

Instructions and Forms for
PETITION FOR A WRIT OF ACTUAL INNOCENCE

TO THE SUPREME COURT OF VIRGINIA

These instructions and forms are provided to those who seek to petition the Supreme Court of Virginia for a writ of actual innocence pursuant to Chapter 19.2 of Title 19.2 of the Code of Virginia (§ 19.2-327.2 to -327.6).

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;
- A form request, REQUEST FOR COUNSEL – PETITION FOR A WRIT OF ACTUAL INNOCENCE, with attached affidavit to proceed in forma pauperis (unable to afford to retain an attorney);
- A form petition, PETITION FOR A WRIT OF ACTUAL INNOCENCE, with attached affidavit to proceed in forma pauperis (without payment of fees);
- Two copies of a form to be used for proof of service of the PETITION FOR A WRIT OF ACTUAL INNOCENCE upon the Attorney General of Virginia and upon the attorney for the Commonwealth of the city or county in which you were convicted; and
- A copy of Chapter 19.1 and of Chapter 19.2 of Title 19.2 of the Code of Virginia (§ 19.2-327.1 and § 19.2-327.2 to -327.6).

2. What is a Writ of Actual Innocence?

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

- (i) he is actually innocent of that crime;
- (ii) there is human biological evidence proving that he is innocent of that crime; and
- (iii) 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 subjected to scientific testing.

Based on the petition for a writ of actual innocence, the Supreme Court may direct the circuit court that convicted the petitioner to conduct further hearings and the Supreme Court may hold a hearing.

The Supreme Court may dismiss the petition for failure to state a claim or it may identify grounds upon which relief shall be granted to the petitioner. If the Supreme Court holds a hearing, it shall then (i) dismiss the petition for failure to establish allegations sufficient to justify the issuance of a writ of actual innocence, or (ii) find, by a preponderance of the evidence, that the petitioner has proven all of the allegations contained in paragraphs 3 through 7 of the PETITION FOR A WRIT OF ACTUAL INNOCENCE and that no rational trier of fact would have found proof of guilt beyond a reasonable doubt, and vacate the conviction. If the Supreme 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, but the Court finds that there remains in the original trial record evidence sufficient to find the petitioner guilty beyond a reasonable doubt of a lesser included offense, the court shall modify the conviction accordingly and remand the case to the circuit court for resentencing.

The burden of proof in a proceeding for a writ of actual innocence shall be upon you, the petitioner.

3. Can I have counsel appointed for a petition for a writ of actual innocence?

The Supreme Court will not consider any request for appointment of counsel until you have filed the form entitled REQUEST FOR COUNSEL – PETITION FOR A WRIT OF ACTUAL INNOCENCE and unless you have completed the in forma pauperis affidavit attached to the request for appointment of counsel. As part of this request, you must attach to that request an attested copy of the order of the circuit court ordering that testing of human biological evidence be performed pursuant to Virginia Code § 19.2-327.1.

4. What must be included with a petition for a writ of actual innocence?

Your petition must contain all relevant allegations of facts that are known to you at the time you prepare your petition and file it. Your petition 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. Your petition must be filed with the Supreme Court of Virginia within sixty days of you or your counsel obtaining the results of the scientific testing which are the basis of your petition.

5. What must be done to file a petition for a writ of actual innocence?

If your petition is not complete, the Supreme Court may dismiss the petition or return the petition to you pending the completion of such petition. The Supreme Court shall not accept your petition unless it is accompanied by either 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 Virginia of the jurisdiction where the conviction occurred and a duly executed return of service

verifying that a copy of this petition and all attachments have been served on the Attorney General of Virginia or an acceptance of service signed by either or both the attorney for the Commonwealth and the Attorney General or a combination of the two.

6. What are the fees to file this petition?

The Supreme Court cannot accept and file your petition unless you submit either a check (or money order) for \$50 or else complete the affidavit (attached to the PETITION FOR A WRIT OF ACTUAL INNOCENCE) affirming that you cannot afford the filing fee.

7. Your responsibility for what is said in your PETITION FOR A WRIT OF ACTUAL INNOCENCE.

You are responsible for all statements contained in this 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.

