

## Instructions for

# PETITION FOR A WRIT OF ACTUAL INNOCENCE BASED ON NONBIOLOGICAL EVIDENCE

## THE COURT OF APPEALS OF VIRGINIA

These instructions and forms are provided to those who seek to petition the Court of Appeals of Virginia for a Writ of Actual Innocence Based on Nonbiological Evidence, pursuant to Chapter 19.3 of Title 19.2 of the Code of Virginia (§§ 19.2-327.10 through 19.2-327.14).

### 1. What is provided to someone who wants to file a petition for a writ of actual innocence?

Included are the following materials:

- These instructions for the petition process (Court of Appeals Form CAV-100), which includes a form entitled DOCUMENTS YOU SHOULD INCLUDE WITH YOUR PETITION (Court of Appeals Form CAV-101);
- A form petition, PETITION FOR A WRIT OF ACTUAL INNOCENCE BASED ON NONBIOLOGICAL EVIDENCE, which includes an affidavit to proceed without payment of a filing fee and a request for appointment of counsel (Court of Appeals Form CAV-102);
- A copy of two forms to be used if you are represented by counsel for proof of service of the PETITION FOR A WRIT OF ACTUAL INNOCENCE BASED ON NONBIOLOGICAL EVIDENCE upon the Attorney General of Virginia and upon the Commonwealth's Attorney of the city or county in which you were convicted or adjudicated delinquent (Court of Appeals Forms CAV-103CA and CAV-103AG);
- Two copies of a form to be used by you if you are representing yourself to certify that the PETITION FOR A WRIT OF ACTUAL INNOCENCE BASED ON NONBIOLOGICAL EVIDENCE was sent by certified mail to the Attorney General of Virginia and to the Commonwealth's Attorney of the city or county in which you were convicted or adjudicated delinquent (Court of Appeals Form CAV-104);
- A copy of Chapter 19.3 of Title 19.2 of the Code of Virginia (§§ 19.2-327.10 through § 19.2-327.14). (Court of Appeals Form CAV-106); and
- A copy of Rule 5A:5(b) of the Rules of the Supreme Court of Virginia.

## 2. What is a Petition for a Writ of Actual Innocence Based on Nonbiological Evidence?

A petition for a writ of actual innocence based on nonbiological evidence is a claim by a person who has been convicted of a felony or adjudicated delinquent of an offense that would be a felony if committed by an adult that

- (i) he/she pleaded not guilty to the offense;
- (ii) he/she is actually innocent of that offense;
- (iii) there is evidence, some of which must be non-biological evidence, proving that he/she is innocent of that offense;
- (iv) the evidence was unknown or unavailable to the petitioner or his/her attorney at the time the conviction or adjudication of delinquency became final in the circuit court; and
- (v) the evidence could not, by the exercise of diligence, have been discovered or obtained before the expiration of 21 days following entry of the trial order of conviction or adjudication of delinquency.

**You may petition the Court of Appeals for a writ of actual innocence ONLY ONCE for each felony (a) conviction or (b) adjudication of delinquency. If the petition is dismissed for any reason, the Code of Virginia prohibits you from filing a subsequent petition with regard to the same conviction or adjudication of delinquency.**

Based on the petition for a writ of actual innocence, the Court of Appeals may direct the circuit court in which you were convicted or adjudicated delinquent to conduct further hearings and the Court of Appeals may hold a hearing. The Court of Appeals may take any of the actions described in Code § 19.2-327.11(B) through (E).

The burden of proof in a proceeding for a writ of actual innocence is by clear and convincing evidence and the burden of such proof is upon you, the petitioner.

## 3. What must be included with a Petition for a Writ of Actual Innocence Based On Nonbiological Evidence?

Your petition must contain all relevant allegations of facts that are known to you at the time you prepare and file your petition. Your petition must include all relevant previous records, applications, petitions, and appeals and their dispositions related to this conviction or adjudication of delinquency, as well as all relevant documents, affidavits, and test results in support of your factual allegations. For guidance, refer to the attached form entitled DOCUMENTS YOU SHOULD INCLUDE WITH YOUR PETITION (Form CAV-101).

