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## SENATE BILL NO. 1069

Offered January 9, 2019

Prefiled December 12, 2018

A BILL to amend and reenact §§ 8.01-654, 8.01-658, and 8.01-662 of the Code of Virginia and to repeal §§ 8.01-656, 8.01-657, and 8.01-659 of the Code of Virginia, relating to habeas corpus.

Patron—Obenshain

Referred to Committee for Courts of Justice

**Be it enacted by the General Assembly of Virginia:**

**1. That §§ 8.01-654, 8.01-658, and 8.01-662 of the Code of Virginia are amended and reenacted as follows:**

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

A. 1. ~~The A petition for a writ of habeas corpus ad subjiciendum shall be granted forthwith by may be filed in the Supreme Court or any circuit court, to any person who shall apply for the same by petition, showing by affidavits or other evidence probable cause to believe that he 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, except as provided in § 8.01-654.1 for cases in which a death sentence has been imposed, 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 ~~held whose detention originated under criminal process, and subject to the provisions of subsection C of this section and of § 17.1-310, only the circuit court which that entered the original judgment or order of conviction or convictions 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 of conviction or convictions 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 determination on the record or after hearing, to be made a part of the record and transcribed.

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.

C. 1. With respect to any such petition filed by a petitioner held under the sentence of death, and subject to the provisions of this subsection, the Supreme Court shall have exclusive jurisdiction to consider and award writs of habeas corpus. The circuit court which entered the judgment order setting the sentence of death shall have authority to conduct an evidentiary hearing on such a petition only if directed to do so by order of the Supreme Court.

2. Hearings conducted in a circuit court pursuant to an order issued under the provisions of

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subdivision 1 of this subsection shall be limited in subject matter to the issues enumerated in the order.

3. The circuit court shall conduct such a hearing within 90 days after the order of the Supreme Court has been received and shall report its findings of fact and recommend conclusions of law to the Supreme Court within 60 days after the conclusion of the hearing. Any objection to the report of the circuit court must be filed in the Supreme Court within 30 days after the report is filed.

**§ 8.01-658. When and from whom response required; dismissal of habeas petition without prejudice.**

A. ~~The writ shall be served on the person to whom it is directed or, in his absence from the place where the petitioner is confined,~~ *Except as may be provided in the Rules of Supreme Court of Virginia, no response to a petition for a writ of habeas corpus shall be required except upon an order of the court, directed to the person in whose custody the petitioner is detained or on the person having the immediate or potential custody of him, and made returnable as soon as may be before the court ordering the same.*

B. *When the petition challenges a criminal conviction or sentence:*

1. If the petitioner is in jail, prison, or other actual physical restraint due to the conviction or sentence he is attacking, the named respondent shall be (i) the Director of the Department of Corrections or the warden or superintendent of the state correctional facility where the petitioner is detained if the sentence is ~~one year or more~~ *petitioner has been committed to, or is subject to transfer to, the Department of Corrections* or (ii) the sheriff or superintendent of a local or regional jail facility if the ~~petitioner's sentence is less than one year~~ *will be served in such local or regional jail facility.*

2. If the petitioner is on probation or parole due to the conviction or sentence he is attacking, the named respondent shall be the probation or parole officer responsible for supervising the applicant or the official in charge of the parole or probation agency.

3. If a petitioner has a suspended sentence and is not under supervision by a probation or parole officer, the respondent shall be (i) the local sheriff if the judgment of conviction the petitioner challenges has a suspended sentence of less than one year or (ii) the Director of the Department of Corrections if the judgment of conviction the petitioner challenges has a suspended sentence of one year or more.

~~B- C.~~ The petitioner shall name a proper party respondent, and if he fails to do so, the court ~~shall~~ *may* allow amendment of the petition. If the petitioner fails to amend the petition by naming a proper party respondent in the time provided by the court, the court in which the petition is filed shall dismiss the habeas petition without prejudice.

D. *If the court in which the petition was filed determines that the petitioner's allegations present a case for the determination of unrecorded matters of fact relating to a previous judicial proceeding in any circuit court, the court may transfer the petition to the circuit court in which such judicial proceeding occurred, or if the petition was filed in the Supreme Court, the Court may require the circuit court in which such judicial proceeding occurred to conduct an evidentiary hearing, in accordance with such procedures as may be set forth in the Rules of Supreme Court of Virginia.*

**§ 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 ~~return~~ response and any other evidence, the court ~~before whom the petitioner is brought~~ shall either discharge or remand ~~him~~ *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, provided,~~ however, that if the petition is denied, the costs and expenses of the proceeding and the ~~attorney's~~ 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.*

**2. That §§ 8.01-656, 8.01-657, and 8.01-659 of the Code of Virginia are repealed.**