In The Supreme Court of The United States

HOOD v. VIRGINIA, RECORD No._____,

PETITION FOR A WRIT OF CERTIORARI

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Virginia:

In the Circuit Court of the City of Richmond, John Marshall Courts Building

CONVICTION AND SENTENCING ORDER

FEDERAL INFORMATION PROCESSING
STANDARDS CODE: **760**

Hearing Date: **September 13, 2002**
Judge: **Spencer**

COMMONWEALTH OF VIRGINIA

v. Indictment for Murder - F-01-2201

STEPHEN JAMES HOOD, Defendant.

This case came before the Court for sentencing of the defendant, who was this day led to the bar in the custody of the Sheriff of this City. He was represented by **David Lassiter** and **Horace Hunter**. The Commonwealth was represented by **Roderick Young**. The Probation and Parole Officer was not present in Court.

On **April 4, 2002** the defendant was found guilty of the following offense:

CASE NUMBER	OFFENSE DESCRIPTION AND INDICATOR (F/M)	OFFENSE DATE	VA. CODE SECTION
CR01-2201	**Murder (F)**	**8-31-90**	**18.2-32**

The presentence report was considered and is ordered filed as part of the record in this case accordance with the provisions of Code §19.2-299.

Pursuant to the provisions of Code §19.2-298.01, the Court has considered and reviewed the applicable discretionary sentencing guidelines and the guidelines worksheets. The sentencing guidelines worksheets and the written explanation of any departure from the guidelines are ordered filed as a part of the record in this case.

Before pronouncing the sentence, the Court inquired if the defendant desired to make a statement and if the defendant desired to advance any reason why judgment should not be pronounced.

Appendix 1

The Court **SENTENCES** the defendant to:

Incarceration with the **Virginia Department of Corrections** for the term of: **65 years** for **murder (CR01-2201)**, upon the following condition(s):

This sentence shall run **consecutively** with any other time.

Supervised probation. The defendant is placed on probation under the supervision of a Probation Officer upon release from incarceration. The defendant shall comply with all the rules and requirements set by the Probation Officer.

DNA. Pursuant to §19.2-310.2, it is Ordered that a sample of the defendant's blood be taken forthwith for DNA analysis.

The defendant, by counsel, moved the Court to suspend part of the sentence, which motion the Court denied.

The defense attorney is to advise the defendant of his appellate rights. It is ordered that in the event he appeals this case to the Court of Appeals of Virginia, the transcript of the proceedings in said case is to be made a part of the record when received in the Clerk's Office of this Court.

Costs. The defendant shall pay costs of **$2,429.00.**

Thereupon, the defendant was remanded.

September 13, 2002 ENTER: _____
Margaret P. Spencer, Judge

DEFENDANT IDENTIFICATION:

SSN: **223-98-8852** DOB: **8-22-61** SEX: **M**

SENTENCING SUMMARY:

TOTAL SENTENCE IMPOSED: **65 years**

TOTAL SENTENCE SUSPENDED: **none**

Hood v. Commonwealth

Court of Appeals of Virginia

February 17, 2004, Decided

Record No. 2469-02-2

Reporter
2004 Va. App. LEXIS 82 *; 2004 WL 290687

STEPHEN JAMES HOOD v. COMMONWEALTH OF VIRGINIA

Notice: [*1] PURSUANT TO THE APPLICABLE VIRGINIA CODE SECTION THIS OPINION IS NOT DESIGNATED FOR PUBLICATION.

Subsequent History: Affirmed by *Hood v. Commonwealth, 2005 Va. LEXIS 26 (Va., Mar. 3, 2005)*

Prior History: FROM THE CIRCUIT COURT OF THE CITY OF RICHMOND. Margaret P. Spencer, Judge.

Disposition: Affirmed.

Core Terms

proffer, murder, killed, lady, sexual assault, night, trial judge, elderly woman, cooperation, medical examiner, apartment, abduction, marijuana, questions, commit murder, elderly, killer, drove, first-degree, interview, stabbed, knife, second degree, cross-examination, perpetrator, homicides, elicited, vaginal, knives, immunity agreement

Case Summary

Procedural Posture
Defendant appealed from his conviction by the Circuit Court of the City of Richmond (Virginia) for first-degree murder as a principal in the second degree, after he entered into an immunity/cooperation agreement with the Commonwealth.

Overview
Defendant argued that his proffer statement was improperly admitted into evidence. The appellate court held that defendant opened the door to admission of the proffer by eliciting testimony that led to inferences that were inconsistent with the proffer. Testimony that the murder was consistent with a string of contemporaneous sexual assaults and murders led to an inference that someone other than defendant and his accomplice murdered the victim, which contradicted the proffer that the accomplice, aided by defendant, was the perpetrator. The second inference was that the accomplice was the "Golden Years" killer and that the murder was part of that string of sexual assaults, which was inconsistent with the proffer that the victim was murdered in retaliation for a theft by a drug dealer, who defendant thought was related to the victim. Further, the evidence was sufficient to support defendant's conviction as a principal in the second degree. Defendant was a lookout for his accomplice, and assisted in the abduction. He drove his accomplice and the victim to the murder site. He provided the murder weapon, and drove the accomplice home from the spot where the victim was found.

Appendix 2

Outcome
The conviction was affirmed.

LexisNexis® Headnotes

Criminal Law & Procedure > Preliminary Proceedings > Plea Bargaining Process > Enforcement of Plea Agreements

HN1 **Plea Bargaining Process, Enforcement of Plea Agreements**

Prosecutors may enter into cooperation/immunity agreements whereby the government promises an individual immunity from prosecution, or from use of, and/or derivative use of, statements the witness makes to the government. These agreements are usually made in consideration for the individual's cooperation in providing information concerning criminal activity. Such agreements are contractual in nature and, thus, are subject to principles of contract law. Cooperation/immunity agreements also are subject to due process safeguards which require that the government strictly adhere to the terms of its agreement.

Contracts Law > ... > Measurement of Damages > Foreseeable Damages > Benefit of the Bargain

Criminal Law & Procedure > Trials > Burdens of Proof > Prosecution

Contracts Law > Breach > General Overview

Contracts Law > ... > Measurement of Damages > Foreseeable Damages > General Overview

Criminal Law & Procedure > Preliminary Proceedings > Plea Bargaining Process > Breach of Plea Agreements

HN2 **Foreseeable Damages, Benefit of the Bargain**

The Commonwealth bears the burden of establishing a breach by the defendant of the cooperation/immunity agreement if the agreement is to be considered unenforceable. In fact, if a defendant did not breach the cooperation/immunity agreement, due process requires that the government provide him with the benefit of his bargain.

Criminal Law & Procedure > Preliminary Proceedings > Plea Bargaining Process > Breach of Plea Agreements

HN3 **Plea Bargaining Process, Breach of Plea Agreements**

Determining whether an appellant has breached a cooperation/immunity agreement requires the appellate court to examine the evidence introduced at trial and to construe the contract, which the appellate court is as well positioned to do as was the trial court.

Criminal Law & Procedure > Trials > Examination of Witnesses > Cross-Examination

Evidence > Relevance > Preservation of Relevant Evidence > Exclusion & Preservation by Prosecutors

HN4 **Examination of Witnesses, Cross-Examination**

Evidence is evidence, whether it comes out on direct or cross-examination.

Criminal Law & Procedure > Sentencing > Corrections, Modifications & Reductions > Cooperation With Government

HN5 **Corrections, Modifications & Reductions, Cooperation With Government**

An immunity/cooperation agreement strives to achieve dual goals--giving the person making the statement an

incentive to tell the truth while providing assurance that the accused can still defend himself at trial if the bargaining collapses.

Criminal Law & Procedure > Sentencing > Corrections, Modifications & Reductions > Cooperation With Government

Criminal Law & Procedure > Trials > Witnesses > General Overview

HN6[] Corrections, Modifications & Reductions, Cooperation With Government

An immunity/cooperation agreement does not require an accused to remain passive at trial or prevent him from offering any defense at all. He remains free to challenge the sufficiency of the Commonwealth's evidence; call into question the credibility of the Commonwealth's witnesses; question the Commonwealth's witnesses about their knowledge and qualifications; challenge inconsistencies in the Commonwealth's evidence; and ask the Commonwealth's witnesses about their motives for testifying against him, as long as the specific method he chooses to effect any such challenge is not contrary to or inconsistent with a defendant's admission of guilt in a bargaining proffer.

Criminal Law & Procedure > Sentencing > Corrections, Modifications & Reductions > Cooperation With Government

Evidence > ... > Credibility of Witnesses > Impeachment > General Overview

HN7[] Corrections, Modifications & Reductions, Cooperation With Government

In order to achieve the joint goals of an immunity/cooperation agreement, a judge must find genuine inconsistency before allowing use of the defendant's proffer statements. Statements are inconsistent only if the truth of one implies the falsity of the other. However, the inconsistency in testimony required for admission of a proffer statement need not be as directly contradictory as a defendant's saying in his proffer, "X is true," and later offering evidence that "X is not true."

Criminal Law & Procedure > Sentencing > Corrections, Modifications & Reductions > Cooperation With Government

HN8[] Corrections, Modifications & Reductions, Cooperation With Government

Testimony not directly contradictory may lead to inferences that properly open the door to the use of a proffer statement because the grounds or bases underlying the two assertions are inconsistent.

Criminal Law & Procedure > ... > Standards of Review > Plain Error > General Overview

HN9[] Standards of Review, Plain Error

On appeal of a criminal conviction, the appellate court views the evidence in the light most favorable to the Commonwealth. The judgment of a trial court will be disturbed only if plainly wrong or without evidence to support it.

Criminal Law & Procedure > Trials > Witnesses > Credibility

Evidence > Inferences & Presumptions > Inferences

Criminal Law & Procedure > Juries & Jurors > Province of Court & Jury > General Overview

HN10[] Witnesses, Credibility

The credibility of a witness, the weight accorded the testimony, and the inferences to be drawn from proven facts are matters solely for the fact finder's determination.

Criminal Law & Procedure > Juries & Jurors > Province of Court & Jury > General Overview

HN11[] Juries & Jurors, Province of Court & Jury

The fact finder is not required to believe all aspects of a

witness's statements or testimony; it may accept some parts as believable and reject other parts as implausible.

Criminal Law & Procedure > Accessories > Aiding & Abetting

Criminal Law & Procedure > ... > Homicide, Manslaughter & Murder > Murder > General Overview

HN12 **Accessories, Aiding & Abetting**

A principal in the second degree is one not the perpetrator, but present, aiding and abetting the act done, or keeping watch or guard at some convenient distance. The defendant's conduct must consist of inciting, encouraging, advising or assisting in the murder. It must be shown that the defendant procured, encouraged, countenanced, or approved commission of the crime.

Criminal Law & Procedure > Accessories > Aiding & Abetting

Criminal Law & Procedure > ... > Acts & Mental States > Mens Rea > General Intent

HN13 **Accessories, Aiding & Abetting**

To constitute one an aider and abettor, he must be guilty of some overt act, or he must share the criminal intent of the principal.

Criminal Law & Procedure > Accessories > Aiding & Abetting

Transportation Law > Private Vehicles > Bicycles

Criminal Law & Procedure > Sentencing > Capital Punishment > General Overview

HN14 **Accessories, Aiding & Abetting**

In felony cases excepting most capital murders, a principal in the second degree may be indicted, tried, convicted and punished in all respects as if he was a principal in the first degree.

Counsel: Horace F. Hunter for appellant.

Paul C. Galanides, Assistant Attorney General (Jerry W. Kilgore, Attorney General, on brief), for appellee.

Judges: Present: Judges Benton, Elder and Senior Judge Hodges. Benton, J., dissenting.

Opinion by: LARRY G. ELDER

Opinion

MEMORANDUM OPINION * BY JUDGE LARRY G. ELDER

Stephen James Hood (appellant) appeals from his bench trial conviction for first-degree murder as a principal in the second degree. [1] On appeal, he contends the trial court (1) erroneously permitted the Commonwealth to introduce into evidence a statement he proffered to the government in the course of plea negotiations; and (2) erroneously concluded the evidence was sufficient to support his conviction as a principal in **[*2]** the second degree to first-degree murder. We hold the trial court's admission of appellant's proffer statements was not error and that the evidence supported appellant's murder conviction. Thus, we affirm.

I.

BACKGROUND

In the early morning hours of August 31, 1990, an elderly woman named Eloise Cooper was abducted from the apartment she shared with her husband. On the afternoon of August 31, 1990, Mrs. Cooper was

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* Pursuant to *Code § 17.1-413*, this opinion is not designated for publication.

[1] He also was convicted for misdemeanor abduction. That conviction is not before us in this appeal. See *infra* footnote 2.

found dead in the woods of a nearby park.

An acquaintance of appellant's was convicted for Mrs. Cooper's murder. Later, however, appellant and a man named Billy Madison "[were] developed as [suspects]." In 2001, appellant and his attorney engaged in plea negotiations with the Commonwealth. Prior to doing so, appellant and the Commonwealth entered into an agreement promising appellant immunity from prosecution if he cooperated with the government and complied with **[*3]** various other terms contained in the agreement.

Pursuant to that agreement, appellant admitted he and Madison were acquaintances and that they engaged in several drug transactions with Roberto Steadman in the summer of 1990. Appellant said that on the night the victim was killed, Madison was searching for Steadman in order to retaliate against him for Steadman's taking their money without providing them with marijuana. Appellant admitted he was present when Madison abducted the victim at knifepoint and that he drove Madison and the victim to a secluded spot where Madison beat the victim and left her behind.

No plea agreement was reached, and appellant was scheduled to be tried for first-degree murder of the victim. The prosecutor confirmed that appellant's statements "can't be used in the Commonwealth's case in chief" but noted the agreement would not prevent any other use of the statements.

At trial, the prosecutor argued appellant presented evidence that breached the terms of the agreement and offered appellant's statements into evidence. The trial court admitted the statements and convicted appellant for first-degree murder.

II.

ANALYSIS

A.

ADMISSION OF STATEMENTS COMPRISING **[*4]** APPELLANT'S PROFFER

> ***HN1***[↑] Prosecutors may enter into cooperation/immunity agreements whereby the government promises an individual immunity from prosecution, or from use of, and/or derivative use of, statements the witness makes to the government. These agreements are usually made in consideration for the individual's cooperation in providing information concerning criminal activity. . . . Such agreements are contractual in nature and, thus, are subject to principles of contract law. . . . Cooperation/immunity agreements [also] are subject to due process safeguards which require that the government strictly adhere to the terms of its agreement.

Commonwealth v. Sluss, 14 Va. App. 601, 604, 419 S.E. 2d 263, 265, 8 Va. Law Rep. 3433 (1992) (citations omitted). ***HN2***[↑] The Commonwealth "[bears] the '"burden of establishing a breach by the defendant [of the cooperation/immunity agreement] if the agreement is to be considered unenforceable." 'In fact, if [appellant] did not breach the cooperation/immunity agreement, due process requires that the government provide [him] with the benefit of his bargain." *Id. at 606, 419 S.E. 2d at 266* (quoting *United States v. Johnson, 861 F.2d 510, 513 (8th Cir. 1988)* **[*5]** (quoting *United States v. Brown, 801 F.2d 352, 355 (8th Cir. 1986)*)). Under the facts of this case, ***HN3***[↑] determining whether appellant has breached the agreement requires us to examine the evidence introduced at trial and to "construe the contract, which [we are] as well positioned to do as the trial court [was]." Id.

Here, the relevant portion of the cooperation/immunity agreement provided that if appellant "at any time offers testimony or presents evidence different from any statement made or other information provided during the proffer, the Commonwealth ...may use any statements provided by [appellant], or any information[] derived directly or indirectly from these statements[,] for impeachment, cross-examination and rebuttal." "Introduction of the statements thus was proper if either [appellant's] testimony or evidence that he presented through the testimony of others contradicted the proffer. Because [appellant] did not testify, only the second clause is at issue. ...Evidence ***HN4***[↑] is evidence, whether it comes out on direct or cross-examination." *United States v. Krilich, 159 F.3d 1020, 1025 (7th Cir. 1998)* (citations omitted) (evaluating **[*6]** more broadly worded agreement, allowing introduction of proffer statements if accused "testified contrary to the substance of the proffer or otherwise presented a position inconsistent with the proffer," which the court interpreted to include not only evidence offered through witnesses other than the accused but also "a position [developed] through arguments of counsel").

HN5[↑] An immunity/cooperation agreement such as this one strives to achieve dual goals--giving the person making the statement "an incentive to tell the truth" while providing "assurance that [the accused can still]

defend himself at trial if the bargaining collapses." Id. HN6[↑] Such an agreement does not require an accused to remain "passive at trial" or prevent him from offering any defense at all. Id. He remains "free to challenge the sufficiency of the [Commonwealth's] evidence; call into question the credibility of the [Commonwealth's] witnesses; question [Commonwealth's] witnesses about their knowledge and qualifications; challenge inconsistencies in the [Commonwealth's] evidence; and ask [Commonwealth's] witnesses about their motives for testifying against [him]," *United States v. Rebbe, 314 F.3d 402, 408 (9th Cir. 2002),* **[*7]** as long as the specific method he chooses to effect any such challenge is not '" contrary to' or 'inconsistent with' a defendant's admission of guilt in a bargaining proffer," *Krilich, 159 F.3d at 1025*.

HN7[↑] In order to achieve the joint goals of an immunity/cooperation agreement, a "judge must find genuine inconsistency before allowing use of the [defendant's proffer] statements. ... Statements are inconsistent only if the truth of one implies the falsity of the other." *Id. at 1025-26*. However, the inconsistency in testimony required for admission of a proffer statement need not be as directly contradictory as a defendant's saying in his proffer, '" X is true, '" and later offering evidence that '" X is not true. '" *United States v. Jasin, 215 F. Supp. 2d 552, 589 (E. D. Pa. 2002)* (deciding whether proffer statement was "materially different" from evidence offered at trial, which phrase parties conceded was equivalent to phrase "inconsistent statement" in *Fed. R. Evid. 613(b) and 801(d)(1)(A)*). HN8[↑] Testimony not directly contradictory may lead to inferences that "properly **[*8]** open[] the door to use of a proffer statement because the grounds or bases underlying the two assertions are inconsistent." *Id. at 590 n. 30* (citing *Krilich, 159 F.3d at 1024-26*).

The United States Court of Appeals for the Seventh Circuit applied these principles in Krilich, in which the defendant was accused of faking a hole-in-one during a golf tournament in order to bribe a local political leader. *159 F.3d at 1024*. The defendant participated in plea negotiations, entering into an agreement that his proffer statements would be admissible if he "testified contrary to the substance of the proffer or otherwise presented a position inconsistent with the proffer." *Id. at 1024-25*. During the proffer, the defendant admitted faking the hole-in-one. *Id. at 1025*. However, the defendant offered evidence, *inter alia*, that the hole at issue was "close to the clubhouse and easily observed." *Id. at 1026*. The court concluded the defendant "wanted the jury to infer that no one would attempt to fake a hole-in-one there," an implication it held was inconsistent with the proffer. Id. The **[*9]** Court held the trial court could reasonably have concluded this evidence "[went] well beyond casting doubt on the prosecutor's evidence" and "advanced a position inconsistent with the proffer," thereby justifying admission of the defendant's statements made in the proffer. Id.; see also *Jasin, 215 F. Supp. 2d at 591-92* (holding that where defendant was charged with illegal export activities, claimed he acted in good faith by relying on representations of another individual who claimed '" Washington approval'" for export activities, and testified, '" I believed [the individual's claim], why wouldn't I believe it?, '" government was entitled to admit proffer statements indicating defendant's knowledge of other fraud and wrongdoing by individual).

Here, appellant, in his proffer statements, said Madison sought to retaliate against Steadman for stealing from them during a drug deal. Appellant admitted he was present when Madison, unable to locate Steadman, pushed the victim into the backseat of the car appellant was driving, climbed in on top of her as she cried and screamed for help, and subsequently murdered her when appellant found a secluded area in a nearby **[*10]** park.

At trial, appellant elicited testimony from Officer Steven Travis about his investigation of the abduction. On cross-examination, the following exchange took place:

> Q [During the] summer of 1990, were you familiar with something called the Golden Years Homicides?
>
> A Yes, sir.
>
> Q Now, during that time, specifically, August of 1990, weren't there four elderly African-American women who had been killed or stabbed during that time?
>
> A Yes, sir, I believe they were.
>
> Q And Ms. Cooper was one of those women, correct?
>
> A I'm not sure if she was considered in that group, but --
>
> Q And some of the women had been sexually --
>
> [PROSECUTOR]: Judge, this is beyond the scope of my direct examination. Now, for the purposes of saving time, I don't mind if [appellant's counsel] goes ahead and asks [Officer Travis] these questions, but I just want him to realize that he is calling Mr. Travis now as his witness and he's asking these questions as his witness.
>
> * * * *

[APPELLANT'S COUNSEL]: I don't have any more questions, Your Honor. He's not my witness.

Appellant's questioning ceased, and the witness did not respond to the partially articulated question regarding **[*11]** whether the victims had been sexually assaulted.

On the Commonwealth's direct examination of the medical examiner, Marcella Fierro, Dr. Fierro testified that the victim was found with her pajama top pulled up, her pajama pants removed, and her "legs spread eagle." The medical examiner said that, based on her "first impression," she "worked [the crime] up" as a sexual assault and examined the victim's body for trace evidence, "hairs or fibers or seminal fluid." Some of the wounds on the victim's body were consistent with attempted sexual assault or rape, but Dr. Fierro found no evidence of sperm in the oral, vaginal or anal swabs.

On cross-examination, appellant's counsel inquired further about the circumstances leading the medical examiner to suspect the attack may have involved a sexual assault. The medical examiner highlighted which of the victim's wounds were consistent with sexual assault. She then testified about a substance called amylase found on the victim's nipple, which she said was a "marker for saliva" and indicated that someone had been "sucking [the victim's] nipple." Finally, she found no tears at the opening of the vaginal area but noted traces of blood, insects **[*12]** and early decomposition. She "did not identify any absolutely convincing evidence ...that there was vaginal penetration with injury." The following exchange then took place:

> Q So just for arguments' sake, if someone had come in and confessed and said that they had vaginally penetrated her with a condom, would that be consistent with your findings?
> A That could be okay.
> * * * *
> Q During the same time, weren't there several other murders of elderly African-American women?
> A African-American and white ladies. Several elderly ladies, yes.
> Q And they had been stabbed?
> A Some had been stabbed and some had been beaten, and these ladies were found in their residences.
> Q And some had been sexually assaulted.
> A Yes, yes.
> Q And this is all around the same time frame?
> A I don't know. I didn't check the dates. I did not check the dates.