4. **What must be done to file a Petition for a Writ of Actual Innocence Based on Nonbiological Evidence?**

You must mail or deliver to the Court of Appeals of Virginia, 109 North Eighth Street, Richmond, Virginia 23219:

- the original plus three copies of your petition (Form CAV-102);
- one copy of the required accompanying documents or evidence;
- the \$50.00 filing fee, if applicable, and
- the proof of service or certificate of mailing form(s)(Forms CAV-103CA and CAV103AG or CAV-104)

If you fail to submit a completed form (Form CAV-102), the Court of Appeals may dismiss the petition or return the petition to you pending the completion of the form.

If you are not represented by counsel, the Court of Appeals will not accept your petition unless it is accompanied by a certificate stating that a copy of the petition and all attachments have been sent by certified mail to 1) the Commonwealth's Attorney of the jurisdiction where the conviction or adjudication of delinquency occurred and 2) the Attorney General of Virginia. You may use Form CAV-104, Certificate of Mailing, provided in this packet.

If you are represented by counsel, the Court of Appeals will not accept your petition unless it is accompanied by a duly executed acceptance of service or return of service verifying that a copy of the petition and all attachments have been served on the Commonwealth's Attorney of the jurisdiction where the conviction or adjudication of delinquency occurred and a duly executed acceptance of service or return of service verifying that a copy of this petition and all attachments have been served on the Attorney General of Virginia.

If you fail to submit a completed form (Form CAV-102), the Court of Appeals may dismiss the petition or return the petition to you pending the completion of such petition.

5. **What are the fees to file this petition?**

The Court of Appeals cannot accept and file your petition unless you (i) submit either a check or money order for \$50; or (ii) complete the affidavit (included in the PETITION FOR A WRIT OF ACTUAL INNOCENCE BASED ON NONBIOLOGICAL EVIDENCE) affirming that you cannot afford the filing fee.

6. **Can counsel be appointed for a Petition for a Writ of Actual Innocence Based on Nonbiological Evidence?**

If you are unable to afford an attorney, you may request the Court of Appeals to appoint an attorney for you. The Court of Appeals may, if it decides it is appropriate, appoint an attorney for you before it considers whether or not your petition should be summarily dismissed. If your petition is not summarily dismissed, you are entitled to have an attorney appointed for you if you requested that an attorney be appointed and if you are unable to pay an attorney to represent you in this proceeding.

The Court of Appeals will not consider any request for appointment of counsel until you have filed a PETITION FOR A WRIT OF ACTUAL INNOCENCE BASED ON NONBIOLOGICAL EVIDENCE (FORM CAV-102) and completed items 17 and 18 in that form.

**You are responsible for all statements contained in the petition. 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.**

## **DOCUMENTS YOU SHOULD INCLUDE WITH YOUR PETITION FOR A WRIT OF ACTUAL INNOCENCE BASED ON NONBIOLOGICAL EVIDENCE**

Your petition must include a statement of facts that explains the previously unknown or unavailable evidence. You must also include with your petition all documents that address the previously unknown or unavailable evidence. You must include any order, record, motion, transcript, petition, application or other document that relates to or will be impacted by the new evidence. You should include, but are not limited to, the following documents:

### **ORDERS OF CONVICTION, ADJUDICATION OF DELINQUENCY, AND SENTENCING**

- Trial court order with your plea to the charge or charges.
- Trial court order with your conviction(s) or adjudication(s) of delinquency.
- Trial court order with your sentence or sentences.

### **DOCUMENTS ON APPEAL**

- All petitions and briefs for appeal of conviction(s) or adjudication(s) of delinquency, including those filed by the Commonwealth.
- Court decisions on the appeal.
- All applications for relief, including *habeas corpus*, and all resulting court decisions.

### **TRANSCRIPTS**

- Transcripts of testimony, argument, and trial court findings that address or involve the previously unknown or unavailable evidence, or that may be impacted by the new evidence.

