

VIRGINIA:

*In the Supreme Court of Virginia held at the Supreme Court Building in the
City of Richmond on* Friday *the* 21st *day of* June, 2013.

It is ordered that the Rules heretofore adopted and promulgated by this Court and now in effect be and they hereby are amended to become effective July 1, 2013.

Amend Rule 5:7B to read as follows:

Rule 5:7B. Petition for a Writ of Actual Innocence.

(a) *Who may File a Petition.* -- A petition for a writ of actual innocence based upon previously unknown or untested human biological evidence may be filed by any person who has been convicted of a felony upon a plea of not guilty, or 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, or by any person, regardless of plea, who has been sentenced to death, or convicted or adjudicated delinquent of a class 1 felony, a class 2 felony or any felony for which the maximum penalty is imprisonment for life.

(b) *Time for Filing.* -- A petition under this Rule shall be filed in the office of the Clerk of this Court within 60 days after the date upon which exculpatory test results are obtained by the petitioner or his counsel of record from the Department of Forensic Science for any tests conducted on human biological evidence pursuant to Code § 19.2-327.1.

(c) *Contents of the Petition.* -- Each petition for a writ of actual innocence shall be filed on a form provided by this Court and shall be verified under oath. The petition must state

categorically and with specificity: (i) the offense or offenses for which petitioner was convicted or adjudicated delinquent, including all previous records, applications, petitions, and appeals relating to these convictions or adjudications of delinquency, and their dispositions; (ii) that the petitioner is actually innocent of the crime or crimes for which he was convicted or adjudicated delinquent; (iii) an exact description of the human biological evidence and the scientific testing supporting the allegation of innocence, attaching a copy of the test results; (iv) that the human biological evidence was not known or available to the petitioner or his attorney at trial, or if it was known, why it was not subject to scientific testing; (v) the earliest date the test results described in the petition became known to the petitioner or any attorney of record; (vi) that the petitioner or his attorney has filed the petition within 60 days of obtaining the test results; (vii) an explanation of the reason or reasons the evidence will prove that no rational trier of fact would have found the petitioner guilty or delinquent beyond a reasonable doubt of the offense or offenses for which the petitioner was convicted or adjudicated delinquent; and (viii) if the conviction or adjudication of delinquency became final in the circuit court after June 30, 1996, that the evidence was not available for testing under Code § 9.1-1104.

(d) *Service of the 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. 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.

(e) *Filing Fee.* -- The petition must be accompanied by either (i) a check or money order for the filing fee required by statute, or (ii) an in forma pauperis affidavit demonstrating that the petitioner cannot afford the filing fee.

(f) *Response.* -- The Attorney General shall respond to the petition as follows:

(1) Within 30 days after service of the petition, the Attorney General shall file with the clerk of this Court a pleading in the form of a declaration stating, in the opinion of the Attorney General, with an explanation of the reasons therefor, whether the record of any trial or appellate proceedings involving the conviction or convictions, or adjudication or adjudications of delinquency, or of any proceedings under Code § 19.2-327.1, is necessary for preparation of a response to the petition. If the Attorney General asserts that the record, or any part thereof, of any trial or appellate court proceedings is necessary, the Attorney General shall request the production of such record by this Court, and shall describe with specificity, including the court, docket number and date of judgment, each and every record or part thereof which is requested.

(2) If the Attorney General asserts in the declaration required by subparagraph (f)(1) of this Rule that no trial or appellate court record, or any part thereof, is necessary for the preparation of a responsive pleading to the petition, the Attorney General shall file with the clerk of this Court within 30 days thereafter a pleading in response to the petition. Any pleading in response filed by the Attorney General may include a motion to dismiss. The response shall

include citation to any relevant legal authorities, and 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 any evidence that was suppressed at trial.

(3) If the Attorney General asserts in the declaration required by subparagraph (f)(1) of this Rule that a trial or appellate court record, or any part thereof, is necessary for the preparation of a response to the petition, the court shall issue the writ of certiorari described in Code § 19.2-327.3(D) to the clerk of the respective court below for the production of the record forthwith to the clerk of this Court. Upon receipt of the record by the clerk of this Court, the clerk shall immediately notify in writing the petitioner, any attorney for the petitioner, the Attorney General, and the attorney for the Commonwealth of the jurisdiction where the conviction or convictions or adjudication or adjudications of delinquency occurred, of the date of receipt of the record. Within 30 days after receipt of the record by the clerk of this Court, the Attorney General shall file the responsive pleading described in subparagraph (f)(2) of this Rule.

(g) *Reply.* -- Within 20 days after the Attorney General's responsive pleading is filed pursuant to subparagraph (f) of this Rule, the petitioner may file a reply.

(h) *Copies to be Filed.* -- Ten copies of the petition, and the Attorney General's responsive pleading, and the petitioner's reply, if any, shall be filed in the office of the clerk of this Court.

(i) *Further Proceedings by Order of this Court.* -- Further proceedings shall be conducted in accordance with the orders of this Court. If this Court determines that an evidentiary hearing is necessary for the proper disposition of the petition, this Court may order that the circuit court conduct a hearing within 90 days

after the order has been issued to certify findings of fact with respect to such issues as this Court shall direct. The record and certified findings of fact of the circuit court shall be filed with the clerk of this Court within 30 days after the hearing is concluded.