Thus, appellant elicited testimony from Officer Travis and Dr. Fierro that the murder of the victim was consistent in several respects with a string of contemporaneous sexual assaults and murders of elderly women in the area, referred to as the Golden Years Homicides. Although this testimony did not directly contradict appellant's proffer **[*13]** statements, two inferences flow from this testimony, and both inferences are inconsistent with appellant's proffer statements.

The first inference from the evidence appellant elicited from the medical examiner is that someone other than appellant and Madison murdered the victim. In fact, in objecting to the admission of the proffer statements, appellant's counsel argued, "for all we know, the same person could have committed all those crimes." Although true that someone else, i. e., the Golden Years murderer, could have killed the victim, evidence suggesting that someone else was the perpetrator contradicted appellant's proffer statement that Madison, aided by appellant, was the perpetrator.

The second inference to be drawn from the evidence appellant elicited from the medical examiner is that Madison was the Golden Years killer and that his killing of the victim was part of that string of sexual assaults. However, this inference was inconsistent with appellant's proffer statement that the motive for killing the victim was retaliation for Steadman's taking their drug money.

Thus, regardless of the interpretation given the testimony appellant elicited from Officer Travis and Dr. **[*14]** Fierro, their testimony challenged the Commonwealth's theory of the case in a way that was impermissible under the terms of the immunity/cooperation agreement. Appellant challenged the Commonwealth's theory of the case in a permissible way when he cross-examined the forensic scientist who testified the victim's stab wounds could have been inflicted by the type of chef's knives appellant had owned and obtained her concession that there existed thousands or even millions of knives of a type that could have been used to inflict the wounds found on the victim. In contrast, appellant challenged the Commonwealth's theory of the case in an impermissible way when he elicited testimony from Officer Travis and Dr. Fierro that was inconsistent with his proffer statements. The testimony was inconsistent because it "*implied* the falsity," *Krilich, 159 F.3d at 1025-26*

(emphasis added), of either (a) appellant's statement that Madison killed the victim or (b) appellant's statement that the killing was in retaliation for Steadman's theft of their drug money. Thus, we hold the trial court did not err in ruling that, under the express terms of the cooperation/immunity agreement, **[*15]** appellant opened the door to allow into evidence the statements that comprised his proffer in order to rebut the evidence he elicited through Officer Travis and Dr. Fierro.

B.

SUFFICIENCY OF EVIDENCE FOR FIRST-DEGREE MURDER CONVICTION [2]

[*16] Appellant argues the evidence was insufficient to prove he acted as a principal in the second degree to first-degree murder of the victim. We disagree.

HN9[↑] On appeal, we view the evidence in the light most favorable to the Commonwealth. *Higginbotham v. Commonwealth, 216 Va. 349, 352, 218 S.E. 2d 534, 537 (1975)*. The judgment of a trial court will be disturbed only if plainly wrong or without evidence to support it. *Martin v. Commonwealth, 4 Va. App. 438, 443, 358 S.E. 2d 415, 418, 4 Va. Law Rep. 127 (1987)*. ***HN10***[↑] The credibility of a witness, the weight accorded the testimony, and the inferences to be drawn from proven facts are matters solely for the fact finder's determination. *Long v. Commonwealth, 8 Va. App. 194, 199, 379 S.E. 2d 473, 476, 5 Va. Law Rep. 2492 (1989)*. ***HN11***[↑] The fact finder is not required to believe all aspects of a witness' statements or testimony; it may accept some parts as believable and reject other parts as implausible. *Pugliese v. Commonwealth, 16 Va. App. 82, 92, 428 S.E. 2d 16, 24, 9 Va. Law Rep. 1057 (1993)*.

> ***HN12***[↑] "A principal in the second degree is one not the perpetrator, but present, aiding and abetting the act done, or keeping watch or guard at some convenient **[*17]** distance." *Brown v. Commonwealth, 130 Va. 733, 736, 107 S.E. 809, 810 (1921)*. ...The defendant's conduct must consist of "inciting, encouraging, advising or assisting in the murder." *Frye v. Commonwealth, 231 Va. 370, 389, 345 S.E. 2d 267, 280 (1986)*. It must be shown that the defendant procured, encouraged, countenanced, or approved commission of the crime. *Augustine v. Commonwealth, 226 Va. 120, 124, 306 S.E. 2d 886, 888-89 (1983)*. ***HN13***[↑] "To constitute one an aider and abettor, he must be guilty of some overt act, or he must share the criminal intent of the principal." *Triplett v. Commonwealth, 141 Va. 577, 586, 127 S.E. 486, 489 (1925)* . . . .

Rollston v. Commonwealth, 11 Va. App. 535, 539, 399 S.E. 2d 823, 825, 7 Va. Law Rep. 1200 (1991); see also *Code § 18.2-18* (providing that ***HN14***[↑] in felony cases excepting most capital murders, principal in second degree may be indicted, tried, convicted and punished in all respects as if principal in first degree).

Here, the evidence, viewed in the light most favorable to the Commonwealth, proved appellant and Madison were "close friends" who jointly **[*18]** asked Roberto Steadman to purchase marijuana for them. When Steadman kept the money and failed to produce the drugs, appellant took Steadman's bicycle and hid it in his apartment. Appellant became angry when the apartment complex's maintenance man allowed Steadman to enter appellant's apartment and reclaim the bicycle. Appellant told the maintenance man that Steadman "owed [appellant] money on that bike."

Appellant and Madison subsequently telephoned Steadman and threatened him, saying, "We'll kick your butt, this and that and the other ...." At some point, Steadman saw appellant with a knife he kept in a sheath behind the seat of his truck. Appellant threatened Steadman with the knife and said, "Don't try to get away with our money."

Other evidence proved Steadman previously had told appellant and Madison that he lived with his grandmother. The address Steadman provided on his employment application for the Wood Run Apartments, where he worked with appellant and Madison, was the address where the elderly victim resided with her husband. Steadman, in fact, was not related to the victim and did not reside with her. He used her address

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[2] Appellant argues on brief that the evidence was insufficient to support both the murder and abduction convictions. However, the murder conviction is the only one before us in this appeal. The trial court found appellant guilty of misdemeanor abduction and first-degree murder on April 4, 2002. It postponed sentencing on the murder conviction to allow preparation of a pre-sentence report. However, it sentenced appellant for the abduction on that date and informed him from the bench that, if he desired to appeal the abduction conviction, he had to file a notice of appeal within thirty days from that date. Neither the trial court's record for the abduction conviction nor a notice of appeal for that conviction appears in the record before us on appeal. Thus, we do not consider the abduction conviction in this appeal.

so "no one [could] trace [him]."

On the **[*19]** night of the victim's murder, appellant and Madison left together. Appellant said he did not want to take his truck because it was too noisy, and Madison said he had access to a quieter vehicle. Appellant then suggested the men take a weapon and retrieved his knives from his truck before he drove Madison downtown in a small red car. Appellant claimed the men were going to meet Steadman and admitted he "knew ...one thing or the other was going to happen when they met with Steadman that night. Either Madison was going to get his money or his drugs, or he was going to 'fuck up' Steadman." With this knowledge, appellant drove Madison downtown, donned a baseball cap and remained slumped down in the car with the engine running while Madison went in search of Steadman. Appellant remained in that position even after Madison returned to the car to retrieve appellant's knives and sheath.

When Madison returned to the car with the elderly victim, who was wearing only her nightclothes and was screaming for help, appellant drove her and Madison to a dark secluded spot where he let his car coast to a stop so as to minimize the risk of detection. Appellant gave no indication to Madison that he did **[*20]** not wish to participate in the abduction; he helped Madison find a secluded spot; and he neither voiced an objection nor offered any aid to the victim when Madison dragged her from the car and began to beat and stab her. At some point during the course of the murder, appellant was close enough to the victim to allow her to scratch his right shoulder in a fashion severe enough that it remained visible the following evening. When asked by Madison's wife how he sustained the injury, appellant derogatorily and callously reported that "some nigger bitch [had] scratched him ...the night before."

This evidence was sufficient to prove appellant acted as a lookout or guard for Madison, assisted in the abduction, and countenanced Madison's murder of the victim as retaliation against Steadman. Appellant drove Madison and the victim to a secluded area and allowed Madison to exit the vehicle with the victim. Appellant provided the murder weapon. Finally, appellant drove Madison home from the spot where the victim was later found dead. This evidence was sufficient to support appellant's conviction for first-degree murder as a principal in the second degree.

III.

For these reasons, we hold the **[*21]** trial court's admission of appellant's proffer statements was not error and that the evidence supported appellant's murder conviction. Thus, we affirm.

Affirmed.

Dissent by: Benton

Dissent

Benton, J., dissenting.

For the reasons that follow, I would hold that the prosecutor's proof of a sexual assault raised an issue beyond the scope of Stephen Hood's proffer statement and that Hood did not trigger the waiver under his agreement when he implied that Billy Madison, the person he named as the killer, may have been the perpetrator of this and other homicides.

I.

The grand jury indicted Hood for murder in the first degree and abduction. Six months later, Hood, his attorney, and an Assistant United States Attorney, who was acting as a Special Assistant Commonwealth's Attorney, entered into an agreement for a proffer from Hood "regarding the Commonwealth's investigation of certain individuals [with whom] Hood is familiar." Pertinent to the issue in this case, the agreement provides as follows:

> In the event your client at any time offers testimony or presents evidence different from any statement made or other information provided during the proffer, the Commonwealth of Virginia **[*22]** may use any statements provided by your client, or any information, derived directly or indirectly from these statements for impeachment, cross-examination and rebuttal. [3]

The language in this portion of the proffer agreement is similar to the wording in other proffer agreements the

[3] The record indicates that the prosecutor's witness testified about the details in the proffer statement as substantive evidence in the prosecutor's case-in-chief, contrary to the terms of the agreement. Hood's trial attorney, however, raised no objection concerning this breach. Therefore, this issue is not before us on appeal.

government has used. See *United States v. Krilich, 159 F.3d 1020, 1024 (7th Cir. 1998)*. This type of conditional waiver serves a distinct purpose when the parties are seeking a plea negotiation. "The prosecutor wants to give [the individual] an incentive to tell the truth; [the individual] wants assurance that he could defend himself at trial if bargaining collapsed (for otherwise he was delivering himself into the prosecutor's hands)." *Id. at 1025*.

[*23] After signing the agreement, Hood gave "a detailed proffer to the Commonwealth" in furtherance of a plea negotiation. The record indicates, however, that when the trial judge ruled the Commonwealth's witness could testify concerning the proffer statement, the trial judge had not read it. [4] To understand the conundrum the trial judge faced, it is necessary to review in detail the relevant parts of Hood's proffer statement, which were made over the course of three interviews and are evidenced in seventeen typed pages.

[*24] In his first interview on November 6, 2001, Hood disclosed that he and Billy Madison were always looking for marijuana. At some point, Madison began purchasing marijuana from Roberto Steadman. Hood said Steadman was Madison's marijuana "connection" and was to sell Madison $ 100 worth of marijuana on August 31, 1990. Hood drove Madison to Cary Street where they met Steadman. After Steadman entered the car, Hood drove the car to a place near Steadman's apartment, where Steadman got out to get the drugs. In pertinent part, the statement continues as follows:

> Approximately five minutes after dropping off Steadman, Madison got out of the car and walked out of sight of Hood .... Madison returned approximately five minutes later. Madison was mad and kept yelling "fuck it" over and over again. Though Hood tried to ask Madison what was going on, Madison did not respond. Instead, Madison reached down to the floorboard of the front passenger seat where he had been sitting and retrieved Hood's sheath and knives ....
>
> After putting on the sheath, Madison walked toward the back of the vehicle. Hood saw Madison in the rearview mirror walking away from the car; however, he never saw into which **[*25]** apartment Madison went, nor had he seen into which apartment Steadman went. Hood does not recall seeing anyone else on the street that night.
>
> After Madison had been gone for approximately five minutes, Hood heard a commotion near the car. The next thing he knew, Madison was throwing a black female, wearing a pastel nightgown, into the back seat of the car. Madison then got in on top of her. The lady was repeatedly screaming "help" and "please," and was crying. Madison kept telling the lady to "shut up."
>
> When Madison threw the lady in the car, Hood tried to say "what the fuck," but before he could even get it out, Madison was saying "go." Madison kept switching between pointing the knife at the lady and pointing the knife at Hood. By the time he pulled away from the curb, Hood was crying.
>
> Hood drove into Byrd Park ....While they were driving, Hood kept crying and saying "what the fuck" and Madison kept telling him to "shut up."
>
> Hood finally turned onto a dark street and Madison told him to turn off the headlights. Hood turned off the lights, and rolled to a stop. Madison and the lady got out of the car and walked a short distance. It was dark and hard for Hood to see what was **[*26]** happening. It looked like Madison was hitting the lady. She was crying at first, but then stopped. Madison got back in the car and said "get the fuck out of here." Madison still had the knife in his hand, and was pointing it at Hood as he got back in the car. At that time, Hood did not know that Madison had killed the lady.
>
> * * * *
>
> After the incident, Hood was constantly trying to avoid Madison. One day, Madison approached Hood on the steps to Hood's apartment. Madison wanted Hood to testify as a character witness for him at a hearing in Charlottesville. Hood said no.

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[4] The trial judge may have had a general sense of the proffer because the prosecutor had filed a pretrial motion containing the following summary of Hood's proffer statement:

> On each occasion, Hood described in great detail how he and a friend ...went to the Parkwood Avenue area of Richmond in the early morning hours of August 31, 1990, with the intention of purchasing narcotics. Hood described that he and his friend gave a putative drug seller money to obtain a quantity of drugs. Hood said that the drug dealer took the money but did not return. After a short while, Hood's companion became enraged, took Hood's knives and knife sheath --Hood worked as a chef --and left the car in search of the drug seller. Hood said that after another short interval, his companion returned to the car dragging an elderly female at knifepoint. The woman was placed in the car and Hood drove off. Hood said that he, his companion and the victim rode to a secluded area near Byrd Park, where the victim was removed from the car and killed.

> Madison then threatened to tell law enforcement authorities about Hood's drug use. When Hood still resisted, Madison leaned in close and said "I'll kill you just like I killed that nigger." ...This was the first time Hood realized that Madison really killed the lady ....
>
> * * * *
>
> Hood never had any contact with Steadman after the murder. Hood never had any idea why Madison grabbed the lady that night. Hood never heard anything about Steadman living with his grandmother.

At the second interview on November 13, 2001, Hood said he first met Steadman a couple of weeks before the murder. After Madison introduced **[*27]** Hood to Steadman, Hood drove Madison and Steadman to Byrd Park. Steadman left the truck with their money and later returned with marijuana. Hood next met Steadman when Madison took him to Steadman's apartment, where they smoked marijuana. Hood also said that he and Madison knew Jeffrey Cox and occasionally smoked marijuana with him. [5]

The typed proffer from the third interview on December 3, 2001, states "the chronology of events are now clearer in Hood's mind." Hood said "the day before or the day of the murder" **[*28]** Madison was angry with Steadman because he had given Steadman money the previous night to buy marijuana and Steadman had not brought the marijuana to him. Hood related again the following events as occurring the night of the murder:

> Hood was okay with Steadman, but Madison was "pissed off." That night Madison said he was going to "get his drugs or get this thing straight." Madison insisted that Hood go with him that night. The whole time they were driving down to meet Steadman, Madison kept saying he was going to get his dope or money. The murder happened after midnight. Madison gave Steadman more money that night.
>
> Hood knew the night of the murder that one thing or the other was going to happen when they met with Steadman that night. Either Madison was going to get his money or drugs, or he was going to "fuck up" Steadman.
>
> Steadman was waiting on Cary Street that night. Madison had already arranged to meet with him. It seemed like Madison and Steadman had arranged a deal by the time Madison came over to Hood's apartment that night. Madison's eyes were bloodshot when he came over.
>
> When Hood and Madison got back that night, . . . Madison gave Hood the sheath back at that **[*29]** time, without the knife he had used. Hood got out of the car, leaving the keys in the ignition. As Hood was running across the parking lot to his apartment, Madison yells "don't say anything about this." It was still dark when they got home that morning.

During this final interview, Hood again said he "did not know for sure that Madison had killed the lady till the stairwell incident," which is described in Hood's first interview.

II.

In his opening statement at trial, the prosecutor said the body of the elderly woman was found "naked and spread eagle" with her nightclothes pulled over her head. Noting that the elderly woman died from three stab wounds, the prosecutor asserted that Hood, a chef, delivered to police several knives from a set of knives but omitted delivering one knife that would be shown to leave marks consistent with the wounds found on the elderly woman's body. Arguing that the evidence "put the [knife] with Stephen Hood," the prosecutor said the evidence would prove Hood's guilt of first-degree murder and also abduction. The prosecutor made no reference to Madison's role in the events. [6] The prosecutor's opening statement did not suggest that Hood was **[*30]** being viewed as a principal in either the first or the second degree and, thus, left open the option to prove the degree of Hood's culpability.

During the trial, the prosecutor raised the spectre of

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[5] Hood's proffer statement does not implicate Cox in the events surrounding the murder. A pleading filed by Madison's attorney alleges, however, that "in December 2001 the Commonwealth ...released Jeffrey David Cox after wrongfully convicting him for the ... murder and kidnapping" of this same elderly woman. The record also contains an order permitting the Commonwealth, under certain conditions, "to introduce evidence of facts and circumstances relevant to the conviction and release of Jeffrey Cox."

[6] The record indicates that, at a pretrial hearing, Madison's attorney unsuccessfully sought to quash a subpoena the prosecutor had issued for Madison to appear at Hood's trial. During that hearing, the prosecutor indicated that Madison "is a potential target and participated in the crime in which Mr. Hood is charged." The evidence at trial proved that Madison had not been arrested for any of the events surrounding the abduction and killing of the elderly woman. The evidence, however, did not disclose whether Madison had been indicted for any offense arising out of those events. The prosecutor did not use Madison as a witness.

sexual assault in its case-in-chief even though none of the indictments charged a sexual offense. This issue was raised in the questioning of Dr. Marcella F. Fierro, the medical examiner. After **[*31]** she described the condition of the elderly woman's body, the prosecutor asked the following:

> Q: . . . With respect to when you saw her at the scene, I want to go back for one second with respect to that. You see the position that her body is in?
>
> A: Yes.
>
> Q: What, if anything, in your experience as a chief medical examiner, does that indicate?
>
> A: Well, when you see ladies with their clothes pulled up and their legs spread eagle and they're laying out in the woods, we treat this as a sex crime.
>
> Q: Did you look at or do any examination of her when you got her back to your office for signs of sexual assault?
>
> A: Yes, we examined her for the presence of trace evidence, which would be hairs or fibers or seminal fluid, and did a PERK kit, a Physical Evidence Recovery Kit, oral, anal and vaginal swabs and smears.
>
> Q: Okay. Did you recover anything, as far as that goes?
>
> A: Well, the laboratory tests that came back did not show any sperm on the vaginal, oral, or anal swabs. I wouldn't be surprised by anal swabs being negative, because they're often negative because of all the other bacteria in the anal canal. But the oral and vaginal swabs were negative **[*32]** for sperm.

The medical examiner also testified on direct examination that the elderly woman's thighs contained contusions "often seen with the forceful spreading of the legs." Although the prosecutor later advanced no argument that a sexual event had occurred, this evidence provided a basis upon which the trial judge might infer a sexual assault had occurred during the commission of the murder. See *Code § 18.2-32* (providing that murder of the first degree includes a killing in the commission of or attempt to commit rape or forcible sodomy).

Cross-examining Dr. Fierro, Hood's attorney asked the following questions:

> Q: During the same time, weren't there several other murders of elderly African-American women?
>
> A: African-American and white ladies. Several elderly ladies, yes.
>
> Q: And they had been stabbed?
>
> A: Some had been stabbed and some had been beaten, and these ladies were found in their residences.
>
> Q: And some had been sexually assaulted?
>
> A: Yes, yes.
>
> Q: And this is all around the same time frame?
>
> A: I don't know. I didn't check the dates. I did not check the dates.

Later, during the direct examination **[*33]** of an F.B.I. agent, the prosecutor moved the judge to permit the agent to testify concerning Hood's proffer statement. The prosecutor argued that Hood's attorney's questions to the medical examiner "about the Golden Years Murders ...were outside the scope of ...direct examination ...[and] contrary to the evidence that was given in these proffers." [7] Hood's attorney denied that the evidence caused a waiver under the agreement and requested the trial judge "to take an *in camera* review of [the] statements that [Hood] may have given on those three days and ...say what specific in those three interviews that is contrary to anything ...[the attorney] may have said." The trial judge declined to review Hood's proffer statements. Apparently relying upon the prosecutor's theory of prosecution, the judge ruled as follows:

> I can do that without looking at the statements. The statements in the interview by Mr. [Hood] were that he committed the murder. The testimony that came from Dr. Fierro was that it could have been related to the Golden Years Murders. So those are the statements that are inconsistent with the evidence that you presented.

[*34] III.

When the prosecutor sought a ruling permitting testimony about Hood's proffer statement, the trial judge had to decide whether, in the language of the agreement, Hood had "presented evidence different from any statement made or other information provided during the proffer." The governing principle is that the

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[7] In a post-trial pleading, the prosecutors alleged the following:

> The Golden Years Murders ...involved a different defendant (Leslie Leon Burchet), who killed elderly women in the Richmond area during the mid 1990's for different motives. That defendant was convicted in the Richmond Circuit Court and is serving five (5) life terms for those crimes.

"judge must find *genuine* inconsistency before allowing use of the [defendant's proffered] statements." *Krilich, 159 F.3d at 1025* (emphasis added). Indeed, this standard means that "statements are inconsistent only if the truth of one implies the falsity of the other." *Id. at 1025-26*. In other words, the test is whether Hood's evidentiary suggestion (that Madison was the murderer of the victim in this case and also was the perpetrator of the other unsolved murders) was a contradiction of his proffer statement. A review of the proffer statement (see Part I above) leaves no doubt that Hood denied committing the murder, that Hood said he "did not know[, when Madison returned to the car,] that Madison had killed the lady," and that Hood said he later learned "that Madison really killed the lady."

Although the trial judge was not **[*35]** required to believe Hood's self-serving proffer statements, the issue the trial judge had to resolve in ruling on the motion was not whether Hood was truthful when he made his proffer. But cf. *Krilich, 159 F.3d at 1024* (noting that "by authorizing the prosecutor to use his statements if he should contradict himself, [the defendant] made his representations more credible"). In ruling on the prosecutor's motion, the trial judge had to assess the proffer statements only in the light of the limitation imposed by the proffer agreement. Simply put, the trial judge's task was not to determine whether Hood's proffer statement was true or false but, rather, her task was to evaluate for inconsistencies the evidentiary propositions Hood asserted at trial against the assertions contained in the proffered statement. Thus, for purposes of determining whether to admit the proffer statement, the trial judge could not accept as a true proposition the prosecutor's theory of prosecution and conclude that Hood was the killer.