REQUEST FOR COUNSEL

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 subsection E of § 19.2-327.3 of the Code of Virginia, I,

NAME OF PETITIONER

hereby request that this Court appoint counsel to assist me in petitioning this Court for a writ of actual innocence. In support of this request, I state under oath that the following information is true:

1. On _____, I was convicted in the
DATE

_____ Circuit Court of the following offense(s):
NAME OF COURT

Description of Offense	Virginia Code	Plea
_____	_____	_____
_____	_____	_____
_____	_____	_____

[] ATTACHED ADDITIONAL SHEET(S)

2. I am innocent of the crime(s) for which I was convicted.

3. On _____, the above-identified circuit court ordered
DATE
testing on human biological evidence pursuant to § 19.2-327.1 of the Code of Virginia. I have
attached to this request an attested copy of that order of the circuit court.

4. I affirm under oath that I am eligible for appointment of counsel and I have attached the completed
affidavit for appointment of counsel.

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:)

PETITION FOR A WRIT OF ACTUAL INNOCENCE

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:)

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 in the
DATE

NAME OF COURT

Circuit Court of the following offense(s):

Description of Offense

Virginia Code

Plea

[] ATTACHED ADDITIONAL SHEET(S)

2. I am innocent of the crime(s) for which I was convicted.

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 became final in the circuit court.

[] This evidence was known at the time the conviction 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.

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 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 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)

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)

- 8. 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.
- 9. 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:)

**PROOF OF SERVICE AND RETURN OF SERVICE/ACCEPTANCE OF SERVICE
PETITION FOR A WRIT OF ACTUAL INNOCENCE**

TO THE SUPREME COURT OF VIRGINIA

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

NAME OF PETITIONER AND PRISONER NO. (if applicable)

am petitioning the Supreme Court of Virginia for a writ of actual innocence. A true copy of this petition shall be served upon:

(CHECK ONE BOX)

The attorney for the Commonwealth for _____ at
(CITY OR COUNTY)

ADDRESS

The Attorney General of Virginia at
The Office of the Attorney General
202 N 9th Street
Richmond, Virginia 23219

with a copy of the following documents attached:

ATTACHED ADDITIONAL SHEET(S)

DATE

SIGNATURE OF PETITIONER

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

DATE

CLERK DEPUTY

FOR NOTARY PUBLIC'S USE ONLY:

State of _____ [] City [] County of _____

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

by _____

..... NOTARY REGISTRATION NUMBER	_____ NOTARY PUBLIC (My commission expires:)
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PROOF OF SERVICE/ACCEPTANCE OF SERVICE

RETURN OF SERVICE BY SHERIFF

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

_____ Sheriff

_____ By _____ Deputy Sheriff

_____ DATE

_____ CITY OR COUNTY

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 and the other documents described.

— Date and time of service:

— Place of service:

STREET ADDRESS, CITY AND STATE

DATE

SIGNATURE

Name (Print or Type)

FOR NOTARY PUBLIC'S USE ONLY:

State of _____ [] City [] County of _____

Acknowledged, subscribed and sworn to before me on this _____ day of _____, 20 ____
by _____

NOTARY REGISTRATION NUMBER

NOTARY PUBLIC
(My commission expires: _____)

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 and the other attached documents described 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

Chapter 19.1 of Title 19.2 of the Code of Virginia

19.2-327.1. Motion by a convicted felon or person adjudicated delinquent for scientific analysis of newly discovered or previously untested scientific evidence; procedure.

A. Notwithstanding any other provision of law or rule of court, any person convicted of a felony or any person who was adjudicated delinquent by a circuit court of an offense that would be a felony if committed by an adult may, by motion to the circuit court that entered the original conviction or the adjudication of delinquency, apply for a new scientific investigation of any human biological evidence related to the case that resulted in the felony conviction or adjudication of delinquency if (i) the evidence was not known or available at the time the conviction or adjudication of delinquency became final in the circuit court or the evidence was not previously subjected to testing; (ii) the evidence is subject to a chain of custody sufficient to establish that the evidence has not been altered, tampered with, or substituted in any way; (iii) the testing is materially relevant, noncumulative, and necessary and may prove the actual innocence of the convicted person or the person adjudicated delinquent; (iv) the testing requested involves a scientific method generally accepted within the relevant scientific community; and (v) the person convicted or adjudicated delinquent has not unreasonably delayed the filing of the petition after the evidence or the test for the evidence became available.

