

The Virginia Supreme Court: Court of Error or Court of Law?

William H. Hurd

Appellate lawyers who practice in the federal courts are keenly aware of a fundamental difference between the U.S. Court of Appeals and the U.S. Supreme of Court. The former sits as a *court of error*. The latter sits as a *court of law*.

In our state system, a question that has sometimes arisen is how to classify the Virginia Supreme Court. Is it a court of error like the Fourth Circuit? Or, is our highest state tribunal a court of law like its federal counterpart? It is a question to which no one-word answer can be given, and attempts to fit the Virginia Supreme Court neatly into a federal model yield more confusion than clarity.

In the federal system, the Fourth Circuit – like its sister circuits – is said to be a *court of error* because litigants who lose in the trial court are entitled to an appeal of right so any harmful error can be corrected. See 28 U.S.C. § 1291; *Digital Equip. Corp. v. Desktop Direct*, 511 U.S. 863, 865 (1994).

On the other hand – and often to the surprise of laymen – the principal task of the U.S. Supreme Court is *not* to correct errors that that lower tribunals may have made. Instead, its task is to resolve conflicts between appellate courts on questions of federal law and, sometimes, even in the absence of a conflict, to decide a particularly important federal question that needs to be decided at the national level. See Rule 10, Rules of U.S. Sup. Ct. Thus, the U.S. Supreme Court is sometimes called a *court of law* and, given the nature of its task, every appeal it hears is a matter of discretion. There is no appeal of right.

Mr. Hurd is a partner with Troutman Sanders in Richmond. He is a former Solicitor General of the Commonwealth of Virginia.

In the Virginia Supreme Court, there is likewise no appeal of right (with very few exceptions, such as capital cases). Because appeals are discretionary – and because a panel of three Justices acts for the entire Court – it may appear that our highest state tribunal is also a court of law, rather than a court of error. But this is not the explanation given by the Court, which has repeatedly explained that its denial of a petition for appeal is based on the *merits* of the case.

The question provoked some dissent in the early 1970s with the publication of an article by two University of Virginia law professors, Graham C. Lilly and Antonin Scalia (now Justice Scalia). Entitled *Appellate Justice: A Crisis in Virginia*, 57 Va. L. Rev 3 (1971), the article compared the increase in petitions filed to the decline in petitions granted. “[T]he statistics suggest that in the face of its increasing workload the Court has altered the criterion for granting appeals, so that a denial can no longer be considered a ‘merits’ determination.” *Id.* at 14. The article suggested that the Court had abandoned its merits standard “in favor of a test more closely tied to the societal importance of the issues presented.” *Id.* at 15.

The criminal defense bar seized on the article to attack convictions where no appeal had been granted. Filing a state petition for habeas corpus, a prisoner claimed that the federal Equal Protection Clause was violated by the Virginia Supreme Court because it granted appeals to some convicted felons while refusing appeals to him and others. *Saunders v. Reynolds*, 214 Va. 697, 699-700, 204 S.E.2d 421, 423 (1974) (citing Lilly/ Scalia).

The Virginia Supreme Court responded in no uncertain terms. While acknowledging that “societal importance” of the question presented “may, and properly should, play some part” in deciding whether to grant an appeal, it explained that this “has always been true.” *Id.* at 700, 204 S.E.2d at 423-24. Then, rebuffing the equal protection claim, the Court stated “unequivocally... a decision to grant or refuse a petition for writ of error is based on one equally-applied criterion – the merits of the case.” *Id.* at 700, 204 S.E.2d at 424.¹

The idea that appeals remain “discretionary” may appear in conflict with the idea that appeals are granted on the merits; however, it is a conflict easily resolved. The key is the standard by which the discre-

tion is guided. As Lilly and Scalia acknowledged, “discretion” in the Virginia system historically served “primarily as a means of summary affirmance, enabling the Court to dispose of the clearer cases without the need for a full hearing and written opinion.” 57 Va. L. Rev. at 14. Thus, although absent in *form*, there has been in Virginia “the *substance* of an appeal of right.” *Id.* (emphasis added) (quoting A. Vanderbilt, Minimum Standards of Judicial Administration 399 (1949)).²

The fact that the Court “delegates” its discretion to a panel of three Justices – often including a retired Justice – likewise presents no conflict, especially given the right of a disappointed petitioner to seek rehearing of his petition by the entire Court. Rule 5:20, Rules of Va. Sup. Ct. It is, perhaps, a right that too often goes unexercised.