The trial judge clearly misperceived the nature of Hood's proffered statements. In ruling that the questioning was contradictory of Hood's statement, the **[*36]** trial judge believed Hood had proffered that he committed the murder. He did not. Although the prosecutor's pretrial pleading indicated "the victim was removed from the car and killed," Hood's proffer statement represented that "Hood never had any idea why Madison grabbed the lady that night" and that Madison committed the murders. The prosecutors knew Hood had not confessed to being the killer; however, they did not correct the judge's misstatement when she ruled that Hood said "he committed the murder."

The Commonwealth's theory of prosecution at trial (that Hood was a principal in the first degree in the commission of the murder) created, in part, a dilemma for Hood. When the Commonwealth sought to prove that Hood was the person who actually abducted and actually killed the elderly woman, Hood was "free to challenge the sufficiency of the [Commonwealth's] evidence" in that regard "without triggering the proffer's admission." *United States v. Rebbe, 314 F.3d 402, 408 (9th Cir. 2002)*. Hood clearly said in his proffer statement that he did not kill the elderly woman and consistently implied that Madison committed the murder. Hood said he did not know a murder had **[*37]** occurred until several days after the event. According to Hood's proffer statement, Madison's threat against Hood days after the murder strongly implied that Madison had killed the elderly woman. Hood, therefore, was not barred from advancing the hypothesis at trial that Madison was the killer.

Likewise, when the prosecution presented evidence that would have permitted an inference at trial that the killer sexually assaulted the elderly woman, Hood was not required to passively accept the burden of that allegation. Nothing in Hood's proffer remotely suggested a sexual assault had occurred or that he had reason to know of a sexual assault. Although the record does not expressly disclose what strategy, if any, Hood's trial attorney was pursuing when raising the spectre of the "Golden Years" homicides, if, however, Hood's trial attorney was attempting to lay blame for those other murders onto Madison, and thereby suggest that Madison also committed the murder of the elderly woman in this case, nothing in that hypothesis is contrary to Hood's proffer statement. In view of the prosecutor's attempt to prove a fact Hood had not proffered, Hood may well have concluded that Madison, whom Hood **[*38]** alleged to be the killer, was a participant in other similar events. Hood's challenge to the prosecutor's hypothesis that Hood sexually assaulted and murdered the elderly woman did not conflict with his proffered statement and certainly was not inconsistent with his admission that he was the driver of the car when Madison abducted the elderly woman and killed her in the park.

I agree with the majority opinion's view that the questions posed by Hood's trial attorney permitted a possible inference that Madison was involved in one or more of the other murders that occurred in the city at that time. That evidentiary suggestion must be viewed, however, in light of Hood's proffer statement that he did not know why Madison abducted the elderly woman in this case and that he later learned Madison killed her. Additionally, the inference of sexual assault during the

killing, which grew from the Commonwealth's evidence, was not consistent with any of Hood's proffered statements. Thus, Hood had a need to defend against the Commonwealth's effort to prove, contrary to Hood's proffer statement, that Hood, not Madison, was the actual killer and that a sexual assault occurred. [8] **[*40]** Consistent with his **[*39]** agreement, however, Hood could not cast doubt upon proof that Madison was the killer because he said as much in his proffer statement. Hood also could not attempt to cast doubt upon his presence in the park when the murder occurred. Hood's agreement, however, did not bar him from presenting evidence that casts doubt on the prosecutor's attempt to show he was the actual killer. [9] In short, by attempting to suggest by his questioning of the medical examiner that Madison may have been the perpetrator of other murders and, by inference, also committed this murder, Hood presented no evidence inconsistent with his proffered statement. Although the trial judge may have had some knowledge concerning the details of the "Golden Years" homicides, this record is silent as to the facts of those homicides and certainly contains no evidence that Madison was not involved in those events or was not suspected to be one of the perpetrators of those events. The prosecutor provided no evidentiary basis upon which the judge could find that the suggestion of Madison's involvement in the "Golden Years" homicides was in conflict with Hood's proffer statement.

I disagree with the majority opinion's view that Hood breached the agreement by suggesting a different motive for the killing. Significantly, the trial judge's ruling was not based upon a hypothesis of conflicting motives. The trial judge ruled that Hood said he committed the murder, that the medical examiner testified the murder could have been related to other murders, and that, therefore, Hood's "statements . . . are inconsistent with the evidence."

Furthermore, a review of Hood's proffered statement provides no motive for Madison's abduction and killing of the elderly woman. Indeed, Hood said that when Madison brought the woman to the car, **[*41]** he sought an explanation from Madison. Madison gave no explanation and told him to drive while threatening him. Hood's proffered statement recites that "Hood never had any idea why Madison grabbed the lady that night." Nothing in Hood's proffered statement contains an assertion or raises an implication that he knew the killing of the elderly woman was in retaliation for Steadman's theft of the drug money. Likewise, nothing in Hood's proffer statement asserts or implies that Madison sexually assaulted the elderly woman before killing her. Those matters flowed from the prosecutor's theory of the prosecution and were impermissibly considered by the trial judge in ruling that Hood's proffer statement, which she had not read, were in conflict with the questions posed by Hood's attorney.

For these reasons, I would reverse the conviction and remand for a new trial.

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[8] The complexities of the evidentiary issues are further revealed by some of the pleadings. In one pleading, the Commonwealth disclosed that "it was learned that in 1998, ... Madison told his wife that he and Stephen Hood committed the ...murder and that Jeffrey Cox was innocent." In a motion *in limine*, however, the Commonwealth represents the following:

> On February 13, 1991, Jeffrey Cox was convicted ...of the murder and abduction ...and was sentenced to life plus 50 years in prison. The conviction of Cox was based, in large part, on his identification by [two witnesses, both of whom] have been subpoenaed by the Commonwealth in the above-styled case.
>
> The Commonwealth respectfully requests this Court to prohibit [Hood] from presenting evidence, or mentioning during opening statement or closing argument, the fact that Cox was convicted of the offense. The Commonwealth does not contest that [Hood] may affirmatively adduce, or elicit on cross-examination, evidence that Cox participated in the murder. For example, the Commonwealth concedes that [Hood] be allowed to attempt to elicit, if that be his strategy, the fact that [two witnesses] identified Cox as one of the perpetrators. The Commonwealth simply asks the Court to exclude evidence of Cox's conviction, as this is a conclusion drawn from facts presented to a jury in 1991.

The prosecutor knew, however, that Hood's proffer statement specifically recites that "Cox was definitely not involved in the commission of this crime ...[and that the] car that Hood drove that night was definitely not Cox's car."

[9] Indeed, the trial judge ultimately accepted as credible the primary events described by Hood's proffer statement and rejected the prosecutor's assertion that Hood "is guilty of the abduction and he is guilty of the murder." The trial judge convicted Hood of accessory after the fact to the abduction and, because he "was not only the lookout but the driver of the getaway car," the judge convicted him "as a principal in the second degree" in the murder.

End of Document

Hood v. Commonwealth

Supreme Court of Virginia

March 3, 2005, Decided

Record No. 040774

Reporter
269 Va. 176 *; 608 S.E.2d 913 **; 2005 Va. LEXIS 26 ***

STEPHEN JAMES HOOD v. COMMONWEALTH OF VIRGINIA

Subsequent History: US Supreme Court certiorari denied by *Hood v. Virginia, 126 S. Ct. 267, 163 L. Ed. 2d 240, 2005 U.S. LEXIS 6702 (U.S., Oct. 3, 2005)*

Prior History: [*1]** FROM THE COURT OF APPEALS OF VIRGINIA.

Hood v. Commonwealth, 2004 Va. App. LEXIS 82 (Va. Ct. App., Feb. 17, 2004)

Disposition: Affirmed.

Core Terms

proffer, murder, Cooper, trial court, apartment, medical examiner, woman, present evidence, plea agreement, elderly woman, second degree, knives

Case Summary

Procedural Posture
Defendant was convicted of first-degree murder as a principal in the second degree. The Court of Appeals of Virginia affirmed the conviction. Defendant appealed.

Overview
Defendant sought reversal of his conviction, asserting that the trial court erred in allowing the Commonwealth to use statements he made in a proffer submitted to the government in the course of plea negotiations. The proffer agreement provided that the proffered statements could be used against defendant if he offered testimony or presented evidence that was different from any statement or information provided in the proffer. Defendant contended that the testimony elicited by defendant from the medical examiner regarding the stabbing murders of other elderly women was not different from his proffered statement. The Commonwealth contended that the testimony created an inference that a person other than his alleged accomplice murdered the victim. The trial court agreed and the appellate court could not say that such a conclusion was erroneous, Thus, the supreme court held that because defendant's evidence at trial was inconsistent with his proffered statement, the trial court did not err in allowing the Commonwealth to use the proffered statement.

Outcome
The judgment of the appellate court was affirmed.

LexisNexis® Headnotes

Appendix 3

Criminal Law & Procedure > Preliminary Proceedings > Plea Bargaining Process > Enforcement of Plea Agreements

Governments > Courts > Rule Application & Interpretation

Criminal Law & Procedure > ... > Entry of Pleas > Guilty Pleas > General Overview

Criminal Law & Procedure > ... > Standards of Review > Clearly Erroneous Review > General Overview

Criminal Law & Procedure > ... > Standards of Review > Clearly Erroneous Review > Findings of Fact

Criminal Law & Procedure > ... > Standards of Review > De Novo Review > General Overview

HN1 **Plea Bargaining Process, Enforcement of Plea Agreements**

Cooperation/immunity agreements, unlike plea agreements, involve only the contracting parties and are not subject to the filing and acceptance procedures applicable to plea agreements. Va. Sup. Ct. R. 3A:8. Cooperation/immunity agreements, like plea agreement, implicate a defendant's due process rights and are generally governed by the law of contracts. On appellate review, the trial court's interpretation of the agreement is a matter of law subject to de novo review, while a clearly erroneous standard of review is applied to the trial court's factual findings.

Criminal Law & Procedure > Accessories > Aiding & Abetting

Criminal Law & Procedure > ... > Homicide, Manslaughter & Murder > Murder > General Overview

Criminal Law & Procedure > ... > Murder > First-Degree Murder > General Overview

Criminal Law & Procedure > ... > Murder > First-Degree Murder > Elements

Criminal Law & Procedure > ... > Murder > Second-Degree Murder > General Overview

Criminal Law & Procedure > ... > Murder > Second-Degree Murder > Elements

HN2 **Accessories, Aiding & Abetting**

A murder committed in the course of an abduction is first-degree murder. *Va. Code Ann. § 18.2-32*. A person is guilty as a principal in the second degree if he is present and assists the perpetrator of the crime or shared the perpetrator's intent to commit the crime.

Counsel: Horace F. Hunter for appellant.

Paul C. Galanides, Assistant Attorney General (Jerry W. Kilgore, Attorney General of Virginia, on brief), for appellee.

Judges: OPINION BY JUSTICE ELIZABETH B. LACY

Opinion by: ELIZABETH B. LACY

Opinion

[*178] [913]** Present: All the Justices

Stephen James Hood was convicted of first-degree murder as a principal in the second degree. Hood asks this Court to reverse his conviction, asserting that the trial **[**914]** court erred in allowing the Commonwealth to use statements Hood made in a proffer submitted to the government in the course of plea negotiations. The proffer agreement provided that the proffered statements could be used against Hood if he offered testimony or presented evidence that was different from any statement or information provided in the proffer. We conclude that because Hood's evidence at trial was inconsistent with his proffered statement, the trial court did not err in allowing the Commonwealth to use the proffered statement.

Facts and Proceedings

The facts, as relevant to the issues in this appeal, are not in dispute. Early in the morning of August 31, 1990, Eloise Cooper, an elderly African-American woman, **[***2]** was abducted from the apartment she shared with her husband. That afternoon her body was found in the woods of a nearby park. According to the medical examiner, Mrs. Cooper had suffered three stab wounds, two of which perforated vital organs and caused her to bleed to death.

Although a third party was convicted of the murder in 1991, the police reopened the case in 1999, at which time Hood and another individual, Billy Madison, were developed as suspects in Mrs. Cooper's murder. Hood was indicted on May 17, 2001 for first degree murder, in violation of *Code § 18.2-32*, and abduction, in violation of *Code § 18.2-47*. As part of plea negotiations, Hood and the government agreed that he would provide a "detailed oral proffer" and that none of the statements made in the proffer would be used against Hood in the Commonwealth's case-in-chief in a criminal prosecution of Hood. The agreement further provided that if Hood "offers testimony or presents evidence different from any statement made or other information provided during the proffer," the Commonwealth could use his statements for impeachment, cross-examination, and rebuttal.

Hood's **[***3]** oral proffer was taken over the course of three days and was reduced to 17 typed pages. In his proffer, Hood stated that he and Madison engaged in a number of drug transactions with Roberto Steadman in the summer of 1990. Shortly before the day of the murder, Madison had given Steadman money to purchase drugs, but Steadman failed to deliver the drugs to Madison or return Madison's **[*179]** money. In response, Madison took Steadman's bicycle and put it in Hood's apartment. When Steadman recovered the bicycle from Hood's apartment, Madison was angry and said he was going to "get his drugs or get this thing straight."

Madison went to Hood's apartment during the early morning hours the day of the murder. Madison called Steadman from Hood's apartment and arranged to meet Steadman to get some drugs. Suggesting that they should not go to the drug deal unarmed, Hood took three knives he obtained while working as a chef. Hood did not want to take his truck because it was "so noisy." Madison had access to a "quieter" car, and Hood drove that car to meet Steadman.

The two men picked up Steadman and took him to his apartment. Shortly after Steadman went into his apartment, Madison got out of the car **[***4]** and walked toward the apartment. According to Hood, when Madison returned to the car, he was "mad." Madison took Hood's knives and again walked away from the car.

Madison returned in a few moments with an elderly African-American woman in a nightgown. Madison "threw" the woman into the back seat of the car and got in on top of her. The woman was screaming and crying. Madison, pointing one of the knives at the woman and at Hood, told Hood to drive to a "dark place." After driving around for a short while, Hood stopped the car on a dark street. Madison and the woman got out of the car and walked a short distance. Hood stated that it looked like Madison was hitting the woman and that the woman's crying eventually stopped. Madison returned to the car with Hood's knife still in his hand, and directed Hood to return to Madison's apartment. Madison got out of the car, took Hood's knife, and returned to his apartment. Hood took the rest of the knives and returned to his apartment.

Sometime later, Hood refused to testify as a character witness for Madison. Madison told Hood that if Hood did not testify he **[**915]** would kill Hood "just like" he killed the woman. Madison also threatened to harm Hood's **[***5]** daughter and the mother of his daughter.

At trial, the Commonwealth agreed that, under the terms of the proffer agreement, it could not use Hood's proffered statements unless Hood presented evidence inconsistent with those statements. During the course of the Commonwealth's case, the state medical examiner was asked to describe the condition of the victim at the crime scene. The medical examiner answered that the victim's pajama bottoms were off, her pajama top was open and pulled up, and her legs were "spread eagle." Under these circumstances, the **[*180]** medical examiner explained that the crime would be treated as a "sex crime;" however, the laboratory tests "were negative for sperm." On cross-examination, Hood's counsel asked the medical examiner if she recalled whether during the same time period "there were several other elderly African-American women who were found stabbed to death." The Commonwealth objected to this question as beyond the scope of its direct examination. Hood's counsel suggested that the Commonwealth could cross-examine the witness and was permitted to elicit testimony from the medical examiner about other murders of elderly women who had been beaten and sexually **[***6]** assaulted around

the same time as the instant crime.

Before resting its case, the Commonwealth sought to introduce Hood's proffered statements through the investigating officer, arguing that the testimony from the medical examiner presented by Hood regarding the similarity of murders of other elderly women to the murder in this case was contrary to the statements in the proffer and, therefore, the Commonwealth was entitled to use the proffered statement against Hood. Hood argued that the medical examiner's testimony was not contrary to Hood's proffer. The court concluded that the testimony of the medical examiner presented by Hood indicating that the murder of Mrs. Cooper "could have been related to the Golden Years Murders" was different from Hood's proffered statements and, therefore, the Commonwealth was entitled to introduce those statements.

The trial court found Hood guilty of murder and abduction as a principal in the second degree. The trial court, after further briefing and argument of counsel, denied Hood's motion to reconsider the admission of his proffered statement, finding that Hood had presented "circumstantial evidence which was different from" the proffered statements. **[***7]** The trial court also rejected Hood's arguments that the evidence was insufficient to support his conviction. In an unpublished memorandum opinion, a divided panel of the Court of Appeals affirmed the judgment of the trial court convicting Hood of the murder as a principal in the second degree. [1] *Hood v. Commonwealth, 2004 Va. App. LEXIS 82, Record No. 2469-02-2 (February 17, 2004)*.

[*181] Discussion

We have not previously considered the type of agreement, described as an "immunity/cooperation" agreement, at issue here. Neither party questions the legality or enforceability of the proffer agreement and the agreement is not inconsistent with the provisions of Rule 3A:8. [2] We first note that these "cooperation/immunity" agreements, are markedly different from plea agreements. These ***HN1***[↑] agreements, unlike plea agreements, involve only the contracting parties and are not subject to the filing and acceptance procedures applicable to plea agreements. **[***8]** *See* Rule 3A:8. *Compare Commonwealth v. Sandy, 257 Va. 87, 509 S.E.2d 492 (1999)*. Nevertheless, there are similarities between plea agreements and the agreement at issue in this case. The Court of Appeals and other courts that have considered such agreements have uniformly held **[**916]** that these cooperation/immunity agreements, like a plea agreement, implicate a defendant's due process rights and are generally governed by the law of contracts. *Lampkins v. Commonwealth, 44 Va. App. 709, ___, 607 S.E.2d 722, ___ (2005)*; *Commonwealth v. Sluss, 14 Va. App. 601, 604, 419 S.E.2d 263, 265, 8 Va. Law Rep. 3433 (1992)*; *Plaster v. United States, 789 F.2d 289, 293 (4th Cir. 1986)*. On appellate review, the trial court's interpretation of the agreement is a matter of law subject to *de* novo review, while a clearly erroneous standard of review is applied to the trial court's factual findings. *Sluss, 14 Va. App. at 606-07, 419 S.E.2d at 266-67*; *United States v. Smith, 976 F.2d 861, 863 (4th Cir. 1992)*; *United States v. Conner, 930 F.2d 1073, 1076 (4th Cir. 1991)*. We will apply these standards **[***9]** of review in this case.

At trial neither party suggested that the proffer agreement was ambiguous, and the trial court was not called upon to interpret the agreement. In his brief to this Court, Hood asserts that the "terms and conditions of the proffer agreement are not contested." Although the record does not reflect any dispute over the meaning of terms in the proffer agreement, the record does show that neither the parties nor the trial court considered or asserted that the phrase "different from" meant simply "in addition to." Rather both parties suggested that evidence contrary to, or inconsistent with, the proffered **[***10]** statement **[*182]** would violate the terms of the proffer. Thus, in this case we consider the phrase "different from" in the same manner.

The trial court concluded that the testimony of the medical examiner presented by Hood was circumstantial evidence regarding the commission of the murder and was different from that contained in the proffered statement. Whether Hood breached the agreement is a question of fact which we review under a clearly erroneous standard.

Hood argues that the evidence elicited from the medical

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[1] Hood's abduction conviction was not before the Court of Appeals and is not before this Court.

[2] The proffer agreement is consistent with the provisions of Rule 3A:8(c)(5) that prohibit such statements from being admitted in the Commonwealth's case-in-chief because it contained such a prohibition and allowed the statements to beadmitted only for cross-examination, rebuttal or impeachment. Hood raised no objection to the manner in which the evidenceat issue was used by the Commonwealth.

examiner regarding the stabbing murders of other elderly women was not different from his proffered statement. At trial Hood asserted that the "crux of [his] statement is this, that he was present and that he knew who did it." On brief in this Court, Hood agrees that evidence showing that someone other than Madison committed the crime would "have constituted presenting evidence different from his statement."

The Commonwealth argues that the testimony elicited by Hood from the medical examiner created an inference that a person other than Madison murdered Mrs. Cooper. This inference arises from the testimony regarding the stabbing murders of a number of elderly women during **[***11]** the same time period. The trial court agreed, stating that this evidence implied that the murder of Mrs. Cooper was related to the "Golden Years" cases, a name given the murders of the other elderly women. The trial court concluded that this circumstantial evidence created an inference that someone other than Madison murdered Mrs. Cooper and that this inference was inconsistent with Hood's proffer that Madison killed Mrs. Cooper. [3]

Based on this record, we cannot say that the trial court clearly erred in concluding that the evidence presented by Hood created an inference that Mrs. Cooper's murderer was someone other than Madison and that the introduction of such evidence was different from the proffer statement that attributed the murder to Madison. Accordingly, for **[***12]** the reasons stated, we will affirm the judgment of the Court of Appeals holding that the trial court's admission of Hood's proffered statement was not error.

We also will affirm the judgment of the Court of Appeals that the evidence supported Hood's conviction for first degree murder as a principal in the second degree. *HN2*[↑] A murder committed in the course of an abduction is first degree murder. *Code § 18.2-32*. A person **[*183]** is guilty as a principal in the second degree if he is present and assists the perpetrator of the crime or shared the perpetrator's intent to commit the crime. *Jones v. Commonwealth, 208 Va. 370, 372-73, 157 S.E.2d 907, 909 (1967)*; *Snyder v. Commonwealth, [**917] 202 Va. 1009, 1015, 121 S.E.2d 452, 457 (1961)*. Hood argues that there is no evidence that he engaged in any overt act to further the murder. However, the evidence, viewed in the light most favorable to the Commonwealth, *Dowden v. Commonwealth, 260 Va. 459, 461, 536 S.E.2d 437, 438 (2000)*, proved that when Hood left his apartment with Madison he knew that something "was going to happen when they met with Steadman that night." The evidence further **[***13]** showed that Hood provided the knives, and that he, at Madison's direction, drove Madison and Mrs. Cooper to a secluded area where they would not be detected and then drove Madison away from the crime scene. This evidence is sufficient to sustain a finding that Hood was present and assisted Madison in the murder of Mrs. Cooper.

For the above reasons, we will affirm the judgment of the Court of Appeals.

Affirmed.

End of Document

[3] As noted by the dissenting judge in the Court of Appeals, the trial court's initial statement that the evidence was inconsistent with Hood's statement that he committed the crime was erroneous. This error, however, does not affect our analysis

VIRGINIA:

IN THE CIRCUIT COURT OF THE CITY OF RICHMOND

STEPHEN J. HOOD,

Petitioner,

v. Docket No. CL06-2311

GENE JOHNSON, DIRECTOR,
VIRGINIA DEPARTMENT OF CORRECTIONS
Respondent.