### **RECORDS, ORDERS, OTHER DOCUMENTS**

- Affidavits concerning the previously unknown or unavailable evidence.
- Test results concerning the previously unknown or unavailable evidence.
- Any written motions, orders, transcripts, or other records of court proceedings where the previously unknown or unavailable evidence was addressed.

**PLEASE NOTE THAT THIS LIST IS FOR YOUR GUIDANCE ONLY AND REPRESENTS DOCUMENTS TYPICAL TO A CRIMINAL OR DELINQUENCY CASE AND ITS RELATED APPEALS. OTHER DOCUMENTS RELEVANT TO YOUR CASE MAY NOT APPEAR ON THIS LIST, BUT MAY BE NECESSARY AND RELEVANT TO YOUR CLAIM OF ACTUAL INNOCENCE. FAILURE TO INCLUDE ALL RELEVANT DOCUMENTS WILL RENDER YOUR PETITION INCOMPLETE, WHICH WILL RESULT IN THE DISMISSAL OF YOUR PETITION FOR A WRIT OF ACTUAL INNOCENCE. ONCE YOUR PETITION FOR A WRIT OF ACTUAL INNOCENCE HAS BEEN DISMISSED, THE COURT CANNOT CONSIDER A SUBSEQUENT PETITION FOR WRIT OF ACTUAL INNOCENCE CONCERNING THE SAME CONVICTION(S) OR ADJUDICATION(S) OF DELINQUENCY.**

**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 \_\_\_\_\_  
\_\_\_\_\_ 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 offense(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.

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

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[ ] ATTACHED ADDITIONAL SHEET(S)

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.

6. This evidence became known or available to me on \_\_\_\_\_  
DATE

7. The circumstances under which the evidence was discovered were

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[ ] 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.

9. 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

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[ ] ATTACHED ADDITIONAL SHEET(S)

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

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[ ] ATTACHED ADDITIONAL SHEET(S)

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

12. 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. 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. I understand that I am responsible for all statements contained in this petition.

15. 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. 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. 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. 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.

**ACCEPTANCE OF SERVICE BY OR RETURN OF SERVICE ON  
THE ATTORNEY GENERAL**

**PETITION FOR A WRIT OF ACTUAL INNOCENCE BASED ON  
NONBIOLOGICAL EVIDENCE (REPRESENTED PETITIONER)**

THE COURT OF APPEALS OF VIRGINIA

Pursuant to the provisions of Chapter 19.3 of Title 19.2 of the Code of Virginia, I,

\_\_\_\_\_  
NAME OF PETITIONER AND PRISONER NO. (if applicable)

am petitioning the Court of Appeals of Virginia for a Writ of Actual Innocence Based on Nonbiological Evidence. A true copy of this petition and all attachments shall be served upon the Attorney General of Virginia at:

The Office of the Attorney General

900 East Main Street

Richmond, Virginia 23219

\_\_\_\_\_  
DATE

\_\_\_\_\_  
SIGNATURE OF PETITIONER

To the Petitioner: In order for this proof of service form to be valid, it must show either a completed acceptance of service, a completed return of service by a sheriff or a completed return of service by a private process server.

**I. ACCEPTANCE OF SERVICE OF PROCESS**

I, the undersigned party named below, swear under oath/affirm that I received a copy of the PETITION FOR A WRIT OF ACTUAL INNOCENCE BASED ON NONBIOLOGICAL EVIDENCE and attachments on this date. I understand that my receipt of these copies and my signature below constitute the acceptance of service of process of these copies.

\_\_\_\_\_  
DATE

\_\_\_\_\_  
SIGNATURE

\_\_\_\_\_  
NAME

**II. RETURN OF SERVICE BY SHERIFF**

I certify that I personally served the person indicated with the PETITION FOR A WRIT OF ACTUAL INNOCENCE BASED ON NONBIOLOGICAL EVIDENCE and the other documents described on the date below.

