

**SENATE BILL 1261:  
APPEALS OF RIGHT COME TO VIRGINIA**

Monica T. Monday  
Gentry Locke  
[Monday@gentrylocke.com](mailto:Monday@gentrylocke.com)

**I. Senate Bill 1261**

**A. *Where do I find the legislation?***

1. S.B. 1261, Va. Gen. Assem. (Reg. Sess. 2021).
2. The final version of the bill can be found here: [\*Bill Tracking - 2021 session > Legislation \(state.va.us\)\*](#).

**B. *Patrons:*** Senator John S. Edwards (Chief Patron), Joseph D. Morrissey, and Scott A. Surovell.

**C. *Passage Date:*** Governor Northam signed SB 1261 into law on March 31, 2021.

**D. *Effective Date of SB 1261:***

1. All but one part of the legislation is effective on January 1, 2022. *See S.B. 1261 Enactment provision (6).*
2. Code § 17.1-400 is effective on July 1, 2021, *see S.B. 1261 Enactment provision (6)*, and provides for the election of 6 new judges to the Court of Appeals.

**II. Jurisdiction of the Court of Appeals through December 31, 2021**

**A. *Generally:*** The Court of Appeals is a court of limited jurisdiction. *Reaves v. Tucker*, 67 Va. App. 719, 727 (2017).

**B. *Appeals of Right (See Code § 17.1-405 (2021); 17.1-406(B) (2021)):***

1. Workers' compensation

2. Juvenile and domestic relations
3. Administrative agency appeals

**C. *Appeals by Petition (See Code § 17.1-406(A) (2021)):***

1. Defendant criminal and traffic convictions
2. Commonwealth criminal appeals

**D. *Original Jurisdiction:***

1. Writs of mandamus, prohibition, and habeas corpus in any case over which the Court of Appeals would have appellate jurisdiction. *See Code § 17.1-404.*
2. Writs of actual innocence based on non-biological evidence. *See Code § 19.2-327.10.*

**III. The Court of Appeals on January 1, 2022**

**A. *Appellate Jurisdiction:***

1. *Appeals of Right (Code § 17.1-405 (2022)):*
  - a. A final decision of a circuit court in a civil matter. *See Code § 17.1-405 (2022).*
  - b. A final decision of a circuit court on appeal from a decision of an administrative agency. *Id.*
  - c. A final decision of a circuit court on appeal from a grievance hearing decision issued pursuant to Code § 2.2 3005. *Id.*
  - d. A final decision of the Workers' Compensation Commission. *Id.*
  - e. A final judgment, order or decree of a circuit court involving:

- i. An application for a concealed weapons permit pursuant to Article 6.1 of Chapter 7 of Title 18.2.
    - ii. Involuntary treatment of prisoners pursuant to Code § 53.1-40.1 or 53.1-133.04.
    - iii. Declaratory or injunctive relief under Code § 57-2.02. *Id.*
  - f. An interlocutory decree or order pursuant to Code § 8.01-267.8, Code § 8.01-626, or Code § 8.01-675.5. *Id.*
  - g. A final conviction in a circuit court of a traffic infraction or a crime. *See Code § 17.1-406(A).*
2. *Appeals by Petition. See Code § 17.1-406(A).*
- a. Commonwealth (and county, city or town) criminal appeals that were previously brought by writ of error under Code § 19.2-317.
  - b. Commonwealth appeals in criminal cases pursuant to Code § 19.2-398.