ORDER

For the reasons stated in the Memorandum Opinion of today's date in this case, the Petition for a Writ of *Habeas* Corpus is granted as to Claim M and denied as to Claims L, G(a), G(b) and H. The writ shall be issued; however, it is ordered that Petitioner be held in the custody of the Department of Corrections until further order of this Court.

Enter: 11-10-2009

Bradley B. Cavedo, Judge

Appendix 4

VIRGINIA:

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GENE JOHNSON, DIRECTOR,
VIRGINIA DEPARTMENT OF CORRECTIONS
Respondent.

MEMORANDUM OPINION

Procedural History

In this *habeas corpus* proceeding, Stephen James Hood is challenging the validity of a conviction and sentencing order entered against him by the Circuit Court of the City of Richmond on September 13, 2002, in which the Court imposed a sentence of 65 years in prison for Hood's conviction of murder. Case No. F-01-2201. Hood had been indicted May 17, 2001, by a multijurisdictional grand jury for the August 31, 1990 abduction and murder of Eloise Cooper. On April 4, 2002, the Court, sitting without a jury, found Hood guilty of both offenses.[1]

The Court of Appeals of Virginia affirmed Hood's conviction for murder on February 17, 2004, and his petition for rehearing *en banc* was denied on March 10, 2004. Record No. 2469-02-2. The Virginia Supreme Court affirmed his conviction on March 3, 2005, *Hood v. Commonwealth*, 269 Va. 176, 180, 608 S.E.2d 913, 916 (2005), and denied his petition for rehearing on April 29, 2005.

[1] Hood was sentenced to 12 months in jail for the misdemeanor abduction offense on that date.

On or about March 24, 2006, Hood, proceeding *pro se*, filed a petition for a writ of *habeas corpus* in this Court. On April 20, 2006, the Court entered an order directing Respondent to file a response to Hood's *habeas* petition, which consisted of four volumes, was over 1,000 pages in length, and was accompanied by a four volume set of exhibits that was also over 1,000 pages in length.

On April 24, 2006, Respondent filed a motion for a bill of particulars and asserted the *habeas* petition did not comply with Code § 8.01-655. On April 27, 2006, this Court granted Respondent's motion and directed Hood to file a bill of particulars within 30 days of that date and that the bill of particulars be sworn to as required by Code § 8.01-655. Hood did not comply with the Court's order. On May 30, 2006, Respondent sought a motion to compel. The Court entered an order compelling Hood to comply on June 6, 2006.

On June 28, 2006, Hood filed with the Court a Bill of Particulars, a memorandum of law and exhibits. On September 8, 2006, the Respondent filed a motion to deny and dismiss the petition for writ of *habeas corpus*.

In a letter opinion dated April 6, 2007, this Court granted Respondent's motion to dismiss, in part, and ordered a plenary hearing on claims G(a), G(b), H, L, and M. The Court took claim J(a) under advisement pending the outcome of hearing; and the remainder of the claims were denied and dismissed. The ruling of this Court is reflected in its April 6, 2007, order. On the same date, the Court appointed counsel to represent the Petitioner at the hearing on the above claims.

On November 25, 2008, the Petitioner moved for leave to file supplemental and amended claims to his previously filed petition for writ of *habeas corpus*.[2] A hearing date of May 20, 2009, was set by the agreement of both sides for the resolution of the granted claims. By order entered April 29, 2009, this Court granted the Respondent's motion to continue and the matter was rescheduled for hearing on July 9, 2009.

The evidentiary hearing was held on July 9, 2009, on the following claims:

> CLAIM G(a) & G(b)
>
> Whether Hood was deprived of his constitutional rights when he entered into the cooperation/immunity agreement involuntarily and unknowingly because the false statements provided during the proffer sessions pursuant to said agreement were induced by promises of the government and defense counsel in violation of the Fifth, Sixth and Fourteenth Amendments of the United States Constitution.
>
> CLAIM H
>
> Whether Hood's defense counsel rendered ineffective assistance of counsel when he induced, coerced, encouraged, provided, and facilitated false statements to the government during the proffer sessions for the purposes of obtaining a plea agreement for Hood and in furtherance of the government's desire to prosecute the individual whom the government believed to be the perpetrator of these crimes in violation of the Sixth and Fourteenth Amendments of the United States Constitution
>
> CLAIM L
>
> Whether Hood was deprived of his Constitutional Due Process rights when the government breached Hood's cooperation/immunity agreement in violation of the Fifth, Sixth, and Fourteenth Amendments of the United States Constitution
>
> CLAIM M

[2] This motion was not brought to the Court's attention, for reasons that are not clear, until the evidentiary hearing on July 9, 2009, at which the Court declined to address the motion for leave at that time.

Whether Hood's court appointed defense counsel rendered ineffective assistance of counsel when they failed to object when the government witness testified about the details in the proffered statements as substantive evidence in the Commonwealth's case-in-chief contrary to the terms of the agreement in this case in violation of the Sixth and Fourteenth Amendments of the United States Constitution.

For the reasons that follow, the petition is granted as to Claim M and denied as to Claims G(a), G(b), and L.

Summary of Criminal Proceedings

The Virginia Supreme Court summarized the evidence presented at trial as follows:

Early in the morning of August 31, 1990, Eloise Cooper, an elderly African-American woman, was abducted from the apartment she shared with her husband. That afternoon her body was found in the woods of a nearby park. According to the medical examiner, Mrs. Cooper had suffered three stab wounds, two of which perforated vital organs and caused her to bleed to death.

Although a third party was convicted of the murder in 1991, the police reopened the case in 1999, at which time Hood and another individual, Billy Madison, were developed as suspects in Mrs. Cooper's murder. Hood was indicted on May 17, 2001 for first degree murder, in violation of Code § 18.2-32, and abduction, in violation of Code § 18.2-47. As part of plea negotiations, Hood and the government agreed that he would provide a "detailed oral proffer" and that **none of the statements made in the proffer would be used against Hood in the Commonwealth's case-in-chief in a criminal prosecution of Hood.** (Emphasis supplied). The agreement further provided that if Hood "offers testimony or presents evidence different from any statement made or other information provided during the proffer," **the Commonwealth could use his statements for impeachment, cross-examination, and rebuttal.** (Emphasis supplied.)

Hood's oral proffer was taken over the course of three days and was reduced to 17 typed pages. In his proffer, Hood stated that he and Madison engaged in a number of drug transactions with Roberto Steadman in the summer of 1990. Shortly before the day of the murder, Madison had given Steadman money to purchase drugs, but Steadman failed to deliver the drugs to Madison or return Madison's money. In response, Madison took Steadman's bicycle and put it in Hood's apartment. When Steadman recovered the bicycle from Hood's apartment, Madison was angry and said he was going to "get his drugs or get this thing straight."

Madison went to Hood's apartment during the early morning hours the day of the murder. Madison called Steadman from Hood's apartment and arranged to meet Steadman to get some drugs. Suggesting that they should not go to the drug deal unarmed, Hood took three knives he obtained while working as a chef. Hood did not want to take his truck because it was "so noisy." Madison had access to a "quieter" car, and Hood drove that car to meet Steadman.

The two men picked up Steadman and took him to his apartment. Shortly after Steadman went into his apartment, Madison got out of the car and walked toward the apartment. According to Hood, when Madison returned to the car, he was "mad." Madison took Hood's knives and again walked away from the car.

Madison returned in a few moments with an elderly African-American woman in a nightgown. Madison "threw" the woman into the back seat of the car and got in on top of her. The woman was screaming and crying. Madison, pointing one of the knives at the woman and at Hood, told Hood to drive to a "dark place." After driving around for a short while, Hood stopped the car on a dark street. Madison and the woman got out of the car and walked a short distance. Hood stated that it looked like Madison was hitting the woman and that the woman's crying eventually stopped. Madison returned to the car with Hood's knife still in his hand, and directed Hood to return to Madison's apartment. Madison got out of the car, took Hood's knife, and returned to his apartment. Hood took the rest of the knives and returned to his apartment.

Sometime later, Hood refused to testify as a character witness for Madison. Madison told Hood that if Hood did not testify he would kill Hood "just like" he killed the woman. Madison also threatened to harm Hood's daughter and the mother of his daughter.

At trial, the Commonwealth agreed that, under the terms of the proffer agreement, it could not use Hood's proffered statements unless Hood presented evidence inconsistent with those statements. During the course of the Commonwealth's case, the state medical examiner was asked to describe the condition of the victim at the crime scene. The medical examiner answered that the victim's pajama bottoms were off, her pajama top was open and pulled up, and her legs were "spread eagle." Under these circumstances, the medical examiner explained that the crime would be treated as a "sex crime;" however, the laboratory tests "were negative for sperm." On cross-examination, Hood's counsel asked the medical examiner if she recalled whether during the same time period "there were several other elderly African-American women who were found stabbed to death." The Commonwealth objected to this question as beyond the scope of its direct examination. Hood's counsel suggested that the Commonwealth could cross-examine the witness and was permitted to elicit testimony from the medical examiner about other murders of elderly women who had been beaten and sexually assaulted around the same time as the instant crime.

> Before resting its case, the Commonwealth sought to introduce Hood's proffered statements through the investigating officer, arguing that the testimony from the medical examiner presented by Hood regarding the similarity of murders of other elderly women to the murder in this case was contrary to the statements in the proffer and, therefore, the Commonwealth was entitled to use the proffered statement against Hood. Hood argued that the medical examiner's testimony was not contrary to Hood's proffer. The court concluded that the testimony of the medical examiner presented by Hood indicating that the murder of Mrs. Cooper "could have been related to the Golden Years Murders" was different from Hood's proffered statements and, therefore, the Commonwealth was entitled to introduce those statements.
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> The trial court found Hood guilty of murder and abduction as a principal in the second degree. The trial court, after further briefing and argument of counsel, denied Hood's motion to reconsider the admission of his proffered statement, finding that Hood had presented "circumstantial evidence which was different from" the proffered statements. The trial court also rejected Hood's arguments that the evidence was insufficient to support his conviction. In an unpublished memorandum opinion, a divided panel of the Court of Appeals affirmed the judgment of the trial court convicting Hood of the murder as a principal in the second degree.

Hood, 269 Va. at 178-81, 608 S.E.2d at 914-15.

Standard of Review for Claims of Ineffective Assistance of Counsel

It is well established that "one attacking a judgment of conviction in a *habeas corpus* proceeding has the burden of proving by a preponderance of evidence allegations contained in [the] petition." *Nolan v. Peyton*, 208 Va. 109, 112, 155 S.E.2d 318, 321 (1967). The writ shall be granted to a person who by evidence shows probable cause to believe he is detained without lawful authority. Virginia Code § 8.01-654(A).

The Petitioner alleges he received ineffective assistance of counsel. Under the standard set forth for such claims in *Strickland v. Washington*, 466 U.S. 668 (1984), the Petitioner has the burden to show both that his attorney's performance was deficient *and* that he was prejudiced as a result. *See Strickland*, 466 U.S. at 687. "Unless [the Petitioner] establishes both prongs of the two-part test, his claims of ineffective assistance of counsel will fail." *Jerman v. Director of the*

Department of Corrections, 267 Va. 432, 438, 593 S.E.2d 255, 258 (2004). *See Lovitt v. Warden*, 266 Va. 216, 249, 585 S.E.2d 801, 820 (2003). *See also Friedline v. Commonwealth*, 265 Va. 273, 279 576 S.E.2d 491, 494 (2003).

The first prong of the *Strickland* test, the "performance" inquiry, "requires showing that counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment." *Strickland*, 466 U.S. at 687. "In applying the performance prong of this test, the issue is whether counsel's acts or omissions were unreasonable in light of all the circumstances." *Lenz v. Warden of the Sussex I State Prison*, 267 Va. 318, 332, 593 S.E.2d 292, 300 (2004). "In deciding this question, the court considering the habeas petition 'must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance.'" *Yarbrough v. Warden*, 269 Va. 184, 196, 609 S.E.2d 30, 37 (2005) (quoting *Strickland*, 466 U.S. at 689).

A reviewing court "must be highly deferential in scrutinizing [counsel's] performance and must filter the distorting effects of hindsight from [its] analysis." *Burket v. Angelone*, 208 F.3d 172, 189 (4th Cir. 2000). *See also Baker v. Corcoran*, 220 F.3d 276, 293 (4th Cir. 2000) (competency of counsel is "measured against what an objectively reasonable attorney would have done under the circumstances").

"The Sixth Amendment's guarantee of assistance of counsel requires that counsel exercise such care and skill as a reasonably competent attorney would exercise for similar services under the circumstances." *Frye v. Commonwealth*, 231 Va. 370, 400, 345 S.E.2d 267, 287 (1986). *See Poyner v. Murray*, 964 F.2d 1404, 1423 (4th Cir. 1992) (law requires not perfect performance, "but only professionally reasonable performance of counsel").

The second prong of the *Strickland* test, the "prejudice" inquiry, requires showing that there is a "*reasonable probability* that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Strickland*, 466 U.S. at 694. (Emphasis added). A reasonable probability is a "probability sufficient to undermine confidence in the outcome." *Id.*

CLAIM M

In Claim M, Hood asserts that his attorneys were ineffective because "they failed to object when the witness for the government testified about the detail in the proffered statements as substantive evidence in the Commonwealth's case-in-chief contrary to the terms of the agreement."

As is clear from the record of the trial proceedings, as well as the Court of Appeals of Virginia and the Virginia Supreme Court's consideration of the merits of the related claim, trial counsel objected to the introduction of the proffered statements on the basis that the defendant had not violated the terms of the agreement as claimed by the Commonwealth in reliance on paragraph "Third" of the proffer agreement. Exhibit B, July 9, 2009, hearing. That objection was overruled. However, defendant's counsel did not object to the proffer statement being offered in the Commonwealth's case-in-chief—a violation by the Commonwealth of the agreement's express terms.

The agreement provided that if Hood's statements were to be offered into evidence then the statements could only be used in cross-examination, impeachment or rebuttal.

> Third, in the event your client at any time offers testimony or presents evidence different from any statement made or other information provided during the proffer, the Commonwealth of Virginia may use any statements provided by your client, or any information, derived directly or indirectly from these statements for impeachment, cross-examination and rebuttal.

Exhibit B, July 9, 2009, hearing. Instead, the Commonwealth offered Hood's statements as evidence in its case-in-chief. Hood's counsel lodged no objection to that tactic. Because the objection was not made, the issue was not considered by the trial judge nor could it be considered on appeal of the resulting conviction, as Judge Benton noted in his dissent: "The record indicates that the prosecutor's witness testified about the details in the proffer statement as substantive evidence in the prosecutor's case-in-chief, contrary to the terms of the agreement. Hood's trial attorney, however, raised no objection concerning this breach. Therefore, this issue is not before us on appeal." *Hood v. Commonwealth,* 04 Vap UNP 2469022 (footnote 3) (2004).

At the Supreme Court, Justice Lacy, writing for the court, similarly noted "The proffer agreement . . . allowed the statements to be admitted only for cross-examination, rebuttal or impeachment. Hood raised no objection to the manner in which the evidence at issue was used by the Commonwealth," further noting that the agreement and Supreme Court Rule 3A:8(c)(5) "prohibit such statements from being admitted in the Commonwealth's case-in-chief." *Hood v. Commonwealth*, 269 Va. 176, 183 (footnote 2)(2005).

The Commonwealth's theory of the case, as revealed by its opening statement, was that Hood was the killer of Mrs. Cooper:

> [t]he prosecutor said the body of the elderly woman was found "naked and spread eagle" with her nightclothes pulled over her head. Noting that the elderly woman died from three stab wounds, the prosecutor asserted that Hood, a chef, delivered to police several knives from a set of knives but omitted delivering one knife that would be shown to leave marks consistent with the wounds found on the elderly woman's body. Arguing that the evidence "put the [knife] with Stephen Hood," the prosecutor said the evidence would prove Hood's guilt of first-degree murder and also abduction. The prosecutor made no reference to Madison's role in the events.[footnote omitted] The prosecutor's opening statement did not suggest that Hood was being viewed as a principal in either the first or the second degree and, thus, left open the option to prove the degree of Hood's culpability.

Hood v. Commonwealth, 04 Vap UNP 2469022 (2004). The trial judge found Hood guilty of murder as a principal in the second degree. Hood was clearly convicted on the evidence of his statements[3] contained in his proffer read into evidence by the Commonwealth as part of its case-in-chief. The only evidence at trial showing Hood's principal in the second-degree participation in the murder was his own statement, which was presented without objection as evidence in the case-in-chief against him, in violation of the proffer agreement's terms.

The Court finds Hood was denied the effective assistance of counsel at trial because his attorneys' failed to object to the improper use of the proffer statement as part of the Commonwealth's case-in-chief. By failing to make this objection, Hood's attorneys' representation fell below an objective standard of reasonableness because it allowed the Commonwealth to overcome a motion to strike in a situation where otherwise there would have been insufficient evidence to support a conviction.

The proffer agreement's terms required that it only be used in cross-examination, impeachment or rebuttal. Hood could not have been convicted of murder as a principal in the second degree without the proffer statement becoming part of the Commonwealth's case-in-chief. There was no other evidence to support the principal in the second-degree theory. The failure of Hood's attorney's to object to the improper use of the proffer statement prevented the trial judge from properly considering the restrictions on use and the timing of use, be it cross-examination, impeachment or rebuttal. Had the objection been made, it would have been sustained; no other result would have been possible under any reasonable interpretation of the proffer agreement's terms.[4] Thus, "there is a reasonable probability that, but for counsel's . . .

[3] The proffer statement was admitted as Exhibit A at the July 9, 2009, hearing.

[4] It would is not possible to contend that, as used, the proffer statement qualified as "impeachment" or "cross examination" as required by the agreement. To be "rebuttal" evidence, it ordinarily would be offered as part of the (Footnote continued.)

error [in failing to object to the use of the proffer statement as evidence in chief], the result of the proceeding would have been different," *i.e.*, the motion to strike the Commonwealth's evidence would have been granted. *Strickland*, 466 U.S. at 694.

Petitioner's conviction is set aside, and the writ of *habeas corpus* shall be issued and the Petitioner is granted a new trial on the underlying indictment if the Commonwealth be so advised.

CLAIM L

Hood had right to due process and a fair trial. Hood was denied that right, in part, by the Commonwealth offering the proffer statement as evidence-in-chief in violation of the terms of the agreement, which limited the use of the statement to impeachment, cross examination and rebuttal should its terms be violated. The trial judge ruled that the agreement's terms were violated by Hood's attorney's questions. Then the Commonwealth itself violated the agreement's terms by putting the statement in as part of its case in chief, without objection from Hood's attorneys. In so doing, the prosecution violated Hood's Constitutional right to a fair trial because the evidence used to convict Hood as a principal in the second degree became evidence

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Commonwealth's rebuttal case, after the defense presented its evidence. Rebuttal evidence must rebut something. The proffer statement rebutted nothing that had been presented by defendant up to the point in which it was introduced as Commonwealth's evidence-in-chief. The questions by Hood's attorney that the trial judge relied upon in ruling that the proffer agreement's terms had been violated—the questions that "opened the door" to the use of the statement —were not rebutted by any part of the proffer statement. When asked "And all this happened around the same time frame?" Dr. Fierro answered, "I don't know." Officer Travis was asked if the victim had been considered part of the "Golden Years Homicides," he answered "I'm not sure if she was considered in the group, but—." This is the testimony the appellate courts ruled created an inference "inconsistent with the proffer." However, nothing in the proffer statement rebutted "I don't know" or "I'm not sure . . .," which was the evidence that came in on cross by Hood's counsel. In fact, the proffer statement was inconsistent with the Commonwealth's theory of the case, as outlined in opening statement, that Hood was the killer. The proffer statement alleged that Billy Madison was the killer. It would not be possible under any known or allowed procedure for the prosecution to be allowed to put on evidence in rebuttal of its own evidence. Thus, the proffer statement was not offered as rebuttal evidence. Additionally, both the Court of Appeals and the Supreme Court noted that the proffer statement came in as evidence-in-chief.

in the case in chief against him in violation of its own agreement with Hood not to use the statement in that manner.

That said, questions of evidence that the Petitioner had a full and fair opportunity to raise at trial and on appeal are not cognizable claims in a *habeas* proceeding. "A petition for a writ of habeas corpus may not be employed as a substitute for an appeal or a writ of error." *Slayton v. Parrigan*, 215 Va. 27, 29, 205 S.E.2d 680, 682 (1974). Had Hood's attorneys objected at trial to the proposed use of the proffer statement as part of the Commonwealth's case-in-chief, the trial judge could have considered the implications of admitting evidence in violation of the terms of the proffer agreement and restricted the evidence to cross examination, impeachment or rebuttal, at the parties to the contract had agreed. Had the objection been overruled, the Court of Appeals and the Supreme Court could have considered the issue as well. But the objection was not made.

For reasons stated in the discussion concerning Claim M, the Court finds that the issue presented in Claim L is subsumed in the deprivation asserted in Claim M. Accordingly, relief as to Claim L is denied.

CLAIM G(a), G(b) and H

Evidence was heard on July 9, 2009, from Hood and his former attorney Steve Goodwin in connection with these claims. The Court finds the testimony of Mr. Goodwin credible and believable and finds the testimony of Hood to be incredible and unworthy of belief. Accordingly, there is no credible evidence in support of the claims before the Court and the petition as to these claims is denied.

CLAIMS G(a) and G(b)

In Claim (G), Hood alleges he was denied his constitutional rights because "he entered into the cooperation/immunity agreement involuntarily and unknowingly because of false

statements provided during the proffer session pursuant to said agreement were induced by promises of the government and defense counsel." Hood presented this claim in three subparts. This Court's order of April 6, 2007, denied and dismissed subpart G(c). In the first subpart, Claim (G)(a), Hood asserts that his original attorney (Goodwin) was ineffective for inducing him to enter into the cooperation/immunity agreement based upon erroneous representations and unprofessional advice.

In Claim (G)(b), Hood alleges that Goodwin's "unprofessional advice" resulted in his involuntary and unintelligent entry into the cooperation/immunity agreement. Because Petitioner has failed to demonstrate either the requisite deficient performance of counsel or prejudice necessary under *Strickland* to sustain the allegation of ineffective assistance set forth in both Claims G(a) and G(b), they must therefore fail.

Hood's July 9, 2009, Testimony

This Court, having heard the testimony of Steven Goodwin, Wayne Orrell, and the Petitioner in reference to Claims G(a) and G(b), determines that the testimony offered by Hood on this matter is incredible and not worthy of belief. The Court credits the testimony of Goodwin and Orrell. As their testimony directly contradicts that of the Petitioner, Claims G(a) and G(b) are accordingly without merit.

At hearing on the matter, the Petitioner testified that he was directed by his then counsel Goodwin to offer fraudulent testimony at the trial of Billy Madison. According to the Petitioner, in exchange for such testimony, Goodwin allegedly conveyed that the prosecution would agree to a reduction in the Petitioner's charges to two misdemeanor offenses and would agree to recommend a sentence limited to the time he had already served in confinement awaiting trial. (Transcript of July 9, 2009 hearing, hereinafter T.T., p. 31-33, 35).

