

23102452D

SENATE BILL NO. 1259

Offered January 11, 2023

Prefiled January 10, 2023

A *BILL to amend and reenact §§ 2.2-511, 15.2-1627, 17.1-407, 19.2-402, and 19.2-404 of the Code of Virginia, relating to criminal appeals; duties of the Attorney General and attorney for the Commonwealth.*

Patron—Petersen

Referred to Committee on the Judiciary

Be it enacted by the General Assembly of Virginia:

1. That §§ 2.2-511, 15.2-1627, 17.1-407, 19.2-402, and 19.2-404 of the Code of Virginia are amended and reenacted as follows:

§ 2.2-511. Criminal cases.

A. Unless specifically requested by the Governor to do so, the Attorney General shall have no authority to institute or conduct criminal prosecutions in the circuit courts of the Commonwealth except in cases involving (i) violations of the Alcoholic Beverage Control Act (§ 4.1-100 et seq.), (ii) violation of laws relating to elections and the electoral process as provided in § 24.2-104, (iii) violation of laws relating to motor vehicles and their operation, (iv) the handling of funds by a state bureau, institution, commission or department, (v) the theft of state property, (vi) violation of the criminal laws involving child pornography and sexually explicit visual material involving children, (vii) the practice of law without being duly authorized or licensed or the illegal practice of law, (viii) violations of § 3.2-4212 or 58.1-1008.2, (ix) with the concurrence of the local attorney for the Commonwealth, violations of the Virginia Computer Crimes Act (§ 18.2-152.1 et seq.), (x) with the concurrence of the local attorney for the Commonwealth, violations of the Air Pollution Control Law (§ 10.1-1300 et seq.), the Virginia Waste Management Act (§ 10.1-1400 et seq.), and the State Water Control Law (§ 62.1-44.2 et seq.), (xi) with the concurrence of the local attorney for the Commonwealth, violations of Chapters 2 (§ 18.2-18 et seq.), 3 (§ 18.2-22 et seq.), and 10 (§ 18.2-434 et seq.) of Title 18.2, if such crimes relate to violations of law listed in clause (x) of this subsection, (xii) with the concurrence of the local attorney for the Commonwealth, criminal violations by Medicaid providers or their employees in the course of doing business, or violations of Chapter 13 (§ 18.2-512 et seq.) of Title 18.2, in which cases the Attorney General may leave the prosecution to the local attorney for the Commonwealth, or he may institute proceedings by information, presentment or indictment, as appropriate, and conduct the same, (xiii) with the concurrence of the local attorney for the Commonwealth, violations of Article 9 (§ 18.2-246.1 et seq.) of Chapter 6 of Title 18.2, (xiv) with the concurrence of the local attorney for the Commonwealth, assisting in the prosecution of violations of §§ 18.2-186.3 and 18.2-186.4, (xv) with the concurrence of the local attorney for the Commonwealth, assisting in the prosecution of violations of § 18.2-46.2, 18.2-46.3, or 18.2-46.5 when such violations are committed on the grounds of a state correctional facility, and (xvi) with the concurrence of the local attorney for the Commonwealth, assisting in the prosecution of violations of Article 10 (§ 18.2-246.6 et seq.) of Chapter 6 of Title 18.2.

In all other criminal cases in the circuit courts, except where the law provides otherwise, the authority of the Attorney General to appear or participate in the proceedings shall ~~not attach unless and until a notice of appeal has been filed with~~ *when the appellate court receives the record after a notice of appeal has been filed with* the clerk of the circuit court noting an appeal to the Court of Appeals or the Supreme Court. In all criminal cases before the Court of Appeals or the Supreme Court in which the Commonwealth is a party or is directly interested, the Attorney General shall appear and represent the Commonwealth *upon receipt of the record in the appellate court*, unless, and with the consent of the Attorney General, the attorney for the Commonwealth who prosecuted the underlying criminal case files a notice of appearance to represent the Commonwealth in any such appeal. *However, in an appeal before the Court of Appeals taken by the defendant pursuant to Article 1 (§ 19.2-119 et seq.) of Chapter 9 of Title 19.2, or a pretrial appeal taken by the Commonwealth pursuant to subsection B of § 19.2-398, the attorney for the Commonwealth who prosecuted the underlying criminal case shall continue to represent the Commonwealth on appeal. In all other appeals taken pursuant to Chapter 25 (§ 19.2-398 et seq.) of Title 19.2 where the Commonwealth's petition for appeal has been granted, the Attorney General shall appear and represent the Commonwealth.*