B. The petitioner shall assert categorically and with specificity, under oath, the facts to support the items enumerated in subsection A and (i) the crime for which the person was convicted or adjudicated delinquent, (ii) the reason or reasons the evidence was not known or tested by the time the conviction or adjudication of delinquency became final in the circuit court, and (iii) the reason or reasons that the newly discovered or untested evidence may prove the actual innocence of the person convicted or adjudicated delinquent. Such motion shall contain all relevant allegations and facts that are known to the petitioner at the time of filing and shall enumerate and include all previous records, applications, petitions, and appeals and their dispositions.

C. The petitioner shall serve a copy of such motion upon the attorney for the Commonwealth. The Commonwealth shall file its response to the motion within 30 days of the receipt of service. The court shall, no sooner than 30 and no later than 90 days after such motion is filed, hear the motion. Motions made by a petitioner under a sentence of death shall be given priority on the docket.

D. The court shall, after a hearing on the motion, set forth its findings specifically as to each of the items enumerated in subsections A and B and either (i) dismiss the motion for failure to comply with the requirements of this section or (ii) dismiss the motion for failure to state a claim upon which relief can be granted or (iii) order that the testing be done.

E. The court shall order the tests to be performed by:

1. A laboratory mutually selected by the Commonwealth and the applicant; or
2. A laboratory selected by the court that ordered the testing if the Commonwealth and the applicant are unable to agree on a laboratory.

If the testing is conducted by the Department of Forensic Science, the court shall prescribe in its order, pursuant to standards and guidelines established by the Department, the method of custody, transfer, and return of evidence submitted for scientific investigation sufficient to insure and protect the Commonwealth's interest in the integrity of the evidence. The results of any such testing shall be furnished simultaneously to the court, the petitioner and his attorney of record and the attorney for the Commonwealth. The Department of Forensic Science shall give testing priority to cases in which a sentence of death has been imposed. The results of any tests performed and any hearings held pursuant to this section shall become a part of the record.

If the testing is not conducted by the Department of Forensic Science, it shall be conducted by a laboratory that is accredited by an accrediting body that requires conformance to forensic-specific requirements and that is a signatory to the International Laboratory Accreditation Cooperation (ILAC) Mutual Recognition Arrangement with a scope of accreditation that covers the testing being performed and follows the appropriate Quality Assurance Standards issued by the Federal Bureau of Investigation.

F. Nothing in this section 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.

G. An action under this section or the performance of any attorney representing the petitioner under this section shall not form the basis for relief in any habeas corpus proceeding or any other appeal. Nothing in this section shall create any cause of action for damages against the Commonwealth or any of its political subdivisions or any officers, employees or agents of the Commonwealth or its political subdivisions.

H. In any petition filed pursuant to this chapter, the petitioner is entitled to representation by counsel subject to the provisions of Article 3 (§ 19.2-157 et seq.) of Chapter 10.

§ 19.2-327.2. Issuance of writ of actual innocence based on biological evidence.

Notwithstanding any other provision of law or rule of court, upon a petition of a person who was convicted of a felony or who was adjudicated delinquent by a circuit court of an offense that would be a felony if committed by an adult, the Supreme Court shall have the authority to issue writs of actual innocence under this chapter. The writ shall lie to the circuit court that entered the felony conviction or adjudication of delinquency and that court shall have the authority to conduct hearings, as provided for in § 19.2-327.5, on such a petition as directed by order from the Supreme Court.

§ 19.2-327.2:1. Petition for writ of actual innocence joined by Attorney General; release of prisoner; bond hearing.

