

RULES OF SUPREME COURT OF VIRGINIA
PART FIVE A
THE COURT OF APPEALS
B. ORIGINAL JURISDICTION

Rule 5A:5. Original Proceedings.

(a) *Original Jurisdiction Proceedings Other Than Actual Innocence Petitions.* With the exception of petitions for the issuance of writs of actual innocence under paragraph (b) of this Rule, all proceedings before the Court of Appeals pursuant to its original jurisdiction shall be conducted in accordance with the procedure prescribed by Rule 5:7 of the Rules of the Supreme Court.

(b) *Petition for a Writ of Actual Innocence.* --

(1) *Scope.* -- Any person convicted of a felony ~~upon a plea of not guilty~~ or any person who was adjudicated delinquent, ~~upon a plea of not guilty~~, by a circuit court of an offense that would be a felony if committed by an adult, may file in the Court of Appeals a petition under Code § 19.2-327.10 *et seq.* seeking a writ of actual innocence based on nonbiological evidence.

(2) *Form and Contents of Petition.* -- The petition must be filed using Form 10 in the Appendix of Forms following Part 5A and must include all allegations and documents required by subsections A and B of Code § 19.2-327.11. Under Code § 19.2-327.11(B) “relevant documents” shall include, but not be limited to, any orders of conviction, adjudication of delinquency, and sentencing orders being challenged, any appellate dispositions on direct review or any habeas corpus orders (issued by any federal or state court), and any prior petitions filed under Code § 19.2-327.10 *et seq.* in the Court of Appeals or under Code § 19.2-327.2 *et seq.* in the Supreme Court.

(3) *Parties.* -- All pleadings shall name as the petitioner the person convicted of a felony or adjudicated delinquent who is seeking relief. The pleadings shall identify the Commonwealth, represented by the Attorney General, as respondent.

(4) *Filing Fee.* -- The petition must be accompanied by either (i) a ~~\$25.00~~50.00 ~~check or money order for the~~ filing fee, or (ii) an *in forma pauperis* affidavit demonstrating that the petitioner cannot afford the filing fee. An affidavit seeking *in forma pauperis* status shall list all assets and liabilities of petitioner, including the current balance of any inmate account maintained by correctional facility.

(5) *Appointment of Counsel.* -- If the Court does not summarily dismiss the petition, the Court shall appoint counsel for any indigent petitioner who requests the appointment of counsel and satisfies the indigency criteria of Code § 19.2-159. In the Court’s discretion, counsel may be appointed at an earlier stage of the proceeding at the petitioner’s request upon a showing of requisite indigency. All

requests for the appointment of counsel shall be made on the form provided by the Court of Appeals.

(6) *Service of Petition and Return of Service.* -- Prior to filing a petition, the petitioner shall serve the petition, along with all attachments, on the Attorney General and on the Commonwealth's Attorney for the jurisdiction where the conviction or adjudication of delinquency occurred. When represented by counsel, the petitioner shall file with the petition either (i) a duly executed return of service in the form of a verification that a copy of the petition and all attachments have been served, or (ii) an acceptance of service signed by either or both of the parties to be served, or (iii) a combination of the two. When unrepresented by counsel, the petitioner shall file with the petition a certificate that a copy of the petition and all attachments have been sent, by certified mail, to the Attorney General and the Commonwealth's Attorney for the jurisdiction where the conviction or adjudication of delinquency occurred.

(7) *Response.* -- If the Court of Appeals does not summarily dismiss the petition, the court will provide written notice to all parties directing the Commonwealth, within 60 days after receipt of such notice, to file a response to the petition pursuant to Code § 19.2-327.11(C). For good cause shown, the 60-day deadline may be extended by the Court of Appeals. The Commonwealth's response may include any information pertinent to the petitioner's guilt, delinquency, or innocence, including proffers of evidence outside the trial court record and evidence previously suppressed at trial.

(8) *Reply.* -- The petitioner may file a reply to the Commonwealth's response only if directed to do so by the Court of Appeals.