(j) *Appointment of Counsel.* -- In any petition filed pursuant to and in compliance with this Rule, petitioner shall be entitled to the appointment of counsel subject to the provisions of Code § 19.2-157 *et seq.* Any request for counsel in this Court must be made on the form provided by this Court, entitled REQUEST FOR COUNSEL - PETITION FOR A WRIT OF ACTUAL INNOCENCE, and must include: (i) all the information required by the in forma pauperis affidavit attached to the request for appointment of counsel, and (ii) an attested copy of the order of the circuit court ordering that testing of human biological evidence on the petitioner's behalf be conducted by the Department of Forensic Science pursuant to Code § 19.2-327.1.

(k) *Duty of Counsel.* -- Any attorney(s) appointed to represent a petitioner pursuant to Code § 19.2-327.1 shall be deemed to be counsel of record for petitioner for all purposes and proceedings under this Rule until a final order of this Court is issued pursuant to Code § 19.2-327.5, or until counsel is relieved or replaced by other counsel by leave of this Court.

* * *

Amend Form 12 in Part Five - Appendix of Forms to read as follows:

APPENDIX OF FORMS

Form 12. Petition for a Writ of Actual Innocence

PETITION FOR A WRIT OF ACTUAL INNOCENCE

TO THE SUPREME COURT OF VIRGINIA

In re: _____
(FULL NAME OF PETITIONER)

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

(PRISONER NO., IF APPLICABLE)

Circuit Court
Case No. (s) _____

(PETITIONER'S ADDRESS)

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

NAME OF PETITIONER

hereby petition this Court for a writ of actual innocence. 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):
NAME OF COURT

Description of Offense	Virginia Code	Class of Felony	Plea
_____	_____	_____	_____
_____	_____	_____	_____
_____	_____	_____	_____

[] ATTACHED ADDITIONAL SHEET(S)

2. I am innocent of the offense(s) for which I was convicted or adjudicated delinquent.

3. My claim of innocence is based upon the following human

biological evidence and scientific testing:

[] ATTACHED ADDITIONAL SHEET(S)

4. Check one:

[] This evidence was not known or available to either me or my attorney at the time the conviction or adjudication of delinquency became final in the circuit court.

[] This evidence was known at the time the conviction or adjudication of delinquency became final in the circuit court, but was not tested because

[] ATTACHED ADDITIONAL SHEET(S)

5. This evidence was tested pursuant to the provisions of Virginia Code § 19.2-327.1 and the results were obtained by me or my attorney on _____.

DATE

This petition is filed within sixty days of obtaining those results and those test results are filed with this petition. Attached is a copy of the notice of the test results from the Department of Forensic Science.

6. The scientific evidence described in paragraph number 4 above will prove that no rational trier of fact would have found me to be guilty or delinquent beyond a reasonable doubt of the charge described above because

[] ATTACHED ADDITIONAL SHEET(S)

7. Check box if applicable and provide any additional information.

[] My conviction or adjudication of delinquency became final after June 30, 1996, and the scientific evidence described in paragraph number 4 above was not available for testing under Virginia Code § 9.1-1104 because:

[] ATTACHED ADDITIONAL SHEET(S)

8. This petition contains all relevant allegations of fact known to me at this time and all previous records, applications, petitions, appeals, and dispositions relating to this matter are attached. In support of this petition, the following documents are attached:

[] ATTACHED ADDITIONAL SHEET(S)

9. I understand that this petition must contain all relevant allegations of fact that are known to me at this time. I understand that it must include all previous records, applications, petitions, appeals, and their dispositions related to this conviction, as well as a copy of any test results of the scientific evidence described above. 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. I understand that I am responsible for all statements contained in this petition. I understand that any knowingly or willfully made false statement shall be a ground for prosecution and conviction of perjury as provided in Virginia Code § 18.2-434. I understand that this Court shall not accept this petition unless it is accompanied by a duly executed return of service verifying that a copy of this petition and all attachments have been served on the attorney for the Commonwealth of the jurisdiction where the conviction occurred and on the Attorney General of Virginia.

10. Check box 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 and I have attached the completed affidavit to this effect.

Based on the above, I petition this Court pursuant to the provisions of Chapter 19.2 of Title 19.2 of the Code of Virginia for a writ of actual innocence.

DATE

SIGNATURE OF PETITIONER

FOR NOTARY PUBLIC'S USE ONLY:

State of [] City [] County of

Acknowledged, subscribed and sworn to before me this day of .., 20

.....
NOTARY REGISTRATION NUMBER

.....
NOTARY PUBLIC

(My commission expires:)

AFFIDAVIT IN FORMA PAUPERIS

The petitioner, _____, being duly sworn, says,

1. I am unable to pay for counsel to prosecute this action;
2. My assets amount to a total of \$ _____

DATE

SIGNATURE OF PETITIONER

FOR NOTARY PUBLIC'S USE ONLY:	
State of [] City [] County of	
Acknowledged, subscribed and sworn to before me this day of .., 20	
..... NOTARY REGISTRATION NUMBER	_____ NOTARY PUBLIC (My commission expires:)

Amend Rule 5A:5 to read as follows:

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 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.

* * *

Amend Form 12 in Part Five A - Appendix of Forms to read as follows:

Form 12. 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
DATE

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

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:

[] 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

[] 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

[] ATTACHED ADDITIONAL SHEET(S)

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

[] 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 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.

A Copy,

Teste:

John L. Hammon

Clerk