

THE APPELLATE PROCESS FOR A VIRGINIA CAPITAL MURDER CONVICTION

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After a defendant is convicted of capital murder and sentenced to death at trial, the appellate process begins. A capital conviction and death sentence normally is reviewed both in state court and then federal court. Once the appellate process begins, the interests of the Commonwealth and of the victim are represented by the Virginia Attorney General's Office in Richmond. The case will be assigned to one of five lawyers in the Criminal Litigation Section's Capital Litigation Unit. This lawyer ordinarily will handle all further litigation in the case.

I. State Court

Direct Appeal

A defendant who is sentenced to death is entitled to an automatic appeal to the Supreme Court of Virginia. At this point, the defendant is called the "appellant" and the Commonwealth is called the "appellee." The record of the trial, including all papers filed in the trial court, the physical evidence presented at trial and a written record of all trial testimony is compiled and filed in the Supreme Court of Virginia. The defendant's attorney then files a brief in which it is argued that error occurred during the trial and that the defendant's conviction and/or death sentence should be reversed. The Attorney General's Office will file a brief for the Commonwealth responding to the defendant's allegations of error. The defendant then may file a reply brief. After all briefs have been filed, the Supreme Court of Virginia will schedule the case for oral argument.

Oral argument is very formalized, with each side having thirty minutes to discuss what happened in the lower court and whether it warrants reversal of the conviction or death sentence. No new evidence or facts not appearing in the record of trial can be presented to the Supreme Court of Virginia. The defendant, of course, will be represented by his or her attorney, and the Commonwealth will be represented by an Assistant Attorney General.

Oral arguments are held in Richmond, are open to the public, and you are welcome to attend. Defendants are not brought to court for oral argument although members of the defendant's family are permitted to attend.

When oral argument has been scheduled in the case in which you have indicated an interest, we will notify you of the time and place so that you may attend if you desire to do so. Appellate courts, however, do not announce their decisions at the conclusion of the oral argument. A decision by the Virginia Supreme Court can be expected in approximately seven weeks.

Based on its resolution of the claims, the Court affirms or reverses the conviction, the sentence or both. If the defendant's conviction or sentence is reversed, the case is returned to the trial court. In such cases, the Commonwealth's Attorney will take over the case again and make any further decisions regarding re-prosecution or resentencing.

If the Court affirms the conviction and sentence, the defendant usually petitions the United States Supreme Court for what is known as "certiorari" review. The defendant, now called "the petitioner," files a petition for a writ of certiorari in the United States Supreme Court in Washington, D.C., asking the Court to review the case and arguing that his federal constitutional rights were violated by the trial court or the Supreme Court of Virginia. The Commonwealth, called "the respondent," files a "brief in opposition" responding to the petition. The Commonwealth argues that there is no reason for the Supreme Court to review the defendant's case because the case is of limited importance or because the defendant's constitutional rights were not violated. In the vast majority of cases, the Supreme Court refuses to hear the case and, with a short written order, denies the defendant's petition. At this point, the defendant's direct appeal is complete.

State Habeas Corpus

A death-sentenced defendant also is entitled to seek state habeas corpus review, which is basically just an additional appeal, differing from the direct appeal described above in that the defendant may raise claims based on facts outside the trial record. In Virginia, the range of claims available to be raised in the state habeas process is quite limited, and a petitioner may raise only claims which could not have been raised on direct appeal. In addition, the petition cannot contain any claims which were pursued during the direct appeal. Claims generally ripe for review in state habeas corpus are allegations of errors by the prisoner's trial counsel.

State habeas review begins when the defendant, now called "the petitioner," files a petition for a writ of habeas corpus in the Supreme Court of Virginia. This petition must be filed in the Virginia Supreme Court within 60 days after the United States Supreme Court denies certiorari after direct appeal.

In the petition, the prisoner again presents claims in which it is argued that his conviction and/or sentence are unlawful or were obtained in violation of his constitutional rights. The Commonwealth, or "respondent," answers the application, specifically refuting the petitioner's claims and arguing that no error occurred in either the guilt-innocence or punishment phases of the trial.