**B. *Original Jurisdiction:***

- 1. Writs of mandamus, prohibition, and habeas corpus in any case over which the Court of Appeals would have appellate jurisdiction. *See Code § 17.1-404.*
- 2. Writs of actual innocence based on non-biological evidence. *See Code § 19.2-327.10.*

**C. *Judges:***

- 1. The Court of Appeals currently has 11 judges. *See Code § 17.1-400 (2021).*
- 2. The Court will gain 6 new judges, for a total of 17 judges. *See Code § 17.1-400 (eff. 7/1/2021).*
- 3. “The General Assembly shall consider regional diversity in making its elections.” *Id.*

4. Additionally, the Chairs of the Senate Judiciary Committee and House Courts Committee announced that the new Court of Appeals judges also will be selected based on racial and practice area diversity. See [Virginia State Bar - News - VSB to Evaluate Candidates for Virginia Court of Appeals Vacancies](#).

**D. *New Procedures:***

1. **Amended Rules of Court for Part 5 and Part 5A:** These new rules will be approved before the end of 2021.
2. **Notice of Appeal (Code § 17.1-407(A)):**
  - a. Filed in the Clerk’s office of lower tribunal or commission.
  - b. Copy of notice of appeal is sent to all opposing counsel, parties not represented by counsel, the Clerk of the Court of Appeals, and (in criminal cases) to the Attorney General.
3. **Appeal Bonds:** Appeal bonds are no longer required in criminal appeals. See *Code § 8.01-676.1*.
4. **The Appendix (Rule 5A:25):**
  - a. The General Assembly has authorized the adoption of rules to permit “truncated record or appendix preparation” in the Court of Appeals.
  - b. This means that there are likely to be significant amendments to Rule 5A:25, which relates to the joint appendix.
  - c. The new rules may permit the parties to dispense with the appendix when there is a digital record, as recommended by the Working Group that studied the issue. “*Report of Working Group to Study Jurisdiction of the Court of Appeals of Virginia,*” p.10 (Sept. 24, 2020).

- d. Many of Virginia’s circuit court clerk’s offices currently send a digital record of the proceedings to the appellate courts.

5. **Oral argument:**

- a. The Court of Appeals may dispense with oral argument only when: (1) the appeal is wholly without merit or (2) when “the dispositive issue or issues have been authoritatively decided, and the appellant has not argued that the case law should be overturned, extended, modified, or reversed.” *Code § 17.1-403*.

- b. *Note:* Under current rules, the Court of Appeals may dispense with oral argument through a procedure called “summary disposition” when an appeal lacks merit. *Rule 5A:27*.

6. **Electronic Filing:** Pursuant to amendments of the Rules for the Court of Appeals, electronic filing is required for all filings beginning June 1, 2021, except where the party is a pro se prisoner or a litigant who has been granted permission by the court to file documents in paper form. See [Amendments to Rules of the Supreme Court of Virginia \(state.va.us\)](https://www.courts.state.va.us/rules/amendments-to-rules-of-the-supreme-court-of-virginia).

#### IV. The Supreme Court of Virginia on January 1, 2022

A. **Jurisdiction:**

1. The Supreme Court will have appellate review of virtually all decisions of the Court of Appeals:
  - a. “A party aggrieved by a final decision of the Court of Appeals may petition the Supreme Court for an appeal in accordance with § 17.1-411.” *Code § 8.01-670; see also Code § 17.1 410(B)*.
  - b. *Exception:* Under Code § 17.1-410(A), a decision or dismissal by the Court of Appeals in the following cases is final and not appealable to the Supreme Court:

- (i) Appeals involving denial of a concealed handgun permit pursuant to Code § 18.2-308.08.
  - (ii) Involuntary treatment of prisoners pursuant to Code § 53.1-40.1 or 53.1-133.04.
  - (iii) Appeals in criminal cases pursuant to subsections A or E of Code § 19.2-398 and 19.2-401.
- c. The pre-2022 limitations on appeals from the Court of Appeals to the Supreme Court in cases involving administrative agencies, workers' compensation, domestic relations, adoption, and traffic and misdemeanor cases where there is no incarceration are abolished. *Code § 17.1-410 (2021)* (making the final judgment of the Court of Appeals in such cases final unless the case involves a substantial constitutional question or matter of significant precedential value).
  - d. Appeals from the Court of Appeals to the Supreme Court are brought by petition. *Code § 8.01-670*.
  - e. Most procedures for the Supreme Court appeal will remain the same.