(9) *Copies.* -- An original and ~~four copies of any attachments to~~ the petition, the Commonwealth's response, and the petitioner's reply, if any, shall be filed with the Court of Appeals. ~~Attachments shall be included with the original petition, response, or reply, but not with any copies of the same.~~

(10) *Evidentiary Hearing.* -- The Court of Appeals may order the circuit court that entered the conviction or adjudication of delinquency to conduct an evidentiary hearing and to certify factual findings pursuant to Code § 19.2-327.12. Such findings, however, shall be limited to the specific questions addressed by the Court of Appeals in its certification order. In the circuit court, the petitioner and the Commonwealth shall be afforded an opportunity to present evidence and to examine witnesses on matters relevant to the certified questions.

(11) *Oral Argument.* -- Unless otherwise directed by the Court of Appeals, oral argument shall only be allowed on the final decision whether to grant or deny the writ under Code § 19.2-327.13.

(12) *Appeal.* -- The petitioner or the Commonwealth may petition for appeal to the Supreme Court from any adverse final decision issued by the Court of Appeals under Code § 19.2-327.13 to issue or deny a writ of actual innocence. Such an appeal shall be initiated by the filing of a notice of appeal pursuant to Rule 5:14.

Last amended by Order dated September 25, 2020; effective immediately.

RULES OF SUPREME COURT OF VIRGINIA
PART FIVE A
THE COURT OF APPEALS
APPENDIX OF FORMS

Form 10. Petition for a Writ of Actual Innocence Based on Nonbiological Evidence.

PETITION FOR A WRIT OF ACTUAL INNOCENCE BASED ON
NONBIOLOGICAL EVIDENCE

THE COURT OF APPEALS OF VIRGINIA

(FULL NAME OF PETITIONER AND PRISONER NO., IF APPLICABLE)

Record No. _____
(TO BE SUPPLIED BY THE CLERK OF THE COURT OF APPEALS)

v.
Commonwealth of Virginia
(RESPONDENT)

(PETITIONER'S ADDRESS)

Pursuant to the provisions of Chapter 19.3 of Title 19.2 of the Code of Virginia, I, _____
NAME OF PETITIONER

hereby petition this Court for a WRIT OF ACTUAL INNOCENCE BASED ON NONBIOLOGICAL EVIDENCE. In support of this petition, I state under oath that the following information is true:

1. On _____, I was convicted or adjudicated delinquent in the
DATE

_____ Circuit Court of the following offense(s):
JURISDICTION (CITY/COUNTY)

Description of Felony Offense	Virginia Code	Circuit Court Case No.	Plea
_____	_____	_____	_____
_____	_____	_____	_____
_____	_____	_____	_____
_____	_____	_____	_____
_____	_____	_____	_____

2. I am innocent of the offenses(s) that are the subject of this petition.

~~3. I understand that I can file only one petition for any felony (a) conviction or (b) adjudication of delinquency and I have not previously filed a Petition For A Writ Of Actual Innocence Based On Nonbiological Evidence with regard to the above conviction(s) or adjudication(s) of delinquency in the Court of Appeals of Virginia.~~

43. My claim of innocence is based upon the following evidence:

[] ATTACHED ADDITIONAL SHEET(S)

4. Check all that apply:

(a) This evidence was previously unknown or unavailable to either me or my attorney at the time the conviction(s) or adjudication(s) of delinquency became final in the circuit court; and/or

(b) This evidence was not subject to scientific testing because _____

~~5. This evidence was previously unknown or unavailable to either me or my attorney at the time the conviction(s) or adjudication(s) of delinquency became final in the circuit court.~~

65. This evidence became known or available to me on _____ .
DATE

76. The circumstances under which the evidence was discovered were _____

[] ATTACHED ADDITIONAL SHEET(S)

~~8. This evidence could not have been discovered or obtained by the exercise of diligence before the expiration of 21 days following entry of the final order(s) of conviction or adjudication of delinquency by the court.~~

7. Check all that apply:

(a) This evidence could not have been discovered or obtained by the exercise of diligence before the expiration of 21 days following entry of the final order(s) of conviction or adjudication of delinquency by the court; and/or

(b) The testing procedure was not available at the time the conviction(s) or adjudication(s) of delinquency became final in the circuit court.