According to Hood, Goodwin explained that he routinely engaged in such dealing with the prosecution, and that Madison was more highly valued as a target for prosecution. (T.T., p. 32). Hood maintained that he was unaware of any inculpatory testimony to offer against Madison, and he asserted that Goodwin's response to such misgivings was to reassure him that he (Goodwin) would take care of everything and develop a story convincing enough to satisfy the prosecution. (T.T., p. 36).

Hood alleged that Goodwin came to his cell with trial transcripts and investigatory reports that appeared to come from the prosecution's files in order to facilitate the development of the version of events that Hood was expected to provide to law enforcement. (T.T., p. 37). Hood further said that Goodwin purportedly had visited the crime scene with the prosecution and based upon the width of the street, Goodwin and the prosecutor determined that Hood would have to claim to have made a three-point turn rather than a U-turn, as the street was simply not wide enough for such a claim to be credible. (T.T., p. 37).

Hood further related that he had been reluctant to carry out such a plan, and that he expressed such reservations to Goodwin. (T.T., p. 37-39). He maintained that Goodwin again reassured him that he would take care of everything and that all Hood needed to do was "stick with the game plan." (T.T., p. 37-39).

Hood alleged that Goodwin explained that he would have to make a proffer, in which he would relate how he and Madison were involved in the death of Cooper, and that according to the terms of the agreement, he would receive immunity from prosecution based upon the contents of his statement. (T.T., p. 40-41). Hood added that Goodwin offered to represent him for free in any future custody dispute that might arise as a result of his criminal case. (T.T., p. 41).

Hood related at the evidentiary hearing that he then signed the immunity agreement, and that he engaged in a series of meetings with the prosecution at which he asserted that he related all of the facts he had previously rehearsed with Goodwin. (T.T., p. 42-43). He further claimed that Goodwin knew the contents of the questions investigators intended to ask in advance of each meeting. (T.T., p. 43). Hood maintained that in advance of the next meeting, Goodwin would allegedly prepare him, providing instruction as to what the prosecution wished to hear. (T.T., p. 44-45).

Hood alleged that the prosecution became concerned that he had revealed to his girlfriend the enterprise to concoct a story by which to pursue Billy Madison. (T.T., p.47). He contends that his phone calls to his girlfriend were monitored, and that a search warrant was obtained to search their house in an effort to obtain information he revealed to her. (T.T., p. 48). The Petitioner maintained that in his calls to his girlfriend he discussed only his innocence of the crimes with which he was charged. (T.T., p. 48). Hood asserted that the search revealed only letters proclaiming his innocence. (T.T., p. 49).

The Petitioner testified that he expressed concern to Goodwin about the prospect of having to submit to a polygraph examination, to which he alleged Goodwin replied that the results of any such test would not be definitive and that if the prosecution wished him to pass, he would. (T.T., p.52).

Hood explained that following the execution of the search warrant, the prosecution threatened to bring obstruction of justice charges against Goodwin, based upon the obtained letters indicating that the Petitioner had lied during the proffer sessions. (T.T., p. 53). Hood claimed that Goodwin came to see him, in the company of someone the Petitioner did not know. (T.T., p. 54). Though the Petitioner could not remember exactly what was said, he alleged that the substance of

the conversation was Goodwin's assertion that their enterprise regarding the proffer had been discovered, and that Goodwin claimed he had never instructed the Petitioner to lie. (T.T., p. 54).

Hood asserted that he had not read the cooperation/immunity agreement when he signed it, and that Goodwin had not explained its provisions to him. (T.T., p. 56-57). Hood maintained that he read the document for the first time after his trial but before the filing of a motion for reconsideration. (T.T., p. 57).

On cross-examination at the evidentiary hearing, Hood claimed that everything he told law enforcement officers regarding the kidnapping and murder of Eloise Cooper was fiction created by Goodwin. (T.T., p. 63). Further, the Petitioner maintained that in advance of each proffer session, Goodwin would relay the necessary information; Hood would memorize it, and then recite the version of events back to law enforcement officers in the next session. (T.T., p. 64).

Hood further denied that he had a conversation with Goodwin following the seizure of his letters to his girlfriend, wherein the Petitioner admitted to Goodwin that he had been told not to lie regarding any of the events addressed in the proffer statement. (T.T., p. 76).

At the hearing, the Petitioner admitted that he had been previously convicted of both perjury and felony offenses. (T.T., p. 76-77).

Goodwin's July 9, 2009, Testimony

Goodwin testified that he first became employed as a lawyer in September of 1991, that he had approximately one thousand trials over a career of nineteen years. He further stated that he began a federal litigation practice in 1992, over which period he had handled numerous multi-week federal jury trials. (T.T., p. 81).

At the time of his initial involvement in the Hood case, Goodwin had been practicing for ten years in both state and federal court. (T.T., p. 82). Goodwin testified that he met with Hood

numerous times during his representation, consulting over both the filing of pretrial motions as well as over trial strategy. (T.T., p. 83).

Goodwin testified that Hood initially maintained to him that he was not involved at all in the kidnapping and murder of Mrs. Cooper. (T.T., p. 83). Goodwin explained that at some point he was approached by the prosecution, who conveyed an offer whereby the Commonwealth would agree to allow Hood to enter a guilty plea to one count of accessory after the fact to murder and one count of felony abduction, provided that Hood would tell the truth about his involvement in the crime. (T.T., p. 83).

Goodwin indicated that prior to the conveyance of the offer, he had been aggressively preparing for trial, including pursuing discovery motions. Goodwin cited as evidence of such preparation his litigation in a pre-trial proceeding over whether the defense could obtain special grand jury transcripts in this matter. (T.T., p. 83-84).

Goodwin explained at the evidentiary hearing that a proffer agreement is routinely used in federal court, noting that the proffer is separate and distinct from the plea agreement. One must agree to tell the complete truth in the proffer in order to have the government agree to make the plea offer. (T.T., p. 85).

Goodwin noted that at the time of his representation of Hood, he was very familiar with the use of proffer agreements, having employed them between 80-100 times prior to Hood's case. (T.T., p.85).

Goodwin conveyed the offer to Hood, and explained to him how the proffer agreement would work. He did not ask Hood to make an immediate decision, but told him to think about it and they would discuss it further. (T.T., p. 87). Goodwin testified that Hood ultimately admitted to him that he had not been truthful when he originally stated that he had no involvement or knowledge of

the offense. (T.T., p. 87). Hood told Goodwin that he wanted to come clean and tell the government what happened. (T.T., p. 87).

Goodwin stated that he stressed to Hood the absolute importance of telling the truth when making a statement pursuant to a proffer agreement. (T.T., p. 88-89). Goodwin testified that Hood decided for himself that it was in his own best interest to accept the agreement. (T.T., p. 89). Goodwin explained that prior to Hood's signing the proffer agreement, he sent the investigators out of the room, and spent ten to fifteen minutes going over the agreement line by line with the Petitioner. (T.T., p. 89-90). Goodwin testified that once Hood signed the agreement and the session began, Hood became emotional as he recounted to the investigators what had occurred on the night that Eloise Cooper was kidnapped and murdered. (T.T., p. 92). Goodwin confirmed that the version of events Hood related to the investigators was consistent with the manner in which Hood had recounted the events in his confession to counsel. (T.T., p. 92).

Goodwin confirmed that he repeatedly stressed to Hood the importance of telling the truth during the sessions, and that even if he were to attempt to minimize his involvement in the offense, the investigators were so knowledgeable about the case that they would recognize such an attempt, and Hood would lose the benefit of his agreement. (T.T., p. 93).

Goodwin testified at the evidentiary hearing that at some point he was contacted by the prosecution and made aware that Hood had asserted that Goodwin told him to lie. (T.T., p.94). Upon learning this information, Goodwin met with Hood at his holding cell in the company of Wayne Orrell, an associate of Goodwin's firm. (T.T., p. 94). In that meeting, Goodwin confronted Hood, asking the Petitioner whether he had ever told Hood to lie. (T.T., p. 94). Hood confirmed that Goodwin had never told him to lie. (T.T., p. 94).

Goodwin testified at the hearing that no obstruction of justice charges were ever pursued against him. (T.T., p. 97). Moreover, Goodwin stated that no bar complaints were pursued against him in this case. (T.T., p. 97). Goodwin testified at the evidentiary hearing that he never instructed the Petitioner to lie regarding his proffer statements, and confirmed that if he had such action could have led to disbarment and potential prosecution for the commission of a crime. (T.T., p. 99).

Orrell's July 9, 2009, Testimony

Wayne Orrell testified at the hearing that he began the practice of law in 2000, and that at the time of Goodwin's representation of Hood, he was employed as an associated in Goodwin's law firm (T.T., p. 116-117). During the course of Goodwin's representation of Hood, Orrell was present at a meeting between the two conducted at the Henrico County jail. (T.T., p. 118). While Orrell possessed a present recollection of the events that transpired at the meeting, he made a recordation in a memorandum to Goodwin. (T.T., p. 119). Orrell recalled the context of the meeting was that an allegation had been made by Hood that Goodwin had instructed him to lie. (T.T., p. 119). The memorandum noted that Hood specifically stated during this meeting that Goodwin had not instructed him to lie. (T.T., p. 120, Respondent's Exhibit C).

The Court finds that the testimony offered by the Petitioner at the evidentiary hearing is incredible. The Court further finds that the Petitioner has failed to demonstrate that counsel provided any "unprofessional advice" so as to render his entry into the cooperation/immunity agreement involuntarily or unintelligently made. No credible testimony has demonstrated that the proffered statements made by Hood were fraudulent, that Hood was induced by counsel to make such fraudulent statements, or that Hood's entry into the agreement was not knowingly, intelligently, and voluntarily made. The Petitioner has thus failed to demonstrate either the requisite

deficient performance of counsel or prejudice necessary under *Strickland* to sustain a claim of ineffective assistance in a *habeas corpus* proceeding.

CLAIM H

In Claim (H), Hood alleges that Goodwin was ineffective because he "induced, coerced, encouraged, provided and facilitated false statements to the government during the proffer sessions for the purposes of obtaining a plea agreement for the Petitioner and in furtherance of the government's desire to prosecute individual whom the government believed to be the perpetrator of" the crimes. Because Petitioner has failed to demonstrate either the requisite deficient performance of counsel or prejudice necessary under *Strickland* to sustain the allegation of ineffective assistance set forth in Claim H, it must therefore fail.

This Court, having heard the testimony of Steven Goodwin, Wayne Orrell, and the Petitioner in reference to Claim H, determines that the testimony offered by Hood is incredible. The Court finds that the testimony of Goodwin and Orrell is credible.

In accordance with the rationale previously set forth above, no credible testimony has demonstrated that the statements made by Hood were fraudulent, or that Hood was induced by counsel to make such fraudulent statements. Thus, the Petitioner has failed to demonstrate either the requisite deficient performance of counsel or prejudice necessary under *Strickland* to sustain the allegation of ineffective assistance set forth in Claim H, and it must therefore fail.

CONCLUSION

For the foregoing reasons, the Petition for a Writ of *Habeas Corpus* is granted as to Claim M and denied as to Claims L, G(a), G(b) and H. The writ shall be issued; however, it will be ordered that Petitioner be held in the custody of the Department of Corrections until further order of this Court.

Bradley B. Cavedo, Judge

11-10-2009

VIRGINIA:

IN THE CIRCUIT COURT OF THE CITY OF RICHMOND

STEPHEN J. HOOD,

Petitioner,

v. Docket No. CL06-2311

GENE JOHNSON, DIRECTOR,
VIRGINIA DEPARTMENT OF CORRECTIONS
Respondent.

ORDER

On March 29, 2010, the parties came before the Court, by counsel, on the respondent's Motion to Reconsider the order of November 10, 2009, which was suspended by Order dated November 30, 2009. Upon consideration of the arguments of counsel, and for the reasons stated in the Memorandum Opinion of November 10, 2009, in this case, it is Ordered that the Petition for a Writ of *Habeas Corpus* is granted as to Claim M and denied as to Claims L, G(a), G(b) and H. The writ shall be issued; however, it is ordered that Petitioner be held in the custody of the Department of Corrections until further order of this Court.

For the reasons stated in respondent's letter of April 23, 2010, and Reply to the Petitioner's Memorandum of Law, dated December 11, 2010, the Court strikes the petitioner's *pro se* memorandum of law, dated December 2, 2009, denies and dismissed the petitioner's motion for leave to file supplemental amended pleadings, and denies and dismisses the request for further evidentiary hearings in this case.

This is a final order and resolves all pending matters.

Enter: 5-21-2010

Bradley B. Cavedo, Judge

Appendix 5

A Copy,
Teste: Bevill M. Dean, Clerk
By: D.C.

VIRGINIA:

IN THE CIRCUIT COURT OF THE CITY OF RICHMOND

STEPHEN J. HOOD,

Petitioner,

v. Docket No. CL06-2311

GENE JOHNSON, DIRECTOR,
VIRGINIA DEPARTMENT OF CORRECTIONS
Respondent.

ORDER

On March 29, 2010, the parties came before the Court, by counsel, on the respondent's Motion to Reconsider the order of November 10, 2009, which was suspended by Order dated November 30, 2009. Upon consideration of the arguments of counsel, and for the reasons stated in the Memorandum Opinion of November 10, 2009, in this case, it is Ordered that the Petition for a Writ of *Habeas Corpus* is granted as to Claim M and denied as to Claims L, G(a), G(b) and H. The writ shall be issued; however, it is ordered that Petitioner be held in the custody of the Department of Corrections until further order of this Court.

For the reasons stated in respondent's letter of April 23, 2010, and Reply to the Petitioner's Memorandum of Law, dated December 11, 2010, the Court strikes the petitioner's *pro se* memorandum of law, dated December 2, 2009, denies and dismissed the petitioner's motion for leave to file supplemental amended pleadings, and denies and dismisses the request for further evidentiary hearings in this case.

This is a final order and resolves all pending matters.

Enter: 5-21-2010

Bradley B. Cavedo, Judge

A Copy,
Teste: Beverly M. Dean, Clerk
By: D.C.

VIRGINIA:

IN THE CIRCUIT COURT FOR THE CITY OF RICHMOND
John Marshall Court Building

COMMONWEALTH OF VIRGINIA

v. Case Nos. F-01-2201, F-01-2202

STEPHEN JAMES HOOD,
DEFENDANT.

PLEA AGREEMENT AND FINAL ORDER

IT IS THE AGREEMENT of the parties hereto that upon entry of a plea of guilty pursuant to Alford v. North Carolina, 400 U.S. 25 (1970), by the defendant Stephen James Hood to the felony charge, Abduction, in violation of Virginia Code § 18.2-49(1), as set forth in amended indictment no. F-01-2201, the defendant shall be sentenced as follows:

The defendant shall serve Eight (8) years in the Department of Corrections and not be fined any dollar amount. The defendant shall receive credit for all time served as a result of his previous convictions in cases F-01-2201 and F-01-2202, and the sentence that is the subject of this agreement shall be deemed to run (and to have run) concurrently with any other sentence that may have been imposed on the defendant prior to the date hereof for any other matter. All parties to this agreement contemplate, and by its acceptance of this agreement, the Court hereby orders, that the defendant shall serve no additional jail time, nor shall he be detained or incarcerated after this date in any State Correctional facility, as a result of this agreement.

The parties further agree, and the Court hereby Orders, by its acceptance of this agreement, that the defendant shall be remanded to the custody of the Sheriff of the City of Richmond. The defendant shall then be released from custody, pursuant to the terms of this agreement.

Appendix 6

The parties further agree:

(1) That the Defendant shall not appear before the Circuit Court, or any court of jurisdiction, including any state appellate Court and any federal Court, to seek a modification of this agreement for any reason whatsoever; however, this provision shall not prejudice the right of

the Defendant to seek such appropriate relief, if any, as may be necessary to enforce the terms of the Plea Agreement.

(2) That the defendant is satisfied with the services of his counsel;

(3) That the defendant waives any claim of double jeopardy or estoppel, and further waives his right to appeal any provision of this agreement;

(4) That the defendant stipulates to the sufficiency of the Commonwealth's evidence to prove felony abduction in violation of Code § 18.2-49(1); and

(5) That the defendant shall not be subject to probation or parole supervision in connection with the charge that is the subject of this plea agreement upon his release from the Department of Corrections and from the custody of the Sheriff of the City of Richmond.

(6) Following the Court's entry of an Order accepting this agreement, the previous sentence in case number F-01-2201 shall be vacated.

SO ORDERED:

Date: 4.14.2011

Judge

Seen and agreed:

Attorney for the Commonwealth

Attorney for the Defendant

Defendant

A Copy,
Teste: Bevill M. Dean, Clerk
By: D.C.

Virginia: In the Circuit Court of the City of Richmond

MOTION HEARING

FIPS CODE: 760

Hearing Date: **November 30, 2011**
Judge: **Bradley B. Cavedo**

COMMONWEALTH OF VIRGINIA

v.

STEPHEN JAMES HOOD, DEFENDANT

This day came the defendant, in person, represented by retained counsel, **Joseph Grove**. The Commonwealth was represented by **Tracy Thorne-Begland**.

CASE NUMBER	OFFENSE DESCRIPTION AND INDICATOR (F/M)	OFFENSE DATE
CR01-F-2202	**Accessory After the Fact in a Felony (M)**	**08/31/90**

On the Commonwealth's motion to dismiss the charge, the Court grants the motion.

On joint motion of counsel, the Court will ORDER that any fine and costs assessed against the defendant for this charge be zeroed out and any fine and costs previously paid by the defendant for this charge be refunded to the defendant.

On the defense motion to preserve evidence and return evidence, the motion is granted in part and denied in part by agreement of the parties.

The Clerk of the Court shall forward a copy of this order to the following:
Virginia State Police
Department of Motor Vehicles
Parrish & LeBar
Defendant
Defendant's counsel
Commonwealth
Tammy Taylor
dls/filming

Appendix 7

ENTER: 12.14.11

Bradley B. Cavedo, Judge

A Copy,
Teste: BEVERLY M. DENN, CLERK
By _____ D.C.

DEFENDANT IDENTIFICATION:
Alias: **none**
SSN: **223-98-8852** DOB: **08/22/61** Sex: **male**

PUBLISHED

VIRGINIA:

In the Court of Appeals of Virginia on **Tuesday** *the* **23rd** *day of* **August, 2022.**

Stephen James Hood, Petitioner,

against Record No. 0732-21-2

Commonwealth of Virginia, Respondent.

Upon a Petition for a Writ of Actual Innocence

Before Judges Humphreys, Causey, and Senior Judge Clements

Stephen James Hood petitioned this Court seeking a writ of actual innocence under Chapter 19.3 of Title 19.2 of the Code of Virginia. In 2002, Hood was convicted in the Circuit Court of the City of Richmond of being an accessory after the fact to abduction and first-degree murder as a principal in the second degree. Hood's convictions, however, were vacated by the circuit court following a successful petition for a writ of habeas corpus based on a claim of ineffective assistance of counsel. Hood nonetheless now petitions this Court for a writ of actual innocence declaring him factually innocent of the crimes underlying his now-vacated 2002 convictions.

Hood's petition therefore raises, as an issue of first impression, whether this Court has the authority to consider a petition for a writ of actual innocence for convictions that have been vacated. For the reasons below, we hold that we do not have subject matter jurisdiction over Hood's petition and accordingly dismiss his petition.

BACKGROUND

Trial, Appeal, and Habeas Proceedings

In the early morning hours of August 31, 1990, Ilouise Cooper was abducted from her apartment on Parkwood Avenue in the city of Richmond. Her body was discovered later that day, and an autopsy

Appendix 8

confirmed that she had suffered several fatal stab wounds. In February 1991, a jury convicted Jeffrey Cox of burglary, abduction, and first-degree murder.

The FBI, however, had information that strongly suggested that Cox was innocent of the crime and that Hood participated in Cooper's killing. Following further investigation by the FBI, Hood was indicted in 2001 for first-degree murder and abduction, and Cox's convictions were set aside. As part of plea negotiations, Hood and the government agreed that he would provide a "detailed oral proffer" of the crime and that none of the statements made in the proffer would be used against Hood in the Commonwealth's case-in-chief in a criminal prosecution of Hood. Hood stated that he and another man, Billy Madison, were the perpetrators of the abduction and killing of Cooper in a case of mistaken identity over being cheated in a drug deal. Hood confessed to driving Madison to Cooper's apartment, giving Madison Hood's knives which he used for his job as a cook, and then taking Madison and Cooper to a secluded area where Madison murdered Cooper.

Following a bench trial on April 3 and 4, 2002, the circuit court convicted Hood of abduction as an accessory after the fact (a lesser-included offense of the felony abduction charge) and first-degree murder as a principal in the second degree. At trial, the Commonwealth used Hood's proffer in its case-in-chief in what would later be found to be a violation of the proffer agreement. By final order entered September 13, 2002, the circuit court sentenced Hood to twelve months' incarceration for the misdemeanor accessory conviction and sixty-five years' incarceration for the first-degree murder conviction.

Hood's convictions were affirmed on appeal by this Court and the Supreme Court of Virginia. *Hood v. Commonwealth*, 269 Va. 176 (2005); *Hood v. Commonwealth*, No. 2469-02-2 (Va. Ct. App. Feb. 17, 2004). On March 24, 2006, Hood filed a state habeas corpus petition in the circuit court challenging his convictions on multiple grounds. Hood argued, among other things, that his proffer was false and that his defense attorney and the Commonwealth coerced him to enter the immunity agreement with false promises. He also asserted that the Commonwealth "breached [the] cooperation/immunity agreement" and that his trial

counsel rendered ineffective assistance of counsel by failing to object to the introduction of the proffer as substantive evidence in the Commonwealth's case-in-chief.

On November 10, 2009, the circuit court granted Hood's petition for a writ of habeas corpus on the grounds that trial counsel was ineffective for failing to argue that, under the immunity agreement, the Commonwealth could not introduce the proffer as substantive evidence in its case-in-chief even if Hood introduced contrary evidence. The circuit court set aside the convictions and stated for the record that "the writ vacated the convictions in those two file numbers." Following the Commonwealth's unsuccessful appeal of the circuit court's ruling, the Commonwealth advised the circuit court that it was electing not to retry Hood for first-degree murder. Instead, under a written plea agreement, the Commonwealth moved to amend the original indictment to reflect a charge of attempted abduction, employing the same case number as the original charge. Hood agreed to plead guilty to the amended charge under *Alford* in exchange for an eight-year sentence, which would be satisfied by the time he served during his post-conviction proceedings. The circuit court accepted Hood's plea, and Hood was released from custody.

