

OP. NO. 03-094

CRIMINAL PROCEDURE: EVIDENCE AND WITNESSES.

Authority for trial court in criminal case to order donation or destruction of human biological evidence where no appeal is timely filed, unless court imposes death sentence or defendant files motion to store, retain, and preserve such evidence. Court may order donation or destruction of evidence received in criminal case on appeal after exhaustion of all appellate remedies. Felon not sentenced to death must file motion to store human biological evidence before court disposes of such evidence; court is not required to wait indefinitely for motion to be filed.

The Honorable Yvonne G. Smith
Clerk, Circuit Court of Henrico County
October 31, 2003

Issue Presented

You ask whether a clerk of the circuit court is required to keep all human biological evidence for an indefinite period of time, or whether the court may order the destruction of such evidence in accordance with § 19.2-270.4(A), assuming that a motion is not made pursuant to § 19.2-270.4:1(A).

Response

It is my opinion that, unless a court imposes a death sentence or a defendant files a motion pursuant to § 19.2-270.4:1(A) to store, retain, and preserve human biological evidence, the trial court, in a criminal case that has not been appealed, may order the donation or destruction of such evidence after the time period for appeal of the final judgment has expired. The court may order the donation or destruction of human biological evidence received in a criminal case on appeal after all appellate remedies have been exhausted. A felon who has not been sentenced to death by a circuit court must file a motion pursuant to § 19.2-270.4:1(A) before the court disposes of the human biological evidence, in accordance with § 19.2-270.4(A), in order to preserve such evidence. The court is not required to wait indefinitely for a motion to be filed pursuant to § 19.2-270.4:1(A).

Applicable Law and Discussion

It is well accepted that statutes should not be read in isolation.¹ Statutes relating to the same subject should be considered *in pari materia*.² Moreover, statutes dealing with the same subject matter should be construed together to achieve a harmonious result, resolving conflicts to give effect to legislative intent.³ The General Assembly enacted § 19.2-270.4:1 as "a precursor step to the procedures for requesting a Writ of Actual Innocence."⁴ The requirements of § 19.2-270.4:1 may be applied in harmony with the requirements of § 19.2-270.4, the pre-existing statute governing the disposal of evidence. Together, the two statutes "protect the efficacy of the appellate process, as well as the need to preserve evidence for use in the event of a retrial or other proceeding allowed by law."⁵

Section 19.2-270.4 governs the disposal of evidence, "[e]xcept as provided in § 19.2-270.4:1."⁶ Section 19.2-270.4:1(A) and (B) specifies two conditions regarding its applicability in a particular case. If either of these conditions is present, the provisions of the statute are applicable. If these conditions are not present, then § 19.2-270.4 applies. Consequently, there would never be a conflict over which statute is applicable in a given case.

Section 19.2-270.4:1(A) provides that, "upon motion of a person convicted of a felony but not sentenced to death ..., the court shall order the storage, preservation, and retention of specifically identified human biological evidence or representative samples ... for a period of up to fifteen years from the time of conviction."⁷ Section 19.2-270.4:1(B) is applicable only "[i]n the case of a person sentenced to death." Under that circumstance, the court must "order any human biological evidence or representative samples to be transferred ... to the Division of Forensic Science" for storage and maintenance "until the judgment is executed."⁸ If neither of these events occurs, § 19.2-270.4:1 does not apply.

When the conditions of § 19.2-270.4:1(A) or (B) are not applicable, § 19.2-270.4 governs the disposal of evidence in a criminal case. Section 19.2-270.4(A) allows the trial court to order the "donation or destruction" of evidence "(i) at any time after the expiration of the time for filing an appeal from the final judgment of the court if no appeal is taken or (ii) if an appeal is taken, at any time after exhaustion of all appellate remedies." The application of § 19.2-270.4 is not constrained by the language of § 19.2-270.4:1.

When read together, the two statutes are not in conflict. Unless § 19.2-270.4:1 is triggered by an event specified within that statute, it does not apply, and the evidence may be donated or destroyed in accordance with § 19.2-270.4(A).

Conclusion

Accordingly, it is my opinion that, unless a court imposes a death sentence or a defendant files a motion pursuant to § 19.2-270.4:1(A) to store, retain, and preserve human biological evidence, the trial court, in a criminal case that has not been appealed, may order the donation or destruction of such evidence after the time period for appeal of the final judgment has expired. The court may order the donation or destruction of human biological evidence received in a criminal case on appeal after all appellate remedies have been exhausted. A felon who has not been sentenced to death by a circuit court must file a motion pursuant to § 19.2-270.4:1(A) before the court disposes of the human biological evidence, in accordance with § 19.2-270.4(A), in order to preserve such evidence. The court is not required to wait indefinitely for a motion to be filed pursuant to § 19.2-270.4:1(A).

¹2B Norman J. Singer, *Sutherland Statutory Construction* § 51.02 (West 6th ed. 2000); *Op. Va. Att'y Gen.*: 1999 at 22, 22; 1998 at 19, 21; *id.* at 123, 124; 1996 at 197, 198; 1995 at 146, 147; 1993 at 135, 137; *id.* at 160, 162; 1992 at 108, 112.

²See *Prillaman v. Commonwealth*, 199 Va. 401, 405-06, 100 S.E.2d 4, 7-8 (1957); 1996 *Op. Va. Att'y Gen.* 134, 135. "*In pari materia*" is the Latin phrase meaning "[o]n the same subject; relating to the same matter." *Black's Law Dictionary* 794 (7th ed. 1999).

³See 2A Singer, *supra* note 1, at § 46:05 (West 6th ed. 2000); 2000 Op. Va. Att’y Gen. 182, 185.

⁴*Commonwealth v. Stevens*, 60 Va. Cir. 432, 432 (2002). Chapter 19.2 of Title 19.2, §§ 19.2-327.2 to 19.2-327.6, sets forth the requirements for the issuance of a writ of actual innocence.

⁵*Lovitt v. Warden*, No. 012663, 2003 Va. LEXIS 81, at *41 (Va. Sup. Ct. Sept. 12, 2003).

⁶Va. Code Ann. § 19.2-270.4(A), (B) (LexisNexis Supp. 2003).

⁷"[T]he court [may] determine[], in its discretion, that the evidence should be retained for a *longer* period of time." Section 19.2-270.4:1(A) (LexisNexis Supp. 2003) (emphasis added).

⁸Section 19.2-270.4:1(B) (LexisNexis Supp. 2003).

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