

**OP. NO. 05-016**

**CRIMINAL PROCEDURE: TRIAL AND ITS INCIDENTS – MISCELLANEOUS PROVISIONS.**

**CONSTITUTION OF THE UNITED STATES: AMENDMENTS IV, V, & VI.**

**COURTS OF RECORD: CIRCUIT COURTS.**

**Defense objections to suppress evidence, based on violations of certain constitutional rights or unconstitutional statutes, to be raised before trial are applicable only to proceedings in circuit courts.**

The Honorable Robert Hurt  
Member, House of Delegates  
May 17, 2005

#### **Issue Presented**

You ask whether § 19.2-266.2, governing defense objections to be raised before trial, applies in district courts as well as circuit courts.

#### **Response**

It is my opinion that the requirements of § 19.2-266.2, governing defense objections to be raised before trial, are applicable only to proceedings in circuit courts and not to proceedings in district courts.

#### **Applicable Law and Discussion**

Section 19.2-266.2 addresses defense motions seeking (1) suppression of evidence obtained in violation of the Fourth, Fifth, or Sixth Amendments or (2) dismissal of a criminal charge that is based on an unconstitutional statute. Section 19.2-266.2 requires that such motions be filed in writing, with notice given to opposing counsel, not later than seven days before trial. A hearing on all such motions must be held no later than three days before trial. "The court may, however, for good cause shown and in the interest of justice, permit the motions or objections to be raised at a later time."<sup>1</sup> Section 19.2-266.2 provides that "[t]o assist the defense in filing such motions or objections in a timely manner, the trial court shall, upon motion of the defendant, direct the Commonwealth to file a bill of particulars pursuant to § 19.2-230."

Section 19.2-230 provides that "[a] *court of record* may direct the filing of a bill of particulars." (Emphasis added.) The reference in § 19.2-266.2 to § 19.2-230, and the adoption of the latter section's provisions, is strong evidence that § 19.2-266.2, like § 19.2-230, was intended by the General Assembly to apply only to courts of record.

This conclusion is supported by the history of the provisions found in § 19.2-266.2. "A statute must be construed with reference to its subject matter, the

object sought to be attained, and the legislative purpose in enacting it...."<sup>2</sup> The 1987 Session of the General Assembly enacted § 19.2-399, together with §§ 19.2-400 through 19.2-409, all of which established procedures for the new pretrial appeals process from courts of record to the Court of Appeals of Virginia.<sup>3</sup> Such appeals were first permitted, pursuant to § 19.2-398, as of December 1, 1986.<sup>4</sup> Section 19.2-399 has never been repealed by the General Assembly, but was recodified in 1995 by the Virginia Code Commission as § 19.2-266.2. No legislative intent to change the meaning or purpose of this statute may be gleaned by such a recodification.<sup>5</sup> The Court of Appeals of Virginia has recognized that § 19.2-266.2 was enacted specifically to govern Commonwealth's pretrial appeals from the circuit courts, holding that "[t]he public policy advanced by ... § 19.2-266.2 is directly related to the provisions of ... § 19.2-398."<sup>6</sup>

### Conclusion

Accordingly, it is my opinion that the requirements of § 19.2-266.2, governing defense objections to be raised before trial, are applicable only to proceedings in circuit courts and not to proceedings in district courts.

<sup>1</sup>Va. Code Ann. § 19.2-266.2 (LexisNexis Repl. Vol. 2004); *see also* Schmitt v. Commonwealth, 262 Va. 127, 145-46, 547 S.E.2d 186, 199, (2001) (interpreting § 19.2-266.2 to require that, "in the absence of good cause shown and in the interests of justice," all motions that seek to suppress evidence based on violations of Fourth, Fifth, and Sixth Amendments be made in writing, not later than seven days before trial).

<sup>2</sup>Esteban v. Commonwealth, 266 Va. 605, 609, 587 S.E.2d 523, 526 (2003); *accord* Ambrogio v. Koontz, 224 Va. 381, 386-87, 297 S.E.2d 660, 663 (1982).

<sup>3</sup>See 1987 Va. Acts ch. 710, at 1265 (amending and reenacting § 19.2-398 and adding §§ 19.2-399 through 19.2-409).

<sup>4</sup>See 1985 Va. Acts ch. 510, cl. 2, at 820, 821 (providing that provisions of the act "shall take effect on December 1, 1986," provided that majority of those voting in referendum vote in favor of amendment to Article VI, § 1 of Constitution of Virginia). The voters ratified the amendment to Article VI, § 1 of the Virginia Constitution on November 4, 1986.

<sup>5</sup>The Code Commission is authorized to renumber and rearrange Code sections when "it is necessary because of any disturbance or interruption of orderly or consecutive arrangement." Va. Code Ann. § 30-149 (LexisNexis Repl. Vol. 2004); *see, e.g.,* Jones v. Robinson, 229 Va. 276, 283 n.3, 329 S.E.2d 794, 799 n.3 (1985) (explaining reason for renumbering change by Code Commission).

<sup>6</sup>Upchurch v. Commonwealth, 31 Va. App. 48, 52, 521 S.E.2d 290, 292 (1999).

[Back to May 2005 Opinion Index](#)