Hood filed this petition on July 30, 2021, alleging various grounds for his writ. Hood contends that the Commonwealth violated his right to exculpatory evidence and other legal deficiencies in his trial. Hood also points to statements from witnesses at Cox's trial and post-conviction proceedings inconsistent with his guilt. Hood also argues that documents obtained from the FBI via a FOIA request show that there is reason to doubt his guilt. Finally, Hood contends that his knives were not subject to scientific testing that he contends has since been conducted and exonerates him.

ANALYSIS

Subject Matter Jurisdiction

Before any court can proceed to the adjudication of a given case, it must first determine whether it has subject matter jurisdiction over the case. Subject matter jurisdiction "is the authority granted through constitution or statute to adjudicate a class of cases or controversies." *Gray v. Binder*, 294 Va. 268, 275

(2017) (quoting *Morrison v. Bestler*, 239 Va. 166, 169 (1990)). This Court's jurisdiction over petitions for writs of actual innocence derives from Code § 19.2-327.10:

> Notwithstanding any other provision of law or rule of court, upon a petition of a person who *was convicted of a felony*, or the petition of a person who was adjudicated delinquent 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. 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.

(Emphasis added). Accordingly, the threshold question for whether this Court has subject matter jurisdiction over a petition for a writ of actual innocence is whether a person was "convicted of a felony." *See Turner v. Commonwealth*, 282 Va. 227, 239 (2011). To establish subject matter jurisdiction, a petitioner needs to show two things: first, that they were convicted of some crime, and second, that the crime of conviction was a felony.

The Commonwealth argues that for a petitioner to show that he "was convicted of a felony" under Code § 19.2-327.10, he must show that he is subject to a valid, final order of conviction. Hood contends that the mere historical fact of his prior conviction is enough to bring his case under this Court's original jurisdiction, regardless of the current validity of that conviction.

The law entertains the legal fiction that certain orders or legal acts, though they undeniably took place as a matter of fact, are treated as legal nullities with no effect whatsoever. This legal fiction has been extended to, among others, void marriages, orders entered when a court lacked personal jurisdiction, and *ultra vires* orders entered by courts. *Kleinfield v. Veruki*, 7 Va. App. 183, 186 (1988) (bigamous marriage); *McCulley v. Brooks & Co. General Contractors*, 295 Va. 583, 589 (2018) (lack of personal jurisdiction); *Burrelll v. Commonwealth*, 283 Va. 474, 476 (2012) (*ultra vires* order).

When a legal act is void or a legal nullity, courts treat that act as if it had never occurred. For example, in *Nerri v. Adu-Gyamfi*, 270 Va. 28 (2005), our Supreme Court considered the legal effect of a motion for judgment signed by an attorney whose license to practice law had been administratively

suspended. The Court explained that because the attorney did not have an active license, any filing made during that time was a legal nullity. *See Nerri*, 270 Va. at 31. Accordingly, the motion for judgment was "invalid and had no legal effect." *Id.* The Court extended this reasoning to hold that the nonsuit filed by the plaintiff in the case was similarly without effect because "no valid proceeding was pending which could be non-suited." *Id.*

There is no clear Virginia case law on whether a vacated conviction is a legal nullity. In *Nelson v. Colorado,* 137 S. Ct. 1249 (2017), however, the United States Supreme Court held that, as a matter of constitutional due process law, a vacated conviction should be treated as a legal nullity. The Court held that Colorado statutes violated due process by requiring defendants whose convictions had been reversed or vacated to prove their innocence by clear and convincing evidence in order to obtain the refund of costs, fees, and restitution paid under the invalid conviction. *Nelson*, 137 S. Ct. at 1253. In that case, the defendant was convicted by a Colorado jury of attempting to patronize a prostituted child and attempted third-degree sexual assault by force. *Id.* The trial court imposed an indeterminate prison sentence and ordered him to pay costs, fees, and restitution totaling $4,413.00. *Id.* The Colorado Supreme Court reversed one of his convictions on direct review, and a postconviction court vacated the other. *Id.* The defendant then sought a refund of the amounts paid under the prior conviction and argued that requiring him to prove his innocence violated his rights under the Due Process Clause of the Fourteenth Amendment. *Id.* The Court held that the Due Process Clause required that "once those convictions were erased, the presumption of [the defendant's] innocence was restored." *Id.* at 1255. The Court rebuffed Colorado's argument that the convictions were voidable rather than void, citing with approval the state supreme court dissent that "reversal is reversal," no matter the reason, "[a]nd an invalid conviction is no conviction at all." *Id.* at 1256 n.10 (quoting *People v. Nelson*, 362 P.3d 1070, 1080 (Colo. 2015) (Hood, J., dissenting)).

This understanding that a vacated judgment is a legal nullity has long been applied by the federal courts. For example, in *United States v. Ayres*, 76 U.S. (9 Wall.) 608, 610 (1869), the Court noted that "it is quite clear, that the order granting the new trial has the effect of vacating the former judgment, and to render

it null and void, and the parties are left in the same situation as if no trial had ever taken place in the cause." *See also Nara v. Frank*, 488 F.3d 187, 201 (3d Cir. 2007); *Weyant v. Okst*, 101 F.3d 845, 854 (2d Cir. 1996); *Miller v. United States*, 173 F.2d 922, 923-24 (6th Cir. 1949).

We see no reason to depart from this line of reasoning. Although it is a historical fact that Hood was convicted of murder in 2002, the writ of habeas corpus vacated that conviction, and therefore, as a matter of law, Hood's conviction was a legal nullity and "no conviction at all." *Nelson*, 137 S. Ct. at 1256 n.10 (quoting 362 P.3d at 1080)). Virginia law is clear that legal nullities should be treated as though they never occurred. *See Nerri*, 270 Va. at 31. Hood's vacated convictions are legal nullities, and Hood was therefore not "convicted of a felony" under Code § 19.2-327.10. We therefore do not have subject matter jurisdiction to adjudicate Hood's petition for a writ of actual innocence.[1]

CONCLUSION

Because we lack the subject matter jurisdiction to adjudicate Hood's petition for a writ of actual innocence, we dismiss his petition.

This order shall be published.

A Copy,

Teste:

A. John Vollino, Clerk

By: Anne Cabit Forsythe

Deputy Clerk

[1] We note that this Court lacks jurisdiction over Hood's petition as it relates to his accessory after the fact conviction for a second reason. This Court can only adjudicate petitions for writs of actual innocence where the crime of conviction is a felony. On the date of Hood's conviction, Code § 18.2-19 established that the crime of being an accessory after the fact to abduction was punished as a misdemeanor. As a result, we are also without subject matter jurisdiction to consider Hood's petition as it relates to his accessory after the fact conviction.

VIRGINIA:

In the Supreme Court of Virginia held at the Supreme Court Building in the City of Richmond on Tuesday the 18th day of April, 2023.

Stephen James Hood, Appellant,

against Record No. 220684
Court of Appeals No. 0732-21-2

Commonwealth of Virginia, Appellee.

From the Court of Appeals of Virginia

Upon review of the record in this case and consideration of the argument submitted in support of the granting of an appeal, the Court refuses the petition for appeal.

Senior Justice Mims took no part in the resolution of the petition.

A Copy,

Teste:

Muriel-Theresa Pitney, Clerk

By: Helen Hayes

Deputy Clerk

Appendix 9

VIRGINIA:

In the Supreme Court of Virginia held at the Supreme Court Building in the City of Richmond on Tuesday the 27th day of June, 2023.

Stephen James Hood, Appellant,

against Record No. 220684
Court of Appeals No. 0732-21-2

Commonwealth of Virginia, Appellee.

Upon a Petition for Rehearing

On consideration of the petition of the appellant to set aside the judgment rendered herein on April 18, 2023, and grant a rehearing thereof, the prayer of the said petition is denied.

Senior Justice Mims took no part in the resolution of this petition.

A Copy,

Teste:

Muriel-Theresa Pitney, Clerk

By: Helen Hayes

Deputy Clerk

Appendix 10

Code of Virginia
Title 8.01. Civil Remedies and Procedure
Chapter 25. Extraordinary Writs
Article 3. Habeas Corpus

§ 8.01-654. When and where petition filed; what petition to contain

A. 1. A petition for a writ of habeas corpus ad subjiciendum may be filed in the Supreme Court or any circuit court showing by affidavits or other evidence that the petitioner is detained without lawful authority.

2. A petition for writ of habeas corpus ad subjiciendum, other than a petition challenging a criminal conviction or sentence, shall be brought within one year after the cause of action accrues. A habeas corpus petition attacking a criminal conviction or sentence shall be filed within two years from the date of final judgment in the trial court or within one year from either final disposition of the direct appeal in state court or the time for filing such appeal has expired, whichever is later.

B. 1. With respect to any such petition filed by a petitioner whose detention originated under criminal process, and subject to the provisions of § 17.1-310, only the circuit court that entered the original judgment or order resulting in the detention complained of in the petition shall have authority to issue writs of habeas corpus. If a district court entered the original judgment or order resulting in the detention complained of in the petition, only the circuit court for the city or county wherein the district court sits shall have authority to issue writs of habeas corpus. Hearings on such petition, where granted in the circuit court, may be held at any circuit court within the same circuit as the circuit court in which the petition was filed, as designated by the judge thereof.

2. Such petition shall contain all allegations the facts of which are known to petitioner at the time of filing and such petition shall enumerate all previous applications and their disposition. No writ shall be granted on the basis of any allegation the facts of which petitioner had knowledge at the time of filing any previous petition. The provisions of this section shall not apply to a petitioner's first petition for a writ of habeas corpus when the sole allegation of such petition is that the petitioner was deprived of the right to pursue an appeal from a final judgment of conviction or probation revocation, except that such petition shall contain all facts pertinent to the denial of appeal that are known to the petitioner at the time of the filing, and such petition shall certify that the petitioner has filed no prior habeas corpus petitions attacking the conviction or probation revocation.

3. Such petition may allege detention without lawful authority through challenge to a conviction, although the sentence imposed for such conviction is suspended or is to be served subsequently to the sentence currently being served by petitioner.

4. In the event the allegations of illegality of the petitioner's detention can be fully determined on the basis of recorded matters, the court may make its determination whether such writ should issue on the basis of the record.

5. The court shall give findings of fact and conclusions of law following a dete
record or after hearing, to be made a part of the record and transcribed.

Appendix 11

6. If petitioner alleges as a ground for illegality of his detention the inadequacy of counsel, he shall be deemed to waive his privilege with respect to communications between such counsel and himself to the extent necessary to permit a full and fair hearing for the alleged ground.

Code 1950, § 8-596; 1958, c. 215; 1968, c. 487; 1977, c. 617; 1978, c. 124; 1995, c. 503;1998, c. 577 ;2005, c. 836;2019, cc. 8, 48;2021, Sp. Sess. I, cc. 344, 345.

The chapters of the acts of assembly referenced in the historical citation at the end of this section(s) may not constitute a comprehensive list of such chapters and may exclude chapters whose provisions have expired.

§ 8.01-655. Form and contents of petition filed by prisoner

A. Every petition filed by a prisoner seeking a writ of habeas corpus must be filed on the form set forth in subsection B. The failure to use such form and to comply substantially with such form shall entitle the court to which such petition is directed to return such petition to the prisoner pending the use of and substantial compliance with such form. The petitioner shall be responsible for all statements contained in the petition and any false statement contained therein, if the same be knowingly or wilfully made, shall be a ground for prosecution and conviction of perjury as provided for in § 18.2-434.

B. Every petition filed by a prisoner seeking a writ of habeas corpus shall be filed on a form to be approved and provided by the office of the Attorney General, the contents of which shall be substantially as follows:

IN THE.....☒COURT

.....☒

Full name and prisonerCase No.....☒

number (if any) of(To be supplied by

Petitionerthe Clerk of the

-vs-Court)

.....☒

.....☒

Name and Title of Respondent

Appendix 12

PETITION FOR WRIT OF HABEAS CORPUS

Instructions--Read Carefully

In order for this petition to receive consideration by the Court, it must be legibly handwritten or typewritten, signed by the petitioner and verified before a notary or other officer authorized to administer oaths. It must set forth in concise form the answers to each applicable question. If necessary, petitioner may finish his answer to a particular question on an additional page. Petitioner must make it clear to which question any such continued answer refers. The petitioner may also submit exhibits.

Since every petition for habeas corpus must be sworn to under oath, any false statement of a material fact therein may serve as the basis of prosecution and conviction for perjury under §18.2-434. Petitioners should, therefore, exercise care to assure that all answers are true and correct.

When the petition is completed, the original and two copies (total of three) should be mailed to the clerk of the court. The petitioner shall keep one copy.

NOTICE

The granting of a writ of habeas corpus does not entitle the petitioner to dismissal of the charges for conviction of which he is being detained, but may gain him no more than a new trial.

.....☒

Place of detention:.....☒

A. Criminal Trial

1. Name and location of court which imposed the sentence from which you seek relief:
.....☒
.....☒☒

2. The offense or offenses for which sentence was imposed (include indictment number or numbers if known):
a.....☒
b.....☒
c.....☒

3. The date upon which sentence was imposed and the terms of the sentence:
a.....☒
b.....☒
c.....☒

4. Check which plea you made and whether trial by jury: Plea of guilty: .....; Plea of not guilty:.....; Trial by jury:.....; Trial by judge without jury:...☒

5. The name and address of each attorney, if any, who represented you at your criminal trial:
.....☒
.....☒
6. Did you appeal the conviction?.....☒
7. If you answered "yes" to 6, state: the result and the date in your appeal or petition for certiorari:
a.....☒
b.....☒
citations of the appellate court opinions or orders:
a.....☒
b.....☒

8. List the name and address of each attorney, if any, who represented you on your appeal:

.....☒
.....☒

B. Habeas Corpus

9. Before this petition did you file with respect to this conviction any other petition for habeas corpus in either a State or federal court?.....☒
10. If you answered "yes" to 9, list with respect to each petition: the name and location of the court in which each was filed:
a.....☒.....☒
b.....☒
the disposition and the date:
a.....☒
b.....☒
the name and address of each attorney, if any, who represented you on your habeas corpus:
a.....☒
b.....☒

11. Did you appeal from the disposition of your petition for habeas corpus?
12. If you answered "yes" to 11, state: the result and the date of each petition:
a.....☒
b.....☒
citations of court opinions or orders on your habeas corpus petition:
a.....☒
b.....☒
the name and address of each attorney, if any, who represented you on appeal of your habeas corpus:
a.....☒
b.....☒

C. Other Petitions, Motions or Applications

13. List all other petitions, motions or applications filed with any court following a final order of conviction and not set out in A or B. Include the nature of the motion, the name and location of the court, the result, the date, and citations to opinions or orders. Give the name and address of each attorney, if any, who represented you.
a.....☒
b.....☒
c.....☒

D. Present Petition

14. State the grounds which make your detention unlawful, including the facts on which you intend to rely:
a.....☒
b.....☒.....☒
c.....☒

15. List each ground set forth in 14, which has been presented in any other proceeding:

a.....☒

b.....☒

c.....☒

List the proceedings in which each ground was raised:

a.....☒

b.....☒

c.....☒

16. If any ground set forth in 14 has not been presented to a court, list each ground and the reason why it was not:

a.....☒

b.....☒

c.....☒

.....☒

Signature of Petitioner

.....☒

Address of Petitioner

STATE OF VIRGINIA

CITY/COUNTY OF.....☒

The petitioner being first duly sworn, says:

1. He signed the foregoing petition;

2. The facts stated in the petition are true to the best of his information and belief.

.....☒

Signature of Petitioner

Subscribed and sworn to before me

this....☒ay of....., 20...☒

.....☒

Notary Public

My commission expires:.....☒

The petition will not be filed without payment of court costs unless the petitioner is entitled to proceed in forma pauperis and has executed the affidavit in forma pauperis.

The petitioner who proceeds in forma pauperis shall be furnished, without cost, certified copies of the arrest warrants, indictment and order of his conviction at his criminal trial in order to comply with the instructions of

this petition.

AFFIDAVIT IN FORMA PAUPERIS

STATE OF VIRGINIA

CITY/COUNTY OF.....☒

The petitioner being duly sworn, says:

1. He is unable to pay the costs of this action or give security therefor;
2. His assets amount to a total of $.....☒

.....☒

Signature of Petitioner

Subscribed and sworn to before me

this....☒ay of....., 20...☒

.....☒
Notary Public

My commission expires:.....☒

Code 1950, § 8-596.1; 1968, c. 359; 1977, c. 617.

The chapters of the acts of assembly referenced in the historical citation at the end of this section(s) may not constitute a comprehensive list of such chapters and may exclude chapters whose provisions have expired.

§ 8.01-662. Judgment of court or judge trying it; payment of costs and expenses when petition denied

After hearing the matter both upon the response and any other evidence, the court shall either discharge or remand the petitioner, grant him any other relief to which he is entitled, or admit him to bail and adjudge the cost of the proceeding, including the charge for transporting the prisoner, provided, however, that if the petition is denied, the costs and expenses of the proceeding and the attorney fees of any attorney appointed to represent the petitioner shall be assessed against the petitioner. If such cost, expenses, and fees are collected, they shall be paid to the Commonwealth.

When relief is granted upon a petition for a writ of habeas corpus, the order granting relief on the writ shall be served on the respondent and the petitioner. Service may, in the court's discretion, be accomplished by personal service or by transmitting a certified copy of the order to the parties via regular or certified mail, a third-party commercial carrier, or electronic delivery.

Code 1950, § 8-603; 1968, c. 482; 1977, c. 617; 2019, cc. 8, 48.

The chapters of the acts of assembly referenced in the historical citation at the end of this section(s) may not constitute a comprehensive list of such chapters and may exclude chapters whose provisions have expired.

Appendix 13

§ 17.1-406. Appeals in criminal matters; cases over which Court of Appeals does not have jurisdiction

A. Any aggrieved party may appeal to the Court of Appeals from any final conviction in a circuit court of a traffic infraction or a crime. The Commonwealth or any county, city, or town may petition the Court of Appeals for an appeal pursuant to this subsection in any case in which such party previously could have petitioned the Supreme Court for a writ of error under § 19.2-317. The Commonwealth may also petition the Court of Appeals for an appeal in a criminal case pursuant to § 19.2-398.

B. In accordance with other applicable provisions of law, appeals lie directly to the Supreme Court from a final decision, judgment or order of a circuit court involving a petition for a writ of habeas corpus, from any final finding, decision, order, or judgment of the State Corporation Commission, and from proceedings under §§ 54.1-3935 and 54.1-3937. Complaints of the Judicial Inquiry and Review Commission shall be filed with the Supreme Court of Virginia. The Court of Appeals shall not have jurisdiction over any cases or proceedings described in this subsection.

1984, c. 701, § 17-116.05:1; 1985, c. 371; 1987, cc. 707, 710; 1988, c. 873; 1998, c. 872;2007, c. 889 ;2013, c. 746;2019, c. 809;2021, Sp. Sess. I, cc. 344, 345, 489.

The chapters of the acts of assembly referenced in the historical citation at the end of this section(s) may not constitute a comprehensive list of such chapters and may exclude chapters whose provisions have expired.

Appendix 14

§ 17.1-411. Review by the Supreme Court

Except where the decision of the Court of Appeals is made final under § 17.1-410 or § 19.2-408, any party aggrieved by a final decision of the Court of Appeals, including the Commonwealth, may petition the Supreme Court for an appeal. The Commonwealth, or any county, city, or town, may also petition the Supreme Court for review pursuant to § 19.2-317. The granting of such petitions shall be in the discretion of the Supreme Court.

1983, c. 413, § 17-116.08; 1997, c. 358;1998, c. 872.

The chapters of the acts of assembly referenced in the historical citation at the end of this section(s) may not constitute a comprehensive list of such chapters and may exclude chapters whose provisions have expired.

Appendix 15

§ 18.2-15. Place of punishment

Imprisonment for conviction of a felony shall be by confinement in a state correctional facility, unless in Class 5 and Class 6 felonies the jury or court trying the case without a jury fixes the punishment at confinement in jail. Imprisonment for conviction of a misdemeanor shall be by confinement in jail.

1975, cc. 14, 15.

The chapters of the acts of assembly referenced in the historical citation at the end of this section(s) may not constitute a comprehensive list of such chapters and may exclude chapters whose provisions have expired.

Appendix 16

§ 18.2-18. How principals in second degree and accessories before the fact punished

In the case of every felony, every principal in the second degree and every accessory before the fact may be indicted, tried, convicted and punished in all respects as if a principal in the first degree; provided, however, that except in the case of a killing for hire under the provisions of subdivision A 2 of § 18.2-31 or a killing pursuant to the direction or order of one who is engaged in a continuing criminal enterprise under the provisions of subdivision A 10 of § 18.2-31 or a killing pursuant to the direction or order of one who is engaged in the commission of or attempted commission of an act of terrorism under the provisions of subdivision A 13 of § 18.2-31, an accessory before the fact or principal in the second degree to an aggravated murder shall be indicted, tried, convicted and punished as though the offense were murder in the first degree.

Code 1950, § 18.1-11; 1960, c. 358; 1975, cc. 14, 15; 1977, c. 478; 1997, c. 313;2002, cc. 588, 623; 2021, Sp. Sess. I, cc. 344, 345.

The chapters of the acts of assembly referenced in the historical citation at the end of this section(s) may not constitute a comprehensive list of such chapters and may exclude chapters whose provisions have expired.

Appendix 17

§ 18.2-19. How accessories after the fact punished; certain exceptions

Every accessory after the fact is guilty of (i) a Class 6 felony in the case of a homicide offense that is punishable as a Class 1 or Class 2 felony or (ii) a Class 1 misdemeanor in the case of any other felony. However, no person in the relation of spouse, parent or grandparent, child or grandchild, or sibling, by consanguinity or affinity, or servant to the offender, who, after the commission of a felony, aids or assists a principal felon or accessory before the fact to avoid or escape from prosecution or punishment, shall be deemed an accessory after the fact.

Code 1950, §§ 18.1-11, 18.1-12; 1960, c. 358; 1975, cc. 14, 15; 2014, c. 668;2020, c. 900;2021, Sp. Sess. I, cc. 344, 345.

The chapters of the acts of assembly referenced in the historical citation at the end of this section(s) may not constitute a comprehensive list of such chapters and may exclude chapters whose provisions have expired.

Appendix 18

Code of Virginia
Title 18.2. Crimes and Offenses Generally
Chapter 4. Crimes Against the Person
Article 1. Homicide

§ 18.2-32. First and second degree murder defined; punishment

Murder, other than aggravated murder, by poison, lying in wait, imprisonment, starving, or by any willful, deliberate, and premeditated killing, or in the commission of, or attempt to commit, arson, rape, forcible sodomy, inanimate or animate object sexual penetration, robbery, burglary or abduction, except as provided in § 18.2-31, is murder of the first degree, punishable as a Class 2 felony.