\_\_\_\_\_, Sheriff  
By \_\_\_\_\_, Deputy Sheriff  
DATE \_\_\_\_\_  
CITY OR COUNTY \_\_\_\_\_

**III. RETURN OF SERVICE BY PRIVATE PROCESS SERVER**

I, the undersigned swear/affirm that:

- 1. I am a private process server (list name, address and telephone number below).  
\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_
- 2. I am not a party to, or otherwise interested in, the subject matter in controversy in this case.
- 3. I am eighteen years of age or older.
- 4. I personally served the person indicated with the PETITION FOR A WRIT OF ACTUAL INNOCENCE BASED ON NONBIOLOGICAL EVIDENCE and the attachments.

— Date and time of service: \_\_\_\_\_

— Place of service: \_\_\_\_\_  
STREET ADDRESS, CITY AND STATE

DATE \_\_\_\_\_ SIGNATURE \_\_\_\_\_

Name (Print or Type) \_\_\_\_\_

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: \_\_\_\_\_

**ACCEPTANCE OF SERVICE BY OR RETURN OF SERVICE ON  
THE COMMONWEALTH'S ATTORNEY**

**PETITION FOR A WRIT OF ACTUAL INNOCENCE BASED ON  
NONBIOLOGICAL EVIDENCE (REPRESENTED PETITIONER)**

THE COURT OF APPEALS OF VIRGINIA

Pursuant to the provisions of Chapter 19.3 of Title 19.2 of the Code of Virginia, I,

\_\_\_\_\_  
NAME OF PETITIONER AND PRISONER NO. (if applicable)

am petitioning the Court of Appeals of Virginia for a Writ of Actual Innocence Based on Nonbiological Evidence. A true copy of this petition and all attachments shall be served upon The Commonwealth's Attorney for \_\_\_\_\_ at \_\_\_\_\_  
(CITY OR COUNTY)

\_\_\_\_\_  
ADDRESS

\_\_\_\_\_  
DATE

\_\_\_\_\_  
SIGNATURE OF PETITIONER

To the Petitioner: In order for this proof of service form to be valid, it must show either a completed acceptance of service, a completed return of service by a sheriff or a completed return of service by a private process server.

**I. ACCEPTANCE OF SERVICE OF PROCESS**

I, the undersigned party named below, swear under oath/affirm that I received a copy of the PETITION FOR A WRIT OF ACTUAL INNOCENCE BASED ON NONBIOLOGICAL EVIDENCE and attachments on this date. I understand that my receipt of these copies and my signature below constitute the acceptance of service of process of these copies.

\_\_\_\_\_  
DATE

\_\_\_\_\_  
SIGNATURE

\_\_\_\_\_  
NAME

**II. RETURN OF SERVICE BY SHERIFF**

I certify that I personally served the person indicated with the PETITION FOR A WRIT OF ACTUAL INNOCENCE BASED ON NONBIOLOGICAL EVIDENCE and attachments on the date below.

\_\_\_\_\_ Sheriff  
By \_\_\_\_\_ Deputy Sheriff  
DATE \_\_\_\_\_  
CITY OR COUNTY \_\_\_\_\_

**III. RETURN OF SERVICE BY PRIVATE PROCESS SERVER**

I, the undersigned swear/affirm that:

- 1. I am a private process server (list name, address and telephone number below).

\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_

- 2. I am not a party to, or otherwise interested in, the subject matter in controversy in this case.

- 3. I am eighteen years of age or older.

- 4. I personally served the person indicated with the PETITION FOR A WRIT OF ACTUAL INNOCENCE BASED ON NONBIOLOGICAL EVIDENCE and attachments.

