

Amended by Order dated June 21, 2013; effective July 1, 2013.

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

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

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

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

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

(d) *Service of the Petition and Return of Service.* Prior to filing a petition, the petitioner shall serve the petition, along with all attachments, on the Attorney General

and on the Commonwealth's Attorney for the jurisdiction where the conviction or adjudication of delinquency occurred. When represented by counsel, the petitioner shall file with the petition either (i) a duly executed return of service in the form of a verification that a copy of the petition and all attachments have been served, or (ii) an acceptance of service signed by either or both of the parties to be served, or (iii) a combination of the two. ~~When not represented by counsel, the petitioner shall file with the petition a certificate that a copy of the petition and all attachments have been sent, by certified mail, to the Attorney General and the Commonwealth's Attorney for the jurisdiction where the conviction occurred.~~

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

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

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

(2) If the Attorney General asserts in the declaration required by subparagraph (f)(1) of this Rule that no trial or appellate court record, or any part thereof, is necessary for the preparation of a responsive pleading to the petition, the Attorney General shall file with the clerk of this Court within 30 days thereafter a pleading in response to the petition. Any pleading in response filed by the Attorney General may include a motion to dismiss. The response shall include citation to any relevant legal authorities, and may contain a proffer of any evidence pertaining to the guilt of the petitioner that is not included in the record of the case, including any evidence that was suppressed at trial.

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

after receipt of the record by the clerk of this Court, the Attorney General shall file the responsive pleading described in subparagraph (f)(2) of this Rule.

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

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

(i) *Further Proceedings by Order of this Court*. Further proceedings shall be conducted in accordance with the orders of this Court. If this Court determines that an evidentiary hearing is necessary for the proper disposition of the petition, this Court may order that the circuit court conduct a hearing within 90 days after the order has been issued to certify findings of fact with respect to such issues as this Court shall direct. The record and certified findings of fact of the circuit court shall be filed with the clerk of this Court within 30 days after the hearing is concluded.

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

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