All murder other than aggravated murder and murder in the first degree is murder of the second degree and is punishable by confinement in a state correctional facility for not less than five nor more than forty years.

Code 1950, § 18.1-21; 1960, c. 358; 1962, c. 42; 1975, cc. 14, 15; 1976, c. 503; 1977, cc. 478, 492; 1981, c. 397; 1993, cc. 463, 490; 1998, c. 281;2021, Sp. Sess. I, cc. 344, 345.

The chapters of the acts of assembly referenced in the historical citation at the end of this section(s) may not constitute a comprehensive list of such chapters and may exclude chapters whose provisions have expired.

Appendix 19

Code of Virginia
Title 18.2. Crimes and Offenses Generally
Chapter 4. Crimes Against the Person
Article 3. Kidnapping and Related Offenses

§ 18.2-47. Abduction and kidnapping defined; punishment

A. Any person who, by force, intimidation or deception, and without legal justification or excuse, seizes, takes, transports, detains or secretes another person with the intent to deprive such other person of his personal liberty or to withhold or conceal him from any person, authority or institution lawfully entitled to his charge, shall be deemed guilty of "abduction."

B. Any person who, by force, intimidation or deception, and without legal justification or excuse, seizes, takes, transports, detains or secretes another person with the intent to subject him to forced labor or services shall be deemed guilty of "abduction." For purposes of this subsection, the term "intimidation" shall include destroying, concealing, confiscating, withholding, or threatening to withhold a passport, immigration document, or other governmental identification or threatening to report another as being illegally present in the United States.

C. The provisions of this section shall not apply to any law-enforcement officer in the performance of his duty. The terms "abduction" and "kidnapping" shall be synonymous in this Code. Abduction for which no punishment is otherwise prescribed shall be punished as a Class 5 felony.

D. If an offense under subsection A is committed by the parent of the person abducted and punishable as contempt of court in any proceeding then pending, the offense shall be a Class 1 misdemeanor in addition to being punishable as contempt of court. However, such offense, if committed by the parent of the person abducted and punishable as contempt of court in any proceeding then pending and the person abducted is removed from the Commonwealth by the abducting parent, shall be a Class 6 felony in addition to being punishable as contempt of court.

Code 1950, §§ 18.1-36, 18.1-37; 1960, c. 358; 1975, cc. 14, 15; 1979, c. 663; 1980, c. 506; 1997, c. 747;2009, c. 662.

The chapters of the acts of assembly referenced in the historical citation at the end of this section(s) may not constitute a comprehensive list of such chapters and may exclude chapters whose provisions have expired.

Appendix 20

Code of Virginia
Title 19.2. Criminal Procedure
Chapter 9. Bail and Recognizances
Article 1. Bail

§ 19.2-120. Admission to bail

Prior to conducting any hearing on the issue of bail, release or detention, the judicial officer shall, to the extent feasible, obtain the person's criminal history.

A. A person who is held in custody pending trial or hearing for an offense, civil or criminal contempt, or otherwise shall be admitted to bail by a judicial officer, unless there is probable cause to believe that:

1. He will not appear for trial or hearing or at such other time and place as may be directed, or

2. His liberty will constitute an unreasonable danger to himself, family or household members as defined in § 16.1-228, or the public.

B. In making a determination under subsection A, the judicial officer shall consider all relevant information, including (i) the nature and circumstances of the offense; (ii) whether a firearm is alleged to have been used in the commission of the offense; (iii) the weight of the evidence; (iv) the history of the accused or juvenile, including his family ties or involvement in employment, education, or medical, mental health, or substance abuse treatment; (v) his length of residence in, or other ties to, the community; (vi) his record of convictions; (vii) his appearance at court proceedings or flight to avoid prosecution or convictions for failure to appear at court proceedings; and (viii) whether the person is likely to obstruct or attempt to obstruct justice, or threaten, injure, or intimidate, or attempt to threaten, injure, or intimidate, a prospective witness, juror, victim, or family or household member as defined in § 16.1-228.

C. The judicial officer shall inform the person of his right to appeal from the order denying bail or fixing terms of bond or recognizance consistent with § 19.2-124.

D. If the judicial officer sets a secured bond and the person engages the services of a licensed bail bondsman, the magistrate executing recognizance for the accused shall provide the bondsman, upon request, with a copy of the person's Virginia criminal history record, if readily available, to be used by the bondsman only to determine appropriate reporting requirements to impose upon the accused upon his release. The bondsman shall pay a $15 fee payable to the state treasury to be credited to the Literary Fund, upon requesting the defendant's Virginia criminal history record issued pursuant to § 19.2-389. The bondsman shall review the record on the premises and promptly return the record to the magistrate after reviewing it.

1975, c. 495; 1978, c. 755; 1979, c. 649; 1987, c. 390; 1991, c. 581; 1993, c. 636; 1996, c. 973;1997, cc. 6, 476;1999, cc. 829, 846;2000, c. 797;2002, cc. 588, 623;2004, cc. 308, 360, 406, 412, 461, 819, 954, 959;2005, c. 132;2006, c. 504;2007, cc. 134, 386, 745, 923;2008, c. 596;2010, c. 862;2011, cc. 445, 450, 480;2012, c. 467;2015, c. 413;2018, c. 71;2020, c. 999;2021, Sp. Sess. I, cc. 337, 344, 345 , 523, 540.

The chapters of the acts of assembly referenced in the historical citation at the section(s) may not constitute a comprehensive list of such chapters and may ex

Appendix 21

whose provisions have expired.

Code of Virginia
Title 19.2. Criminal Procedure
Chapter 10. Disability of Judge or Attorney for Commonwealth; Court- Appointed Counsel; Interpreters; Transcripts
Article 3. Appointment of Attorney for Accused

§ 19.2-157. Duty of court when accused appears without counsel

Except as may otherwise be provided in §§ 16.1-266 through 16.1-268, whenever a person charged with a criminal offense the penalty for which may be confinement in the state correctional facility or jail, including charges for revocation of suspension of imposition or execution of sentence or probation, appears before any court without being represented by counsel, the court shall inform him of his right to counsel. The accused shall be allowed a reasonable opportunity to employ counsel or, if appropriate, the statement of indigence provided for in § 19.2-159 may be executed.

Code 1950, §§ 19.1-241.1, 19.1-241.7; 1964, c. 657; 1966, c. 460; 1973, c. 316; 1975, c. 495; 1978, c. 362; 2021, Sp. Sess. I, cc. 344, 345.

The chapters of the acts of assembly referenced in the historical citation at the end of this section(s) may not constitute a comprehensive list of such chapters and may exclude chapters whose provisions have expired.

Appendix 22

§ 19.2-158. When person not free on bail shall be informed of right to counsel and amount of bail

Every person charged with an offense described in § 19.2-157, who is not free on bail or otherwise, shall be brought before the judge of a court not of record, unless the circuit court issues process commanding the presence of the person, in which case the person shall be brought before the circuit court, on the first day on which such court sits after the person is charged, at which time the judge shall inform the accused of the amount of his bail and his right to counsel. If the court not of record sits on a day prior to the scheduled sitting of the court which issued process, the person shall be brought before the court not of record. The court shall also hear and consider motions by the person or Commonwealth relating to bail or conditions of release pursuant to Article 1 (§ 19.2-119 et seq.) of Chapter 9 of this title. Absent good cause shown, a hearing on bail or conditions of release shall be held as soon as practicable but in no event later than three calendar days, excluding Saturdays, Sundays, and legal holidays, following the making of such motion.

No hearing on the charges against the accused shall be had until the foregoing conditions have been complied with, and the accused shall be allowed a reasonable opportunity to employ counsel of his own choice, or, if appropriate, the statement of indigence provided for in § 19.2-159 may be executed.

Code 1950, §§ 19.1-241.2, 19.1-241.8; 1964, c. 657; 1966, c. 460; 1973, c. 316; 1975, c. 495; 1998, c. 773;1999, cc. 829, 846;2014, c. 515.

The chapters of the acts of assembly referenced in the historical citation at the end of this section(s) may not constitute a comprehensive list of such chapters and may exclude chapters whose provisions have expired.

Appendix 23

Code of Virginia
Title 19.2. Criminal Procedure
Chapter 10. Disability of Judge or Attorney for Commonwealth; Court- Appointed Counsel; Interpreters; Transcripts
Article 3. Appointment of Attorney for Accused

§ 19.2-159. Determination of indigency; guidelines; statement of indigence; appointment of counsel

A. If the accused shall claim that he is indigent, and the charge against him is a criminal offense that may be punishable by confinement in the state correctional facility or jail, subject to the provisions of § 19.2-160, the court shall determine from oral examination of the accused or other competent evidence whether or not the accused is indigent within the contemplation of law pursuant to the guidelines set forth in this section.

B. In making its finding, the court shall determine whether or not the accused is a current recipient of a state or federally funded public assistance program for the indigent. If the accused is a current recipient of such a program and does not waive his right to counsel or retain counsel on his own behalf, he shall be presumed eligible for the appointment of counsel. This presumption shall be rebuttable where the court finds that a more thorough examination of the financial resources of the defendant is necessary. If the accused shall claim to be indigent and is not presumptively eligible under the provisions of this section, then a thorough examination of the financial resources of the accused shall be made with consideration given to the following:

1. The net income of the accused, which shall include his total salary and wages minus deductions required by law. The court also shall take into account income and amenities from other sources including but not limited to social security funds, union funds, veteran's benefits, other regular support from an absent family member, public or private employee pensions, dividends, interests, rents, estates, trusts, or gifts.

2. All assets of the accused which are convertible into cash within a reasonable period of time without causing substantial hardship or jeopardizing the ability of the accused to maintain home and employment. Assets shall include all cash on hand as well as in checking and savings accounts, stocks, bonds, certificates of deposit, and tax refunds. All personal property owned by the accused which is readily convertible into cash shall be considered, except property exempt from attachment. Any real estate owned by the accused shall be considered in terms of the amounts which could be raised by a loan on the property. For purposes of eligibility determination, the income, assets, and expenses of the spouse, if any, who is a member of the accused's household, shall be considered, unless the spouse was the victim of the offense or offenses allegedly committed by the accused.

3. Any exceptional expenses of the accused and his family which would, in all probability, prohibit him from being able to secure private counsel. Such items shall include but not be limited to costs for medical care, family support obligations, and child care payments.

The available funds of the accused shall be calculated as the sum of his total income and assets less the exceptional expenses as provided in the first paragraph of this subdivi
accused does not waive his right to counsel or retain counsel on his own behal
appointed for the accused if his available funds are equal to or below 125 perc
poverty income guidelines prescribed for the size of the household of the accu

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Department of Health and Human Services. The Supreme Court of Virginia shall be responsible for distributing to all courts the annual updates of the federal poverty income guidelines made by the Department.

If the available funds of the accused exceed 125 percent of the federal poverty income guidelines and the accused fails to employ counsel and does not waive his right to counsel, the court may, in exceptional circumstances, and where the ends of justice so require, appoint an attorney to represent the accused. However, in making such appointments, the court shall state in writing its reasons for so doing. The written statement by the court shall be included in the permanent record of the case.

C. If the court determines that the accused is indigent as contemplated by law pursuant to the guidelines set forth in this section, the court shall provide the accused with a statement which shall contain the following:

"I have been advised this _____ day of _____, 20__, by the (name of court) court of my right to representation by counsel in the trial of the charge pending against me; I certify that I am without means to employ counsel and I hereby request the court to appoint counsel for me."

_____ (signature of accused)

The court shall also require the accused to complete a written financial statement to support the claim of indigency and to permit the court to determine whether or not the accused is indigent within the contemplation of law. The accused shall execute the said statements under oath, and the said court shall appoint competent counsel to represent the accused in the proceeding against him, including an appeal, if any, until relieved or replaced by other counsel.

The executed statements by the accused and the order of appointment of counsel shall be filed with and become a part of the record of such proceeding.

All other instances in which the appointment of counsel is required for an indigent shall be made in accordance with the guidelines prescribed in this section.

D. Except in jurisdictions having a public defender, or unless (i) the public defender is unable to represent the defendant by reason of conflict of interest or (ii) the court finds that appointment of other counsel is necessary to attain the ends of justice, counsel appointed by the court for representation of the accused shall be selected by a fair system of rotation among members of the bar practicing before the court whose names are on the list maintained by the Indigent Defense Commission pursuant to § 19.2-163.01. If no attorney who is on the list maintained by the Indigent Defense Commission is reasonably available, the court may appoint as counsel an attorney not on the list who has otherwise demonstrated to the court's satisfaction an appropriate level of training and experience. The court shall provide notice to the Commission of the appointment of the attorney.

Code 1950, § 19.1-241.3; 1964, c. 657; 1966, c. 460; 1975, c. 495; 1976, c. 553; 1978, c. 720; 1984, c. 709; 2004, cc. 884, 921;2006, cc. 680, 708;2008, cc. 122, 154;2021, Sp. Sess. I, cc. 344, 345.

The chapters of the acts of assembly referenced in the historical citation at the end of this section(s) may not constitute a comprehensive list of such chapters and may exclude chapters whose provisions have expired.

Code of Virginia
Title 19.2. Criminal Procedure
Chapter 10. Disability of Judge or Attorney for Commonwealth; Court- Appointed Counsel; Interpreters; Transcripts
Article 3. Appointment of Attorney for Accused

§ 19.2-160. Appointment of counsel or waiver of right

If the charge against the accused is a crime the penalty for which may be incarceration, and the accused is not represented by counsel, the court shall ascertain by oral examination of the accused whether or not the accused desires to waive his right to counsel.

In the event the accused desires to waive his right to counsel, and the court ascertains that such waiver is voluntary and intelligently made, then the court shall provide the accused with a statement to be executed by the accused to document his waiver. The statement shall be in a form designed and provided by the Supreme Court. Any executed statement herein provided for shall be filed with and become a part of the record of such proceeding.

In the absence of a waiver of counsel by the accused, and if he shall claim that he is indigent, the court shall proceed in the same manner as is provided in § 19.2-159.

Should the defendant refuse or otherwise fail to sign either of the statements described in this section and § 19.2-159, the court shall note such refusal on the record. Such refusal shall be deemed to be a waiver of the right to counsel, and the court, after so advising the accused and offering him the opportunity to rescind his refusal shall, if such refusal is not rescinded and the accused's signature given, proceed to hear and decide the case. However, if, prior to the commencement of the trial, the court states in writing, either upon the request of the attorney for the Commonwealth or, in the absence of the attorney for the Commonwealth, upon the court's own motion, that a sentence of incarceration will not be imposed if the defendant is convicted, the court may try the case without appointing counsel, and in such event no sentence of incarceration shall be imposed.

Code 1950, § 19.1-241.9; 1973, c. 316; 1975, c. 495; 1978, c. 365; 1979, c. 468; 1983, c. 97; 1989, c. 385.

The chapters of the acts of assembly referenced in the historical citation at the end of this section(s) may not constitute a comprehensive list of such chapters and may exclude chapters whose provisions have expired.

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Code of Virginia
Title 19.2. Criminal Procedure
Chapter 14. Presentments, Indictments and Informations
Article 3. Amendments

§ 19.2-231. Amendment of indictment, presentment or information

If there be any defect in form in any indictment, presentment or information, or if there shall appear to be any variance between the allegations therein and the evidence offered in proof thereof, the court may permit amendment of such indictment, presentment or information, at any time before the jury returns a verdict or the court finds the accused guilty or not guilty, provided the amendment does not change the nature or character of the offense charged. After any such amendment the accused shall be arraigned on the indictment, presentment or information as amended, and shall be allowed to plead anew thereto, if he so desires, and the trial shall proceed as if no amendment had been made; but if the court finds that such amendment operates as a surprise to the accused, he shall be entitled, upon request, to a continuance of the case for a reasonable time.

Code 1950, §§ 19.1-175 through 19.1-177; 1960, c. 366; 1975, c. 495.

The chapters of the acts of assembly referenced in the historical citation at the end of this section(s) may not constitute a comprehensive list of such chapters and may exclude chapters whose provisions have expired.

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§ 19.2-243. Limitation on prosecution of felony due to lapse of time after finding of probable cause; misdemeanors; exceptions

Where a district court has found that there is probable cause to believe that an adult has committed a felony, the accused, if he is held continuously in custody thereafter, shall be forever discharged from prosecution for such offense if no trial is commenced in the circuit court within five months from the date such probable cause was found by the district court; and if the accused is not held in custody but has been recognized for his appearance in the circuit court to answer for such offense, he shall be forever discharged from prosecution therefor if no trial is commenced in the circuit court within nine months from the date such probable cause was found.

If there was no preliminary hearing in the district court, or if such preliminary hearing was waived by the accused, the commencement of the running of the five and nine months periods, respectively, set forth in this section, shall be from the date an indictment or presentment is found against the accused.

If an indictment or presentment is found against the accused but he has not been arrested for the offense charged therein, the five and nine months periods, respectively, shall commence to run from the date of his arrest thereon.

Where a case is before a circuit court on appeal from a conviction of a misdemeanor or traffic infraction in a district court, the accused shall be forever discharged from prosecution for such offense if the trial de novo in the circuit court is not commenced (i) within five months from the date of the conviction if the accused has been held continuously in custody or (ii) within nine months of the date of the conviction if the accused has been recognized for his appearance in the circuit court to answer for such offense.

The provisions of this section shall not apply to such period of time as the failure to try the accused was caused:

1. By his insanity or by reason of his confinement in a hospital for care and observation;

2. By the witnesses for the Commonwealth being enticed or kept away, or prevented from attending by sickness or accident;

3. By the granting of a separate trial at the request of a person indicted jointly with others for a felony;

4. By continuance granted on the motion of the accused or his counsel, or by concurrence of the accused or his counsel in such a motion by the attorney for the Commonwe
of the accused or his counsel to make a timely objection to such a motion by
Commonwealth, or by reason of his escaping from jail or failing to appear a
recognizance;

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5. By continuance ordered pursuant to subsection I or J of § 18.2-472.1 or subsection C or D of §

'19.2-187.1;

6. By the inability of the jury to agree in their verdict; or

7. By a natural disaster, civil disorder, or act of God.

But the time during the pendency of any appeal in any appellate court shall not be included as applying to the provisions of this section.

For the purposes of this section, an arrest on an indictment or warrant or information or presentment is deemed to have occurred only when such indictment, warrant, information, or presentment or the summons or capias to answer such process is served or executed upon the accused and a trial is deemed commenced at the point when jeopardy would attach or when a plea of guilty or nolo contendere is tendered by the defendant. The lodging of a detainer or its equivalent shall not constitute an arrest under this section.

Code 1950, § 19.1-191; 1960, c. 366; 1974, c. 391; 1975, c. 495; 1984, c. 618; 1988, c. 33; 1993, c. 425; 1995, cc. 37, 352;2002, c. 743;2005, c. 650;2007, c. 944;2009, Sp. Sess. I, cc. 1, 4.

The chapters of the acts of assembly referenced in the historical citation at the end of this section(s) may not constitute a comprehensive list of such chapters and may exclude chapters whose provisions have expired.

Code of Virginia
Title 19.2. Criminal Procedure
Chapter 15. Trial and Its Incidents
Article 3. Arraignment; Pleas; Trial without Jury

§ 19.2-254. Arraignment; pleas; when court may refuse to accept plea; rejection of plea agreement; recusal

Arraignment shall be conducted in open court. It shall consist of reading to the accused the charge on which he will be tried and calling on him to plead thereto. In a felony case, arraignment is not necessary when waived by the accused. In a misdemeanor case, arraignment is not necessary when waived by the accused or his counsel, or when the accused fails to appear.

An accused may plead not guilty, guilty or nolo contendere. The court may refuse to accept a plea of guilty to any lesser offense included in the charge upon which the accused is arraigned; but, in misdemeanor and felony cases the court shall not refuse to accept a plea of nolo contendere.

With the approval of the court and the consent of the Commonwealth, a defendant may enter a conditional plea of guilty in a misdemeanor or felony case in circuit court, reserving the right, on appeal from the judgment, to a review of the adverse determination of any specified pretrial motion. If the defendant prevails on appeal, he shall be allowed to withdraw his plea.

Upon rejecting a plea agreement in any criminal matter, a judge shall immediately recuse himself from any further proceedings on the same matter unless the parties agree otherwise.

1975, c. 495; 1987, c. 357; 2014, cc. 52, 165.

The chapters of the acts of assembly referenced in the historical citation at the end of this section(s) may not constitute a comprehensive list of such chapters and may exclude chapters whose provisions have expired.

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Code of Virginia
Title 19.2. Criminal Procedure
Chapter 18. Sentence; Judgment; Execution of Sentence
Article 1. General Provisions

§ 19.2-303. Suspension or modification of sentence; probation; taking of fingerprints and blood, saliva, or tissue sample as condition of probation

After conviction, whether with or without jury, the court may suspend imposition of sentence or suspend the sentence in whole or part and in addition may place the defendant on probation under such conditions as the court shall determine, including monitoring by a GPS (Global Positioning System) tracking device, or other similar device, or may, as a condition of a suspended sentence, require the defendant to make at least partial restitution to the aggrieved party or parties for damages or loss caused by the offense for which convicted, or to perform community service, or both, under terms and conditions which shall be entered in writing by the court. The court may fix the period of probation for up to the statutory maximum period for which the defendant might originally have been sentenced to be imprisoned. Any period of supervised probation shall not exceed five years from the release of the defendant from any active period of incarceration. The limitation on the period of probation shall not apply to the extent that an additional period of probation is necessary (i) for the defendant to participate in a court-ordered program or (ii) if a defendant owes restitution and is still subject to restitution compliance review hearings in accordance with § 19.2-305.1. The defendant may be ordered by the court to pay the cost of the GPS tracking device or other similar device. If, however, the court suspends or modifies any sentence fixed by a jury pursuant to § 19.2-295, the court shall file a statement of the reasons for the suspension or modification in the same manner as the statement required pursuant to subsection B of § 19.2-298.01. The judge, after convicting the defendant of any offense for which a report to the Central Criminal Records Exchange is required in accordance with subsection A of § 19.2-390, shall determine whether a copy of the defendant's fingerprints or fingerprint identification information has been provided by a law-enforcement officer to the clerk of court for each such offense. In any case where fingerprints or fingerprint identification information has not been provided by a law-enforcement officer to the clerk of court, the judge shall require that fingerprints and a photograph be taken by a law-enforcement officer as a condition of probation or of the suspension of the imposition or execution of any sentence for such offense. Such fingerprints shall be submitted to the Central Criminal Records Exchange under the provisions of subsection D of § 19.2-390.