B. The Attorney General shall, upon request of a person who was the victim of a crime and subject to such reasonable procedures as the Attorney General may require, ensure that such person is given notice of the filing, of the date, time and place and of the disposition of any appeal or habeas corpus

proceeding involving the cases in which such person was a victim. For the purposes of this section, a victim is an individual who has suffered physical, psychological or economic harm as a direct result of the commission of a crime; a spouse, child, parent or legal guardian of a minor or incapacitated victim; or a spouse, child, parent or legal guardian of a victim of a homicide. Nothing in this subsection shall confer upon any person a right to appeal or modify any decision in a criminal, appellate or habeas corpus proceeding; abridge any right guaranteed by law; or create any cause of action for damages against the Commonwealth or any of its political subdivisions, the Attorney General or any of his employees or agents, any other officer, employee or agent of the Commonwealth or any of its political subdivisions, or any officer of the court.

§ 15.2-1627. Duties of attorneys for the Commonwealth and their assistants.

A. No attorney for the Commonwealth, or assistant attorney for the Commonwealth, shall be required to carry out any duties as a part of his office in civil matters of advising the governing body and all boards, departments, agencies, officials and employees of his county or city; of drafting or preparing county or city ordinances; of defending or bringing actions in which the county or city, or any of its boards, departments or agencies, or officials and employees thereof, shall be a party; or in any other manner of advising or representing the county or city, its boards, departments, agencies, officials and employees, except in matters involving the enforcement of the criminal law within the county or city.

B. The attorney for the Commonwealth and assistant attorney for the Commonwealth shall be a part of the department of law enforcement of the county or city in which he is elected or appointed, and shall have the duties and powers imposed upon him by general law, including the duty of prosecuting all warrants, indictments or informations charging a felony, and he may in his discretion, prosecute Class 1, 2 and 3 misdemeanors, or any other violation, the conviction of which carries a penalty of confinement in jail, or a fine of \$500 or more, or both such confinement and fine. He shall enforce all forfeitures, and carry out all duties imposed upon him by § 2.2-3126. He may enforce the provisions of § 18.2-268.3, 29.1-738.2, 46.2-341.20:7, or 46.2-341.26:3. He may, in his discretion, file a ~~notice of petition for an appeal with the circuit court for the appeal of a criminal case for which he was the prosecuting attorney pursuant to Chapter 25 (§ 19.2-398 et seq.) of Title 19.2 and he may appear and shall continue to represent the Commonwealth in any criminal case on appeal before the Court of Appeals or the Supreme Court for which he was the prosecuting attorney, provided that the Attorney General consented to such appearance pursuant to § 2.2-511 so long as the record remains lodged in the trial court.~~

He shall also represent the Commonwealth in an appeal of a civil matter related to the enforcement of a criminal law or a criminal case for which he was the prosecuting attorney, including a petition for expungement of a defendant's criminal record, an action of forfeiture filed in accordance with the provisions of Chapter 22.1 (§ 19.2-386.1 et seq.) of Title 19.2, or any matter which he may enforce pursuant to this section.

C. *The attorney for the Commonwealth shall respond to any motions filed in the circuit court of the county or city in which he is elected or appointed that seek to vacate, in whole or in part, any order entered in a criminal case filed more than 21 days after a final order has been entered in the case. Such motions shall be treated as civil motions. In any case in which the attorney for the Commonwealth files a response agreeing that a criminal order should be vacated in whole or in part, the circuit court shall order a response from the Attorney General, who shall then become counsel of record for the Commonwealth. The provisions of this section shall not apply to petitions for writ of habeas corpus filed in the circuit court but shall apply to any other post-conviction attack on a conviction including audita querela and declaratory judgment actions.*

§ 17.1-407. Procedures on appeal.

A. The notice of appeal in all cases within the jurisdiction of the court shall be filed with the clerk of the trial court or the clerk of the Virginia Workers' Compensation Commission, as appropriate, and a copy of such notice shall be mailed or delivered to all opposing counsel and parties not represented by counsel, to the clerk of the Court of Appeals, and to the Attorney General in criminal cases. The clerk shall endorse thereon the day and year he received it.