2. There is a limited **right of appeal** to the Supreme Court:

- a. Appeals of right to the Supreme Court are available in State Corporation Commission appeals, Virginia State Bar disciplinary cases, and appeals from the circuit court involving a petition for a writ of habeas corpus. *Code § 17.1-406(B)*.
- b. As part of the Supreme Court's original jurisdiction, Complaints of the Judicial Inquiry & Review Commission are filed directly with the Supreme Court. *Id.* The Supreme Court also has original jurisdiction to issue writs of mandamus, prohibition, habeas corpus, and actual innocence based upon biological evidence. *Code § 17.1-309 and Code § 19.2-327.2*.
- c.

## **B. Procedure after January 1, 2022**

1. New rules will be approved before the end of 2021.
2. Most appeals will proceed as before in the Supreme Court.
3. Note: Pursuant to amendments of the Rules for the Court of Appeals, electronic filing is required for all filings in the Supreme Court beginning June 1, 2021, except where the party is a pro se prisoner or a litigant who has been granted permission by the Court to file documents in paper form. See [Amendments to Rules of the Supreme Court of Virginia \(state.va.us\)](https://www.state.va.us/rule.htm)

## **V. Interlocutory Appeals and Petitions**

**A. General Rule:** Interlocutory appeals will be heard by the Court of Appeals. *Code § 8.01-267.8 (eff. 1/1/2022); Code § 8.01-675.5 (eff. 1/1/2022); Code § 17.1-405(4) (eff. 1/1/2022).*

### **B. Appeals by Permission**

1. Multiple Claimant Litigation under Code § 8.01-267.1 *et seq.*
  - a. “The Court of Appeals, in its discretion, may permit an appeal to be taken from an order of a circuit court although the order is not a final order where the circuit court has ordered a consolidated trial of claims joined or consolidated pursuant to this chapter.” *Code § 8.01-267.8(A).*
  - b. “The Court of appeals, in its discretion, may permit an appeal to be taken from any other order of a circuit court in an action combined pursuant to this chapter although the order is not a final order provided the written order of the circuit court states that the order involves a controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal from the order may materially advance the ultimate termination of the litigation.” *Code § 8.01-267.8(B).*

2. Certified Interlocutory Appeals under Code § 8.01-675.5(A)

- a. When, before trial, a circuit court issues a non-final order or decree, a party may file in the circuit court a motion asking the circuit court to certify such order or decree for interlocutory appeal.
- b. The motion shall include a concise analysis of the statutes, rules, or cases believed to be determinative of the issues and request that the court certify in writing that the order or decree involves a question of law as to which (1) there is substantial ground for difference of opinion; (ii) there is no clear, controlling precedent or point in the decisions of the Supreme Court or Court of Appeals; (iii) determination of the issues will be dispositive of a material aspect of the proceeding pending before the court; and (iv) it is in the parties' best interest to seek an interlocutory appeal.
- c. Within 15 days of the entry of an order by the circuit court granting such certification, a petition for appeal may be filed with the Court of Appeals.
- d. If the Court of Appeals determines that the certification has sufficient merit, it may, in its discretion, permit an appeal to be taken from the interlocutory order or decree.
- e. Consideration of such an appeal will proceed in accordance with the applicable procedures.
- f. No petition or appeal under Code § 8.01-675.5(A) will stay proceedings in the circuit court unless the circuit court or appellate court so orders upon a finding that (i) the petition or appeal could be dispositive of the entire civil action or (ii) there exists good cause, other than the pending petition or appeal, to stay the proceedings. *Code § 8.01-675.5(C)*.
- g. "The failure of a party to seek interlocutory review under this section shall not preclude review of the issue on appeal from a final order." *Code § 8.01-675.5(D)*.