In those courts having electronic access to the Department of Forensic Science DNA data bank sample tracking system within the courtroom, prior to or upon sentencing, the clerk of court shall also determine by reviewing the DNA data bank sample tracking system whether a blood, saliva, or tissue sample is stored in the DNA data bank maintained by the Department of Forensic Science pursuant to Article 1.1 (§ 19.2-310.2 et seq.) of Chapter 18 of this title. In any case in which the clerk has determined that a DNA sample is not stored in the DN[illegible] case in which electronic access to the DNA data bank sample tracking syst[illegible] the courtroom, the court shall order that the defendant appear within 30 [illegible] or probation officer and allow the sheriff or probation officer to take the r[illegible] order shall also require that, if the defendant has not appeared and allowe[illegible] probation officer to take the required sample by the date stated in the order, then the sheriff or

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probation officer shall report to the court the defendant's failure to appear and provide the required sample.

After conviction and upon sentencing of an active participant or member of a criminal street gang, the court may, as a condition for suspending the imposition of the sentence in whole or in part or for placing the accused on probation, place reasonable restrictions on those persons with whom the accused may have contact. Such restrictions may include prohibiting the accused from having contact with anyone whom he knows to be a member of a criminal street gang, except that contact with a family or household member, as defined in § 16.1-228, shall be permitted unless expressly prohibited by the court.

Notwithstanding any other provision of law, in any case where a defendant is convicted of a violation of § 18.2-48, 18.2-61, 18.2-63, 18.2-67.1, 18.2-67.2, 18.2-67.3, 18.2-370, or 18.2-370.1, committed on or after July 1, 2006, and some portion of the sentence is suspended, the judge shall order that the period of suspension shall be for a length of time at least equal to the statutory maximum period for which the defendant might originally have been sentenced to be imprisoned, and the defendant shall be placed on probation for that period of suspension subject to revocation by the court. The conditions of probation may include such conditions as the court shall determine, including active supervision. Where the conviction is for a violation of clause (iii) of subsection A of § 18.2-61, subdivision A 1 of § 18.2-67.1, or subdivision A 1 of § 18.2-67.2, the court shall order that at least three years of the probation include active supervision of the defendant under a postrelease supervision program operated by the Department of Corrections, and for at least three years of such active supervision, the defendant shall be subject to electronic monitoring by means of a GPS (Global Positioning System) tracking device, or other similar device.

If a person is sentenced to jail upon conviction of a misdemeanor or a felony, the court may, at any time before the sentence has been completely served, suspend the unserved portion of any such sentence, place the person on probation in accordance with the provisions of this section, or otherwise modify the sentence imposed.

If a person has been sentenced for a felony to the Department of Corrections (the Department), the court that heard the case, if it appears compatible with the public interest and there are circumstances in mitigation of the offense, may, at any time before the person is transferred to the Department, or within 60 days of such transfer, suspend or otherwise modify the unserved portion of such a sentence. The court may place the person on probation in accordance with the provisions of this section.

1975, c. 495; 1982, cc. 458, 636; 1983, c. 431; 1984, c. 32; 1992, c. 391; 1993, c. 448; 2006, cc. 436, 483, 853, 914;2007, cc. 259, 528;2011, cc. 799, 837;2019, cc. 782, 783;2021, Sp. Sess. I, cc. 176, 538;2022, cc. 41, 42.

The chapters of the acts of assembly referenced in the historical citation at the end of this section(s) may not constitute a comprehensive list of such chapters and may exclude chapters whose provisions have expired.

§ 19.2-310. Transfer of prisoners to custody of Director of Department of Corrections

Every person sentenced by a court to the Department of Corrections upon conviction of a felony shall be conveyed to an appropriate receiving unit operated by the Department in the manner hereinafter provided. The clerk of the court in which the person is sentenced shall forthwith transmit to the Central Criminal Records Exchange the report of dispositions required by § 19.2-390. The clerk of the court within 30 days from the date of the judgment shall forthwith transmit to the Director of the Department a certified copy or copies of the order of trial and a certified copy of the complete final order, and if he fails to do so shall forfeit $50. The clerk of the court may transmit or make available a copy or copies of such orders electronically. Such copy or copies shall contain, as nearly as ascertainable, the birth date of the person sentenced. The sheriff shall certify to the Director of the Department any jail credits to which the person to be confined is entitled at such time as that person is transferred to the custody of the Director of the Department.

Following receipt of the order of trial and a certified copy of the complete final order, the Director or his designee shall dispatch a correctional officer to the county or city with a warrant directed to the sheriff authorizing him to deliver the prisoner to the correctional officer whose duty it shall be to take charge of the person and convey him to an appropriate receiving unit designated by the Director or his designee. The Director or his designee shall allocate space available in the receiving unit or units by giving first priority to the transportation, as the transportation facilities of the Department may permit, of those persons held in jails who in the opinion of the Director or his designee except as required by § 53.1-20 require immediate transportation to a receiving unit. In making such a determination of priority, the Director shall give due regard to the capacity of local as well as state correctional facilities and, to the extent feasible, shall seek to balance between local and state correctional facilities the excess of prisoners requiring detention.

Code 1950, § 19.1-296; 1960, c. 366; 1966, c. 522; 1970, c. 67; 1972, c. 358; 1974, cc. 44, 45; 1975, c. 495; 1981, c. 529; 1982, cc. 476, 636; 1986, c. 606; 1990, cc. 676, 768; 2010, c. 352;2011, c. 470.

The chapters of the acts of assembly referenced in the historical citation at the end of this section(s) may not constitute a comprehensive list of such chapters and may exclude chapters whose provisions have expired.

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§ 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, or the petition of a person who was adjudicated delinquent 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. 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.

2004, c. 1024;2013, c. 170;2020, cc. 993, 994.

The chapters of the acts of assembly referenced in the historical citation at the end of this section(s) may not constitute a comprehensive list of such chapters and may exclude chapters whose provisions have expired.

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§ 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; (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 (a) the previously unknown or unavailable evidence supporting the allegation of innocence or (b) the previously untested evidence and the scientific testing supporting the allegation of innocence; (iv)(a) 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 or (b) if known, the reason that the evidence was not subject to scientific testing set forth in the petition; (v) the date (a) the previously unknown or unavailable evidence became known or available to the petitioner and the circumstances under which it was discovered or (b) the results of the scientific testing of previously untested evidence became known to the petitioner or any attorney of record; (vi)(a) that the previously unknown or unavailable evidence is such as could not, by the exercise of diligence, have been discovered or obtained before the time the conviction or adjudication of delinquency became final in the circuit court or (b) that the testing procedure was not available at the time the conviction or adjudication of delinquency became final in the circuit court; (vii) that the previously unknown, unavailable, or untested 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) that the previously unknown, unavailable, or untested evidence is not merely cumulative, corroborative, or collateral. Nothing in this chapter shall constitute grounds 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 o and the Attorney General, or an acceptance of service signed by these offi combination thereof. In cases brought by petitioners pro se, the Court of A the petition unless it is accompanied by a certificate that a copy of the pet

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'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, unavailable, or untested 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.

2004, c. 1024;2013, cc. 170, 180;2020, cc. 993, 994;2021, Sp. Sess. I, cc. 344, 345;2022, c. 625.

The chapters of the acts of assembly referenced in the historical citation at the end of this section(s) may not constitute a comprehensive list of such chapters and may exclude chapters whose provisions have expired.

§ 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, unavailable, or untested evidence sufficient to justify the issuance of the writ, or (ii) only upon a finding that the petitioner has proven by a preponderance of the 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.

2004, c. 1024;2007, cc. 465, 824, 883, 905;2013, cc. 170, 180;2020, cc. 993, 994.

The chapters of the acts of assembly referenced in the historical citation at the end of this section(s) may not constitute a comprehensive list of such chapters and may exclude chapters whose provisions have expired.

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§ 19.2-392.2. Expungement of police and court records

A. If a person is charged with the commission of a crime, a civil offense, or any offense defined in Title 18.2, and

1. Is acquitted, or

2. A nolle prosequi is taken or the charge is otherwise dismissed, including dismissal by accord and satisfaction pursuant to § 19.2-151, he may file a petition setting forth the relevant facts and requesting expungement of the police records and the court records relating to the charge.

B. If any person whose name or other identification has been used without his consent or authorization by another person who has been charged or arrested using such name or identification, he may file a petition with the court disposing of the charge for relief pursuant to this section. Such person shall not be required to pay any fees for the filing of a petition under this subsection. A petition filed under this subsection shall include one complete set of the petitioner's fingerprints obtained from a law-enforcement agency.

C. The petition with a copy of the warrant, summons, or indictment if reasonably available shall be filed in the circuit court of the county or city in which the case was disposed of by acquittal or being otherwise dismissed and shall contain, except where not reasonably available, the date of arrest and the name of the arresting agency. Where this information is not reasonably available, the petition shall state the reason for such unavailability. The petition shall further state the specific criminal charge or civil offense to be expunged, the date of final disposition of the charge as set forth in the petition, the petitioner's date of birth, and the full name used by the petitioner at the time of arrest.

D. A copy of the petition shall be served on the attorney for the Commonwealth of the city or county in which the petition is filed. The attorney for the Commonwealth may file an objection or answer to the petition or may give written notice to the court that he does not object to the petition within 21 days after it is served on him.

E. The petitioner shall obtain from a law-enforcement agency one complete set of the petitioner's fingerprints and shall provide that agency with a copy of the petition for expungement. The law-enforcement agency shall submit the set of fingerprints to the Central Criminal Records Exchange (CCRE) with a copy of the petition for expungement attached. The CCRE shall forward under seal to the court a copy of the petitioner's criminal history, a copy of the source documents that resulted in the CCRE entry that the petitioner wishes to expunge, if applicable, and the set of fingerprints. Upon completion of the hearing, the court shall return the fingerprint card to the petitioner. If no hearing was conducted, upon the entry of an order of expungement or an order denying the petition for expungement, the court shall cause the fingerprint card to be destroyed unless, within 30 days of the date of the entr petitioner requests the return of the fingerprint card in person from the clerk provides the clerk of the court a self-addressed, stamped envelope for the ret fingerprint card.

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F. After receiving the criminal history record information from the CCRE, the court shall conduct a hearing on the petition. If the court finds that the continued existence and possible dissemination of information relating to the arrest of the petitioner causes or may cause circumstances which constitute a manifest injustice to the petitioner, it shall enter an order requiring the expungement of the police and court records, including electronic records, relating to the charge. Otherwise, it shall deny the petition. However, if the petitioner has no prior criminal record and the arrest was for a misdemeanor violation or the charge was for a civil offense, the petitioner shall be entitled, in the absence of good cause shown to the contrary by the Commonwealth, to expungement of the police and court records relating to the charge, and the court shall enter an order of expungement. If the attorney for the Commonwealth of the county or city in which the petition is filed (i) gives written notice to the court pursuant to subsection D that he does not object to the petition and (ii) when the charge to be expunged is a felony, stipulates in such written notice that the continued existence and possible dissemination of information relating to the arrest of the petitioner causes or may cause circumstances which constitute a manifest injustice to the petitioner, the court may enter an order of expungement without conducting a hearing.

G. The Commonwealth shall be made party defendant to the proceeding. Any party aggrieved by the decision of the court may appeal, as provided by law in civil cases.

H. Notwithstanding any other provision of this section, when the charge is dismissed because the court finds that the person arrested or charged is not the person named in the summons, warrant, indictment or presentment, the court dismissing the charge shall, upon motion of the person improperly arrested or charged, enter an order requiring expungement of the police and court records relating to the charge. Such order shall contain a statement that the dismissal and expungement are ordered pursuant to this subsection and shall be accompanied by the complete set of the petitioner's fingerprints filed with his petition. Upon the entry of such order, it shall be treated as provided in subsection K.

I. Notwithstanding any other provision of this section, upon receiving a copy pursuant to § 2.2-402 of an absolute pardon for the commission of a crime that a person did not commit, the court shall enter an order requiring expungement of the police and court records relating to the charge and conviction. Such order shall contain a statement that the expungement is ordered pursuant to this subsection. Upon the entry of such order, it shall be treated as provided in subsection K.

J. Upon receiving a copy of a writ vacating a conviction pursuant to § 19.2-327.5 or 19.2-327.13, the court shall enter an order requiring expungement of the police and court records relating to the charge and conviction. Such order shall contain a statement that the expungement is ordered pursuant to this subsection. Upon the entry of the order, it shall be treated as provided in subsection K.

K. Upon the entry of an order of expungement, the clerk of the court shall cause a copy of such order to be forwarded to the Department of State Police, which shall, pursuant to rules and regulations adopted pursuant to § 9.1-134, direct the manner by which the appropriate expungement or removal of such records shall be effected.

L. Costs shall be as provided by § 17.1-275, but shall not be recoverable against the Commonwealth. If the court enters an order of expungement, the clerk of the court shall refund to the petitioner such costs paid by the petitioner.

M. Any order entered where (i) the court or parties failed to strictly comply with the procedures set forth in this section or (ii) the court enters an order of expungement contrary to law, shall be voidable upon motion and notice made within three years of the entry of such order.

1977, c. 675; 1983, c. 394; 1984, c. 642; 1990, c. 603; 1992, c. 697; 2001, cc. 40, 345;2007, cc. 465, 824, 883, 905;2009, c. 618;2011, c. 362;2015, c. 426;2016, c. 617;2019, c. 181;2020, cc. 1285, 1286.

The chapters of the acts of assembly referenced in the historical citation at the end of this section(s) may not constitute a comprehensive list of such chapters and may exclude chapters whose provisions have expired.

§ 53.1-20. Commitment of convicted persons to custody of Director

A. Every person convicted of a felony committed before January 1, 1995, and sentenced to the Department for a total period of more than two years shall be committed by the court to the custody of the Director of the Department. The Director shall receive all such persons into the state corrections system within sixty days of the date on which the final sentencing order is mailed by certified letter or sent by electronic transmission to the Director by the clerk.

B. Persons convicted of felonies committed on or after January 1, 1995, and sentenced to the Department or sentenced to confinement in jail for a year or more shall be placed in the custody of the Department and received by the Director into the state corrections system within sixty days of the date on which the final sentencing order is mailed by certified letter or sent by electronic transmission to the Director by the clerk.

C. If the Governor finds that the number of prisoners in state facilities poses a threat to public safety, it shall be within the discretion of the Director to determine the priority for receiving prisoners into the state corrections system from local correctional facilities.

D. All felons sentenced to a period of incarceration and not placed in an adult state correctional facility pursuant to this section shall serve their sentences in local correctional facilities which shall not include a secure facility or detention home as defined in § 16.1-228.

E. Felons committed to the custody of the Department for a new felony offense shall be received by the Director into the state corrections system in accordance with the provisions of this section without any delay for resolution of (i) issues of alleged parole violations set for hearing before the Parole Board or (ii) any other pending parole-related administrative matter.

F. After accounting for safety, security, and operational factors, the Director shall place prisoners who are known primary caretakers of minor children in a facility as close as possible to such children.

Code 1950, §§ 19-270, 19.1-296, 53-21.1; 1960, c. 366; 1966, c. 522; 1970, cc. 67, 648; 1972, c. 145; 1973, c. 330; 1974, cc. 44, 45, 506; 1981, c. 529; 1982, c. 636; 1990, cc. 676, 768; 1993, c. 502; 1994, cc. 128, 859, 949;1994, 2nd Sp. Sess., cc. 1, 2;1997, c. 840;2020, c. 526.

The chapters of the acts of assembly referenced in the historical citation at the end of this section(s) may not constitute a comprehensive list of such chapters and may exclude chapters whose provisions have expired.

Appendix 35

Code of Virginia
Title 53.1. Prisons and Other Methods of Correction
Chapter 2. State Correctional Facilities
Article 1. General Provisions

§ 53.1-21. Transfer of prisoners into and between state and local correctional facilities

A. Any person who (i) is accused or convicted of an offense (a) in violation of any county, city, or town ordinance within the Commonwealth, (b) against the laws of the Commonwealth, or (c) against the laws of any other state or country or (ii) is a witness held in any case in which the Commonwealth is a party and who is confined in a state or local correctional facility may be transferred by the Director, subject to the provisions of § 53.1-20, to any other state or local correctional facility which he may designate.

B. The following limitations shall apply to the transfer of persons into the custody of the Department:

1. No person convicted of violating § 20-61 shall be committed or transferred to the custody of the Department.

2. No person who is convicted of a misdemeanor or a felony and receives a jail sentence of 12 months or less shall be committed or transferred to the custody of the Department without the consent of the Director.

3. Beginning July 1, 1991, and subject to the provisions of § 53.1-20, no person, whether convicted of a felony or misdemeanor, shall be transferred to the custody of the Department when the combined length of all sentences to be served totals two years or less, without the consent of the Director.

Code 1950, §§ 19.2-310.1, 53-19.17, 53-84, 53-103, 53-135.1; Code 1950, § 53-8; 1952, c. 557; 1960, c. 432; 1962, c. 326; 1968, c. 357; 1970, c. 648; 1971, Ex. Sess., c. 110; 1972, c. 573; 1973, cc. 330, 342; 1974, cc. 44, 45; 1976, cc. 287, 462; 1982, c. 636; 1990, cc. 676, 768; 1999, cc. 945, 987; 2021, Sp. Sess. I, c. 463.

The chapters of the acts of assembly referenced in the historical citation at the end of this section(s) may not constitute a comprehensive list of such chapters and may exclude chapters whose provisions have expired.

Appendix 36

§ 53.1-24. Record of convictions and register to be kept

The Director shall file and preserve a copy of the judgment furnished by the clerk of the court of conviction of each prisoner and keep a register describing the term of his confinement, for what offense, and when received into a state correctional facility. The Director may dispose of these records with the consent of The Library of Virginia in accordance with retention regulations for records maintained by the Department established under the Virginia Public Records Act (§ 42.1-76 et seq.).

Code 1950, § 53-24; 1982, c. 636; 1994, c. 64;2020, c. 759.

The chapters of the acts of assembly referenced in the historical citation at the end of this section(s) may not constitute a comprehensive list of such chapters and may exclude chapters whose provisions have expired.

Appendix 37

§ 53.1-28. Authority to fix discharge date; improper release; warrant, arrest and hearing

For the purpose of scheduling and providing a uniform, effective and continual program of pre-release training and conditioning of prisoners, the Director shall have authority to discharge any prisoner within the Virginia penal system on any day within a period of 30 days prior to the date upon which such prisoner's term would normally expire. The Director shall provide each prisoner with the following documents upon discharge: (i) verification of the prisoner's work history while in custody; (ii) certification of all educational and treatment programs completed by the prisoner while in custody; and (iii) a copy of his medical records, so long as such prisoner requests a copy of his records at least 60 days prior to the date upon which the prisoner's term would expire. The Department shall develop procedures wherein the records are to be made available to the prisoner in a safe and secure manner.

The Director or his designee upon the discovery of an improper release or discharge of a prisoner from custody shall report such release or discharge to the circuit court of the jurisdiction wherein the prisoner was released or discharged. The circuit court shall then issue a warrant for the arrest of the prisoner which may be executed by any duly sworn correctional officer or law-enforcement officer. Such warrant shall direct that the prisoner be presented forthwith to the court to determine the propriety of the original discharge or release. After a hearing, if the court is satisfied that the release or discharge was made improperly, the prisoner shall be returned to the state correctional facility from which he was released or discharged, or to any other correctional facility designated by the Director to serve the remainder of his sentence.

Code 1950, § 53-37; 1964, c. 140; 1968, c. 303; 1982, c. 636; 2006, cc. 108, 132.

The chapters of the acts of assembly referenced in the historical citation at the end of this section(s) may not constitute a comprehensive list of such chapters and may exclude chapters whose provisions have expired.

Appendix 38

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

Rule 5A:5. Original Proceedings.

(a) *Original Jurisdiction Proceedings Other Than Actual Innocence Petitions.* – With the exception of petitions for the issuance of writs of actual innocence under paragraph (b) of this Rule, all proceedings before this Court pursuant to its original jurisdiction will 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 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 file in this Court a petition under Code § 19.2-327.10 *et seq.* seeking a writ of actual innocence based on nonbiological evidence.

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

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

(4) Filing Fee. The petition must be accompanied by either (i) a $50.00 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 must 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 will 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 must be made on the form provided by this Court.

(6) Service of Petition and Return of Service. Prior to filing a petition, the petitioner must 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 must 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 must 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 this Court 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 this Court. 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 this Court.

(9) Evidentiary Hearing. This Court 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, will be limited to the specific questions addressed by this Court in its certification order. In the circuit court, the petitioner and the Commonwealth must be afforded an opportunity to present evidence and to examine witnesses on matters relevant to the certified questions.

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

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

Last amended by Order dated April 1, 2021; effective June 1, 2021.

RULES OF SUPREME COURT OF VIRGINIA
PART ONE
RULES APPLICABLE TO ALL PROCEEDINGS

Rule 1:1. Finality of Judgments, Orders and Decrees.

(a) *Expiration of Court's Jurisdiction.* — All final judgments, orders, and decrees, irrespective of terms of court, remain under the control of the trial court and may be modified, vacated, or suspended for twenty-one days after the date of entry, and no longer. But notwithstanding the finality of the judgment, in a criminal case the trial court may postpone execution of the sentence in order to give the accused an opportunity to apply for a writ of error and supersedeas; such postponement, however, will not extend the time limits hereinafter prescribed for applying for a writ of error. The date of entry of any final judgment, order, or decree is the date it is signed by the judge either on paper or by electronic means in accord with Rule 1:17.

(b) *General Rule: Orders Deemed Final.* — Unless otherwise provided by rule or statute, a judgment, order or decree is final if it disposes of the entire matter before the court, including all claim(s) and all cause(s) of action against all parties, gives all the relief contemplated, and leaves nothing to be done by the court except the ministerial execution of the court's judgment, order or decree.

(c) *Demurrers.* — An order sustaining a demurrer or sustaining a demurrer with prejudice or without leave to amend is sufficient to dispose of the claim(s) or cause(s) of action subject to the demurrer, even if the order does not expressly dismiss the claim(s) or cause(s) of action at issue. An order sustaining a demurrer and granting leave to file an amended pleading by a specific time is sufficient to dispose of the claim(s) or cause(s) of action subject to the demurrer, if the amended pleading is not filed within the specific time provided, even if the order does not expressly dismiss the claim(s) or cause(s) of action at issue.

(d) *Pleas in Bar and Motions for Summary Judgment.* — An order sustaining a plea in bar or sustaining a plea in bar with prejudice or without leave to amend is sufficient to dispose of a claim(s) or cause(s) of action subject to the plea in bar, as is an order granting a motion for summary judgment, even if the order does not expressly dismiss the claim(s) or cause(s) of action at issue or enter judgment for the moving party.

(e) *Motions to Strike.* — In a civil case, an order which merely grants a motion to strike, without expressly entering summary judgment or partial summary judgment or dismissing the claim(s) or cause(s) of action at issue, is insufficient to dispose of the claim(s) or cause(s) of action at issue.

Last amended by Order dated November 23, 2020; effective March 1, 2021.

Appendix 40