B. Appeals pursuant to § 17.1-405 and subsection A of § 17.1-406, other than petitions for appeal by the Commonwealth in criminal cases, are appeals of right. *Appeals of denials of motions to vacate convictions described in subsection C of § 15.2-1627 shall not be appeals of right. The attorney for the Commonwealth shall not be required to file a brief in opposition unless directed to do so by the Court of Appeals.* The clerk of the Court of Appeals shall refer each case for which a notice of appeal has been filed to a panel of the court as the court may direct.

C. Each petition for appeal by the Commonwealth in a criminal case shall be referred to one or more judges of the Court of Appeals as the court shall direct. A judge to whom the petition is referred may grant the petition on the basis of the record without the necessity of oral argument. The clerk shall refer each appeal for which a petition has been granted to a panel of the court as the court shall direct.

D. Before a petition for appeal by the Commonwealth is denied, counsel for the Commonwealth shall

121 be entitled to state orally before a panel of the court the reasons why its appeal should be granted. If all
122 of the judges of the panel to whom the petition is referred are of the opinion that the petition ought not
123 be granted, the order denying the appeal shall state the reasons for the denial. Thereafter, no other
124 petition in the matter shall be entertained in the Court of Appeals.

125 **§ 19.2-402. Petition for appeal; brief in opposition; time for filing.**

126 A. When a notice of appeal has been filed pursuant to § 19.2-400, the Commonwealth may petition
127 the Court of Appeals for an appeal pursuant to § 19.2-398. The Commonwealth shall be represented by
128 the Attorney General or the attorney for the Commonwealth prosecuting the case if he filed a notice of
129 appearance pursuant to § 2.2-511.

130 B. The provisions of this subsection apply only to pretrial appeals. The petition for a pretrial appeal
131 shall be filed with the clerk of the Court of Appeals not more than 14 days after the notice of transcript
132 or written statement of facts required by § 19.2-405 is filed or, if there are objections thereto, within 14
133 days after the judge signs the transcript or written statement of facts. The accused may file a brief in
134 opposition with the clerk of the Court of Appeals within 14 days after the filing of the petition for
135 pretrial appeal. If the accused has filed a notice of cross appeal, he shall file a petition for cross appeal
136 to be consolidated with, and filed within the same time period as, his brief in opposition. The
137 Commonwealth may file a brief in opposition to any petition for cross appeal within 10 days after the
138 petition for cross appeal is filed. Except as specifically provided in this section, all other requirements
139 for the petition for pretrial appeal and brief in opposition shall conform as nearly as practicable to Part
140 Five A of the Rules of the Supreme Court of Virginia.

141 **§ 19.2-404. Procedures on awarded pretrial appeal.**

142 This section applies only to pretrial appeals. If the Court of Appeals grants the Commonwealth's
143 petition for a pretrial appeal, the Attorney General shall represent the Commonwealth during that appeal
144 unless the attorney for the Commonwealth prosecuting the case has filed a notice of appearance pursuant
145 to § 2.2-511.

146 The Commonwealth shall file its opening brief in the office of the clerk of the Court of Appeals
147 within 25 days after the date of the certificate awarding the appeal. The brief of the appellee shall be
148 filed in the office of the clerk of the Court of Appeals within 25 days after the filing of the
149 Commonwealth's opening brief. The Commonwealth may then file a reply brief, including its response
150 to any cross appeal, in the office of the clerk of the Court of Appeals within 15 days after the filing of
151 the brief of the accused. With the permission of a judge of the Court of Appeals, the time for filing any
152 brief may be extended for good cause shown. ~~Four copies of each brief shall be filed and three copies~~
153 ~~shall be mailed or delivered to opposing counsel on or before the date of filing.~~ Except as specifically
154 provided in this section, all other requirements of the brief shall conform as nearly as practicable to Part
155 Five A of the Rules of the Supreme Court of Virginia. The Court of Appeals shall accelerate the appeal
156 on its docket and render its decision not later than 60 days after the filing of the appellee's brief or after
157 the time for filing such brief has expired.

158 When the opinion is rendered by the Court of Appeals, the mandate shall immediately issue and the
159 clerk of the Court of Appeals shall return the record forthwith to the clerk of the trial court. No petition
160 for rehearing may be filed.