*h.* “An order by the Court of Appeals denying interlocutory review under this section shall not preclude review of the issue on appeal from a final order, unless the order denying such interlocutory review provides for such preclusion.” *Id.*

**C. Immunity Appeals under Code § 8.01-675.5(B).**

1. “When, prior to the commencement of trial, a circuit court has entered in any pending civil action an order granting or denying a plea of sovereign, absolute, or qualified immunity that, if granted, would immunize the movant from compulsory participation in the proceeding, the order is eligible for immediate appellate review.”
2. “Any person aggrieved of by such order may, within 15 days of the entry of such order, file a petition for review with the Court of Appeals in accordance with the procedures set forth in Code § 8.01-626.”
3. “If the assigned judge or judges grant the petition for review, the clerk shall refer the appeal to a panel of the court, as the court shall direct, and the parties shall prosecute the appeal in the manner provided for in the Rules of the Supreme Court of Virginia.”
4. No petition or appeal under Code § 8.01-675.5(B) will stay proceedings in the circuit court unless the circuit court or appellate court so orders upon a finding that (1) the petition or appeal could be dispositive of the entire civil action or (ii) there exists good cause, other than the pending petition or appeal, to stay the proceedings. *Code § 8.01-675.5(C).*
5. “The failure of a party to seek interlocutory review under this section shall not preclude review of the issue on appeal from a final order.” *Code § 8.01-675.5(D).*
6. “An order by the Court of Appeals denying interlocutory review under this section shall not preclude review of the issue on appeal from a final order, unless the order denying such interlocutory review provides for such preclusion.” *Id.*

**D. Injunction Petitions under Code § 8.01-626.**

1. The procedure for injunction petitions remains essentially the same, except that the appeal is heard by the Court of Appeals instead of the Supreme Court.
2. A party may file a petition for review with the Court of Appeals seeking review of an order of the circuit court that grants an injunction, refuses an injunction or, having granted an injunction, dissolves or refuses to enlarge it.
3. The aggrieved party must file a petition for review within 15 days of the circuit court's order, and serve a copy of the petition on counsel for the opposing party; the petition for review must be accompanied by a copy of the proceedings, including the original papers and the court's order respecting the injunction.
4. The opposing party may file a response to the petition within seven days from the date of services unless the Court specifies a shorter time frame.
5. *The same standard:* The Court of Appeals “may take such action thereon as it considers appropriate under the circumstances of the case.”
6. *Further review in the Supreme Court:* A party aggrieved by the action of the Court of Appeals regarding its petition for review may, within 15 days of the order of the Court of Appeals, present a petition for review to the Supreme Court, and essentially the same procedure will again be followed in the Supreme Court.
7. *A change in Supreme Court review:* Previously, a party could present the injunction petition to one justice of the Supreme Court. After January 1, 2022, the Clerk of the Supreme Court “shall assign the petition to a three-justice panel of the Supreme Court.”

## VI. Pending Cases

### A. The date the notice of appeal is filed will govern how the case will proceed.

1. Virtually all appeals filed on or after January 1, 2022 will be filed in the Court of Appeals of Virginia.
2. Appeals noted before the effective date of the legislation will proceed in the Court of Appeals and Supreme Court under existing rules and procedures. *See S.B. Enactment Provision (3).*
3. **Exception:** For criminal cases pending in the Court of Appeals where a petition has been filed before, but remains pending, on January 1, 2022, the petition will be deemed granted. *See S.B. Enactment Provision (4).*
4. There is a 30-day window before the effective date of the legislation where a civil litigant may determine whether their appeal will be heard by petition in the Supreme Court or as a matter of right in the Court of Appeals.

### B. Transfer of Appeal

1. There is no change in existing law regarding appeals filed in the wrong appellate court.
2. Appeals filed in the wrong appellate court will be transferred to the correct appellate court. *Code § 8.01-677.1.*