98. The evidence upon which I base my claim is material and when considered with all of the other evidence in the record, will prove that no rational trier of fact would have found me to be guilty or delinquent beyond a reasonable doubt of the charge(s) described above because

[] ATTACHED ADDITIONAL SHEET(S)

~~10~~9. In support of this petition, I have attached the following documents:

[] ATTACHED ADDITIONAL SHEET(S)

~~11~~10. I understand that this petition must contain all relevant allegations of facts that are known to me at this time.

~~12~~11. I understand that it must include all previous records, applications, petitions, and appeals and their dispositions related to this/these conviction(s) or adjudication(s) of delinquency, as well as a copy of any documents or evidence in support of the facts that I assert above.

~~13~~12. I understand that if this petition is not complete, this Court may dismiss the petition or return the petition to me pending the completion of such form.

~~14~~13. I understand that I am responsible for all statements contained in this petition.

~~15~~14. I understand that any knowingly or willfully made false statement shall be a ground for prosecution and conviction of perjury as provided for in Virginia Code § [18.2-434](#).

~~16~~15. Counsel. Check the appropriate box.

[] I am being represented by an attorney on the filing of this petition.
My attorney's name and address are

[] I am not being represented by an attorney on the filing of this petition.

~~17~~16. Exemption from filing fee. Check box below if claiming in forma pauperis status and seeking to file this petition without payment of fees.

[] I claim *in forma pauperis* status and I request that this Court accept this petition without the payment of filing fees. I affirm under oath that I am eligible for *in forma pauperis* status. My assets amount to \$ _____ (which sum includes my institutional inmate account which has a balance of \$ _____), and my liabilities amount to \$ _____.

~~18~~17. Request for counsel. Check box below if claiming eligibility for court-appointed counsel and requesting appointment of counsel.

I am requesting that the Court appoint counsel to represent me in this action. I affirm under oath that I am unable to pay for an attorney to represent me in this action, as set forth in item No. 17 above.

Based on the above, I petition this Court pursuant to the provisions of Chapter 19.3 of Title 19.2 of the Code of Virginia for a Writ of Actual Innocence Based on Nonbiological Evidence.

DATE SIGNATURE OF PETITIONER

Commonwealth/State of _____

City County of _____

Subscribed and sworn to/affirmed before me on this date by the above-named person.

DATE NOTARY PUBLIC

My commission expires: _____

DATE SIGNATURE OF ATTORNEY (IF APPLICABLE)

VIRGINIA STATE BAR NUMBER

Pro se (self-represented) petitioners: You are required to send copies of the PETITION FOR A WRIT OF ACTUAL INNOCENCE BASED ON NONBIOLOGICAL EVIDENCE and all attachments to the Commonwealth's Attorney of the jurisdiction where the conviction(s) or adjudication(s) of delinquency occurred and to the Attorney General of Virginia by certified mail. You must complete the form entitled Court of Appeals Form CAV-104, CERTIFICATE OF MAILING - PETITION FOR A WRIT OF ACTUAL INNOCENCE BASED ON NONBIOLOGICAL EVIDENCE.

Petitioners represented by counsel: You are required to serve copies of the PETITION FOR A WRIT OF ACTUAL INNOCENCE BASED ON NONBIOLOGICAL EVIDENCE and all attachments on the Commonwealth's Attorney of the jurisdiction where the conviction(s) or adjudication(s) of delinquency occurred and on the Attorney General of Virginia. You must include the forms entitled Court of Appeals Form CAV-103CA, ACCEPTANCE OF SERVICE OR RETURN OF SERVICE BY THE COMMONWEALTH'S ATTORNEY - PETITION FOR A WRIT OF ACTUAL INNOCENCE BASED ON NONBIOLOGICAL EVIDENCE **and** Court of Appeals Form CAV-103AG, ACCEPTANCE OF SERVICE OR RETURN OF SERVICE BY THE ATTORNEY GENERAL - PETITION FOR A WRIT OF ACTUAL INNOCENCE BASED ON NONBIOLOGICAL EVIDENCE.

Last amended by Order dated September 24, 2020; effective immediately.