The Supreme Court of Virginia reviews the petition and, in nearly all cases, decides the case without an evidentiary hearing. If the Supreme Court of Virginia decides a hearing is necessary to properly resolve the petitioner's claims, the hearing is held in the circuit court where the prisoner was convicted, ordinarily before the same judge who presided at the trial. The petitioner will be present at any hearing ordered to be held on a habeas corpus petition. Such hearings are open to the public, and we will notify you if a hearing is ordered in the case, so that you may attend if you wish.

The trial court reviews the claims, makes findings of fact and conclusions of law regarding those claims, and recommends to the Supreme Court of Virginia that it either grant or deny relief. Only the Supreme Court of Virginia, however, can make the final decision upholding or overturning the petitioner's conviction and/or sentence.

As with the direct appeal, the prisoner can petition the United States Supreme Court for certiorari

review after denial of his state habeas action, although this is extremely rare.

At this point, the Attorney General's Office seeks an execution date by notifying the trial court that the prisoner has completed his state habeas review. The trial court must hold a hearing within 10 days after receiving the notice, and must set an execution date for a date within sixty days after the hearing. This date, in almost all instances, will be stayed by a federal court while the prisoner seeks federal habeas corpus review.

II. Federal Court

Federal District Court

Federal habeas review follows state habeas review. It is initiated when the prisoner requests that the United States District Court stay his execution date and appoint him counsel to file a federal habeas petition on his behalf. The federal district court will appoint counsel and allow counsel several months to file the petition. Here, the prisoner is called "the petitioner," and the Commonwealth is called "the respondent."

In the petition filed in the United States District Court, the defendant argues that the conviction and/or sentence should be overturned because the conviction was obtained in violation of the defendant's federal constitutional rights. In its answer, the Commonwealth responds to each of the defendant's claims, arguing that relief must be denied and the conviction and sentence upheld. Normally, the Commonwealth urges alternative bases for denying relief, including (1) various procedural bases, for example that a claim is foreclosed because the defendant did not object at trial or because the claim relies on a rule that is inapplicable in federal review, and (2) that the defendant's constitutional rights were not violated. The record of all the previous state court proceedings, including the trial, direct appeal, and state habeas action, are filed in the United States District Court. In rare instances, the United States District Court holds a hearing to resolve some or all of the prisoner's claims.

Such hearings are held before a single district court judge. They are open to the public, and we will notify you if a hearing is to be held in the case in which you are interested, so that you may attend if you desire. The petitioner is also entitled to be present.

Federal law requires that the federal courts give considerable deference to the earlier decisions of the state courts in rejecting a prisoner's claims. For this reason, successful federal habeas petitions are unusual.

United States Court of Appeals for the Fourth Circuit

Once the district court has disposed of a habeas case, the losing side can appeal to the United States Court of Appeals for the Fourth Circuit.

The losing side, now called "the appellant," files a legal brief explaining why the district court's decision was wrong. The prevailing party, called the "appellee," files a brief arguing that the district court's decision was correct. In death penalty cases, the Fourth Circuit will require both sides to present oral argument. This argument is usually, but not always, held in Richmond

Prisoners do not attend oral argument in the Fourth Circuit. We will notify you when argument is set so that you may attend if you so choose.

Appellate proceedings in the Fourth Circuit are conducted much like those in the Supreme Court of Virginia, except a panel of three judges decides the case first, with possible reconsideration later by the full court. Full court reconsideration, however, is rare.

United States Supreme Court

When the Fourth Circuit has finished with a federal habeas appeal, the losing side can petition the United States Supreme Court for certiorari review. As with certiorari after the direct appeal, the Supreme Court rarely agrees to hear and consider such cases.

If the Commonwealth prevails in the Fourth Circuit, the Attorney General's Office will ask the trial court to set an execution date. Absent executive clemency or action by the United States Supreme Court, the execution is carried out on the date set by the trial court.

III. Executive Clemency

Executive Clemency is the power of the Governor to grant full or conditional pardons, reprieves of executions and commutations of sentences. It is initiated when the prisoner files a petition for executive clemency directly with the Governor. After reviewing the petition and fully acquainting himself with the facts of the case, the Governor grants or denies clemency.

IV. Execution

Executions in Virginia are ordinarily set for 9:00 p.m. and take place at the Greensville Correctional Center in Jarrat, Virginia. As a member of the victim's family, you may request to witness the execution. Advance approval must be obtained from the Virginia Department of Corrections and this Office is available to assist you in making such a request.