— Date and time of service: \_\_\_\_\_

— Place of service: \_\_\_\_\_  
STREET ADDRESS, CITY AND STATE

DATE \_\_\_\_\_ SIGNATURE \_\_\_\_\_

Name (Print or Type) \_\_\_\_\_

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: \_\_\_\_\_

**CERTIFICATE OF MAILING  
FOR SELF-REPRESENTED (PRO SE) PETITIONER**

**PETITION FOR A WRIT OF ACTUAL INNOCENCE  
BASED ON NONBIOLOGICAL EVIDENCE**

THE COURT OF APPEALS OF VIRGINIA

Pursuant to the provisions of Chapter 19.3 of Title 19.2 of the Code of Virginia, I,

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NAME OF PETITIONER AND PRISONER NO. (if applicable)

am petitioning the Court of Appeals of Virginia for a Writ of Actual Innocence Based on Nonbiological Evidence.

**I certify the following:**

I. I am not represented by counsel for the filing of this petition;

II. A true and accurate copy of the Petition for a Writ of Actual Innocence Based on Nonbiological Evidence and all attachments have been sent by certified mail on

\_\_\_\_\_ to the Commonwealth's Attorney for \_\_\_\_\_,  
Date

the jurisdiction where the conviction(s) or adjudication(s) of delinquency occurred, whose name and address are:

\_\_\_\_\_

\_\_\_\_\_

\_\_\_\_\_ ; and

III. A true and accurate copy of the Petition for a Writ of Actual Innocence Based on Nonbiological Evidence and all attachments have been sent by certified mail on

\_\_\_\_\_ to the Attorney General of Virginia at the following address:  
date

Office of the Attorney General  
900 East Main Street  
Richmond, Virginia 23219

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Date

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Signature of Petitioner

## Chapter 19.3 of Title 19.2 of the Code of Virginia

### ISSUANCE OF WRIT OF ACTUAL INNOCENCE BASED ON NONBIOLOGICAL EVIDENCE

#### § 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, or the petition of a 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, 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 or adjudication of delinquency may be filed by a petitioner. The writ shall lie to the circuit court that entered the conviction or the adjudication of delinquency 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 or the offense for which the petitioner was adjudicated delinquent, and that such conviction or adjudication of delinquency was upon a plea of not guilty; (ii) that the petitioner is actually innocent of the crime for which he was convicted or the offense for which he was adjudicated delinquent; (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 or adjudication of delinquency 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 or adjudication of delinquency by the circuit 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 would have found proof of guilt or delinquency 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 (iv) of § 53.1-232.1 or to delay or stay any other appeals following conviction or adjudication of delinquency, 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, and 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 or adjudication of delinquency 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 or adjudication of delinquency 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 or delinquency or innocence 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 petitioner is entitled to representation by counsel subject to the provisions of Article 3 (§ 19.2-157 *et seq.*) and Article 4 (§ 19.2-163.3 *et seq.*) of Chapter 10. 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 or the adjudication of delinquency 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 would have found proof of guilt or delinquency beyond a reasonable doubt, grant the writ, and vacate the conviction or finding of delinquency, or in the event that the Court finds that no rational trier of fact would have found sufficient evidence beyond a reasonable doubt as to one or more elements of the offense for which the petitioner was convicted or adjudicated delinquent, but the Court finds that there remains in the original trial record evidence sufficient to find the petitioner guilty or delinquent beyond a reasonable doubt of a lesser included offense, the Court shall modify the order of conviction or delinquency accordingly and remand the case to the circuit court that entered the conviction or adjudication of delinquency for resentencing. The burden of proof in a proceeding brought pursuant to this chapter shall be upon the convicted or delinquent person seeking relief. If a writ vacating a conviction or adjudication of delinquency is granted, and no appeal is made to the Supreme Court, or the Supreme Court denies the Commonwealth's petition for appeal or upholds the decision of the Court of Appeals to grant the writ, the Court of Appeals shall forward a copy of the writ to the circuit court, where an order of expungement shall be immediately granted.

**§ 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.

That the Office of the Executive Secretary of the Supreme Court of Virginia shall report to the Chairmen of the Senate and House Courts of Justice Committees on January 1 of each year the number of petitions filed for writ of actual innocence pursuant to Chapter 19.3 of Title 19.2 and the dispositions thereof.

## RULE 5A:5(b) OF THE RULES OF THE SUPREME COURT OF VIRGINIA

(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 12 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 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 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 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.