule a parole “hearing” (a.k.a. a “Board appointment”) if the inmate’s family, etc., had a hearing the previous year. “Hearings” or “Board appointments” refer to the process whereby the family, etc., meets with one Board member and the inmate is not present. This should be distinguished from the “interview” of the inmate conducted at the prison by a parole examiner.

Inmates will still be “reviewed” each year of eligibility, unless an inmate receives a two or three year deferral. As of yet, no mention has been made regarding the possibility of other significant changes, but the Board has authority to make changes to policy. Also, the statutes in Virginia do not specifically require annual “hearings” for those who are being reviewed. In fact, an inmate is only entitled to minimal due process rights during parole review. This basically

means that an inmate must be"reviewed" each year of eligibility, and the inmate must be informed of the reason(s) for denial. As stated by the Fourth Circuit, "[W]e discern no constitutional requirement that each prisoner receive a personal hearing, have access to his files, or be entitled to call witnesses in his behalf to appear before the Board. These are all matters which are better left to the discretion of the parole authorities." Fanklin v. Shields, 569 F.2d 784 (4th Cir. 1978) (en banc).

At this time, the specific causes for the changes in the parole process in Virginia have not been reported, but budgetary cuts and inefficiencies in the system are likely suspects.

Clemency Authority of the Governor

Many people ask about clemency petitions and the possibility of receiving a pardon from the Governor's Office. The Governor of Virginia has the power, through Article V, Section 12, of the Va. Constitution, and Va. Code § 53.1-229 through 53.1-231, to grant various types of pardons and to restore rights of felons. However, this clemency power is used very rarely (i.e., almost never) to release convicted inmates.

The process works as follows: an inmate files a letter containing the required information to the Office of the Secretary of the Commonwealth. These requests are reviewed in order of receipt, and, if the case warrants further inquiry, the Governor's Office directs the Virginia Parole Board to investigate the case. Then, the Governor's Office notifies the inmate of the decision. The review process takes at least one year or more, and a backlog of cases is common.

Most importantly, the process is not a legal proceeding, and there is no right to appeal any decision. At this point, other avenues, such as the new DNA testing statutes (and hopefully the proposed new rule 3A:15A), are probably better methods to address unjust convictions. For more specific information regarding clemency petitions, an inmate should write to: Office of the Secretary of the Commonwealth, P.O. Box 2454, Richmond, VA 23218-2454.

Recent and/or Significant Cases:

●United States v. Ruiz, 123 S. Ct. 284 (2002). When a defendant enters a guilty plea, with or without a plea agreement, the prosecution is not required to disclose material evidence which could impeach potential prosecution witnesses. The government continues to have the duty to reveal evidence that would support a defendant's innocence.

●Hope v. Pelzer, 122 S. Ct. 2508 (2002). In this *civil rights case*, corrections officers were not entitled to qualified immunity for their actions of twice handcuffing an inmate to a hitching post. The inmate was handcuffed to a hitching post following an argument with another inmate and a second time following a wrestling match with a guard. On the second occasion, he remained shirtless all day while the sun burned his skin. He remained attached to the post for about seven hours during which he was given water only once or twice and was given no bathroom breaks. The U.S. Supreme Court held that the facts as alleged constituted an obvious Eighth Amendment violation. Despite the clear lack of an emergency, the guards knowingly subjected him to a substantial risk of physical harm, to unnecessary pain caused by the handcuffs and the restricted position of confinement for a seven hour period, to unnecessary exposure to the heat of the sun, to prolonged thirst and taunting, and to a deprivation of bathroom breaks that created a risk of discomfort and humiliation. The guards' conduct violated clearly established statutory or constitutional rights of which a reasonable person would have known.

●Bell v. Cone, 535 U.S. 685 (2002). State court's finding, that defense counsel's failure to present mitigation evidence and waiver of final argument did not constitute ineffective assistance, was neither "contrary to" nor an "unreasonable application" of federal law.

●Atkins v. Virginia, 536 U.S. 304 (2002). The execution of mentally retarded criminals is "cruel and unusual punishment" in violation of the Eighth Amendment and, therefore, prohibited.

●Carey v. Saffold, 536 U.S. 214 (2002). For the purposes of tolling under the federal habeas statutes, a state application for collateral review is "pending" during the time between a lower state court's decision and the filing of a notice of appeal to the higher state court.

●Marshall v. Hendricks, 307 F.3d 36 (3rd Cir. 2002). The federal district court dismissed the habeas petition by deferring to the state court's decision that counsel's actions were based on legal strategy. The Third Circuit disagreed. There was nothing in the record to explain or justify counsel's lack of preparation and investigation, and an evidentiary hearing was necessary before deciding whether the state court's determination on habeas was reasonable.

●Lam v. Kelchner, 304 F.3d 256 (3rd Cir. 2002). Petitioner was entitled to habeas relief on her due process claim involving the voluntariness of statements she made to undercover agents and an alleged co-conspirator. The state court's determination was unreasonable in light of the holding in Arizona v. Fulminante, 499 U.S. 279 (1991).

●Ostrander v. Angelone, 43 Fed. Appx. 684 (4th Cir. 2002). The federal district court did not inquire as to when he filed his state habeas petition in the state circuit court. If the petition to the Virginia Supreme Court was properly filed, the time between the circuit court's order and the filing in the Supreme Court of Virginia should also be tolled. Taking these periods of tolling into consideration, it was possible that petitioner's federal habeas petition was timely, and the Fourth Circuit remanded the case for further proceedings.

● Commonwealth v. Tweed, 264 Va. 524, 570 S.E.2d 797 (2002). With a narrow view of the case, the Virginia Supreme Court reversed the Court of Appeals' decision to grant a new trial based on newly discovered evidence, but the granting of a new sentencing hearing was affirmed.

●Green v. Young, 264 Va. 558, 570 S.E.2d 785 (2002). In a case handled by HARGETT & WATSON, petitioner was granted habeas relief where a jury instruction clearly violated defendant's due process rights and trial counsel unreasonably failed to object. Second, absent pure speculation, one could not assume that the jury, when faced with the inconsistent directions, followed only the correct statement of law and ignored the incorrect statement. Thus, there was no proper verdict of guilty beyond a reasonable doubt for felony murder, and counsel's error deprived defendant of a fair trial for felony murder and the related firearm charge.

●White v. Godinez, 301 F.3d 796 (7th Cir. 2002). Habeas relief granted where counsel failed to adequately consult with defendant, and counsel failed to investigate and present evidence favorable to the defense.

About *Legal Notes*

Legal Notes is intended to provide defendants and others with 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 are the founding members of HARGETT & WATSON, PLC, which is located in Richmond, Virginia, and they devote the majority of their practice to criminal litigation, criminal appeals, habeas cases, parole hearings, other post-conviction remedies, and civil litigation.

The law firm of HARGETT & WATSON wishes 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 Us:

HARGETT &WATSON welcomes letters and phone calls, but please understand that we cannot respond to all letters or accept every phone call. When writing to H&W, please be clear and brief. If you have trouble corresponding with us, you might ask a friend or family member to call the office on your behalf.

If you have questions or need more information, feel free to contact us as follows:

HARGETT & WATSON, PLC
Attorneys and Counselors at Law
7 South Adams Street
Richmond, VA 23220
Office Telephone: (804) 788-1956
Facsimile: (804) 788-1982

On The Internet:
Web Site: www.hargettwatson.com
E-Mail: DavidHargett@hargettwatson.com
ToddWatson@hargettwatson.com