The Attorney General may join in a petition for a writ of actual innocence made pursuant to § 19.2-327.2. When such petition is so joined, the petitioner may file a copy of the petition and attachments thereto and the Attorney General's answer with the circuit court that entered the felony conviction or adjudication of delinquency and move the court for a hearing to consider release of the person on bail pursuant to Chapter 9 (§ 19.2-119 et seq.). Upon hearing and for good cause shown, the court may order the person released from custody subject to the terms and conditions of bail so established, pending a ruling by the Supreme Court on the writ under § 19.2-327.5.

§ 19.2-327.3. Contents and form of the petition based on previously unknown or untested human biological evidence of actual innocence.

A. The petitioner shall allege categorically and with specificity, under oath, the following: (i) the crime for which the petitioner was convicted or the offense for which the petitioner was adjudicated delinquent; (ii) that the petitioner is actually innocent of the crime 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; (iv) that the evidence was not previously known or available to the petitioner or his trial attorney of record at the time the conviction or adjudication of delinquency became final in the circuit court, or if known, the reason that the evidence was not subject to the scientific testing set forth in the petition; (v) the date the test results under § 19.2-327.1 became known to the petitioner or any attorney of record; (vi) that the petitioner or his attorney of record has filed the petition within 60 days of obtaining the test results under § 19.2-327.1; (vii) the reason or reasons the evidence will prove that no rational trier of fact would have found proof of guilt or delinquency beyond a reasonable doubt; and (viii) for any conviction or adjudication of delinquency that became final in the circuit court after June 30, 1996, that the evidence was not available for testing under § 9.1-1104. The Supreme Court may issue a stay of execution pending proceedings under the petition. 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.

B. Such petition shall contain all relevant allegations of facts that are known to the petitioner at the time of filing and shall enumerate and include all previous records, applications, petitions, and appeals and their dispositions. A copy of any test results shall be filed with the petition. The petition shall be filed on a form provided by the Supreme Court. If the petitioner fails to submit a completed form, the Court may dismiss the petition or return the petition to the prisoner pending the completion of such form. The petitioner shall be responsible for all statements contained in

the petition. Any false statement in the petition, if such statement is knowingly or willfully made, shall be a ground for prosecution and conviction of perjury as provided for in § 18.2-434.

C. The Supreme Court 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 has 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. The Attorney General shall have 30 days after receipt of the record by the clerk of the Supreme Court in which to file a response to the petition. 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 Supreme Court may, when the case has been before a trial or appellate court, 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.

E. In any petition filed pursuant to this chapter, the petitioner is entitled to representation by counsel subject to the provisions of Article 3 (§ 19.2-157 et seq.) of Chapter 10.

§ 19.2-327.4. Determination by the Supreme Court for findings of fact by the circuit court.

If the Supreme Court determines from the petition, from any hearing on the petition, from a review of the records of the case, including the record of any hearing on a motion to test evidence pursuant to § 9.1-1104, or from any response from the Attorney General that a resolution of the case requires further development of the facts under this chapter, the court may order the circuit court 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 Supreme Court shall direct. The record and certified findings of fact of the circuit court shall be filed in the Supreme Court 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.

§ 19.2-327.5. 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 the record of any hearings held pursuant to § 19.2-327.1, and if applicable, any findings certified from the circuit court pursuant to § 19.2-327.4, the Supreme Court shall either dismiss the petition for failure to state a claim or assert grounds upon which relief shall be granted; or upon a hearing the Court shall (i) dismiss the petition for failure to establish allegations sufficient to justify the issuance of the writ or (ii) only upon a finding by a preponderance of the evidence that the petitioner has proven all of the allegations contained in clauses (iv) through (viii) of subsection A of § 19.2-327.3, 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 adjudication 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 conviction or adjudication of delinquency accordingly and remand the case to the circuit court 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, the Court shall forward a copy of the writ to the circuit court, where an order of expungement shall be immediately granted.

§ 19.2-327.6. Claims of relief.

An action under this chapter or the performance of any attorney representing the petitioner under this chapter shall not form the basis for relief in any habeas corpus or appellate proceeding. Nothing in this chapter shall create any cause of action for damages against the Commonwealth or any of its political subdivisions or any officers, employees or agents of the Commonwealth or its political subdivisions.