The fact that petitions for appeal are decided on the merits suggests an important collateral question – what is the precedential effect of a denial? By finding “no reversible error,” does the Virginia Supreme Court give its imprimatur to the trial court judgment? Given the merits-based nature of the denial, some lawyers logically thought the answer would be “yes;” however, for a panel of only three Justices to set binding precedent is obviously problematic.

The conundrum was solved in a unanimous opinion authored by Justice Lemons in 2002, which reaffirmed that petitions for appeal are decided on the merits, but then explained that a denial is *not* precedential. *Sheets v. Castle*, 263 Va. 407, 559 S.E.2d 616 (2002). In *Sheets*, the Court quoted its typical order refusing a petition, which succinctly states that “there is no reversible error in the judgment complained of.” Given this language, “the *grounds* upon which the Court relied as a basis for denial cannot be determined.” *Sheets*, 263 Va. at 412, 559 S.E.2d at 619 (emphasis added).

While it may be that no error was found, other possibilities exist as well. Perhaps, there was error but it was harmless, or the trial court reached the right result for the wrong reason, or there was an independent basis for the trial court’s decision that was not argued as error, to name a few. There is simply no way of telling the *reason* for the denial without “sifting through the records of cases buried” in clerks’ offices, *id.*, an uncertain and unreliable procedure the Court was not willing to countenance. The rule in Virginia is

this: “unless the grounds upon which the refusal is based is discernible from the four corners of the Court’s order, the denial carries no precedential value.” *Id.*

Thus, albeit by a different route, the Virginia Supreme Court has reached the same result as the U.S. Supreme Court, which has long rejected the idea that its denial of certiorari carries precedential value. *E.g.*, *Singleton v. Commissioner*, 439 U.S. 940, 944 (1978) (“[A]ll that a denial of a petition for a writ of certiorari means is that fewer than four members of the Court thought it should be granted... such a denial carries with it no implication whatever regarding the Court’s views on the merits of a case which it has declined to review.”).

In sum, insofar as there is no appeal of right, the Virginia Supreme Court may be compared to its federal counterpart. Yet, insofar as every petition is considered on the merits, it is more closely akin to the U.S. Court of Appeals. And, insofar as no precedential value attaches to the denial of a petition, it is again similar to the U.S. Supreme Court. No carbon copy of a federal model, the Virginia Supreme Court is decidedly a *Virginia* institution. ■

¹ As for the statistical trends cited by Lilly and Scalia, the Court explained that they were the result of an increase in “*frivolous* petitions” spawned by “newly-enunciated constitutional principles and the extension of rights of the indigent defendant... to seek an appeal.” *Id.* at 701, 204 S.E.2d at 424 (emphasis in original). In support of its explanation, the Court cited the report of a study sponsored by the National Center for State Courts in which Professor Lilly, author of the controversial article, later served as Virginia project director.

² Appeals from the Court of Appeals are governed by a different standard. Created years after the Lilly/Scalia article and *Saunders* decision, this “intermediate” appellate court has the final word on many cases within its jurisdiction, unless there is “a substantial constitutional question as a determinative issue or matters of significant precedential value.” Va. Code § 17.1-410. The qualifying phrases “substantial” and “significant” appear to invite the Supreme Court to exercise a different level of discretion than implicated in appeals from trial courts.

[Note: This electronic reprint corrects printing errors found in original publication.]