VIRGINIA STATE CRIME COMMISSION

2016 Annual Report:

Habeas Corpus: Restrictions, Deadlines and Relief

Habeas Corpus: Restrictions, Deadlines and Relief

Executive Summary

In April 2016, the Mid-Atlantic Innocence Project and the Innocence Project sent a letter to the Crime Commission requesting a study of Virginia's existing post-conviction statutory framework, including writs of actual innocence and *habeas corpus*. The letter requested an examination of how these statutes could be modified to assure that an actually innocent person convicted on the basis of non-DNA scientific evidence could obtain relief. The letter referenced a 2013 Texas statute which allows for a writ of *habeas corpus* on the basis of new or changing scientific evidence.

The question presented was how to resolve claims for post-conviction relief that do not fall within Virginia's existing *habeas corpus* and actual innocence law. This contemplated a situation where new or discredited science casts serious doubt on a conviction, but where there were no due process violations and the petitioner cannot meet the high burden of proving actual innocence.

The Executive Committee of the Crime Commission requested that staff review the writ of *habeas corpus* in Virginia as it relates to the restrictions, statute of limitations, available remedies and relief, and actual innocence. Staff reviewed statutory and case law in Virginia and Texas, reviewed other literature on *habeas corpus*, examined newspaper articles on claims of wrongful convictions, gathered data from Virginia and Texas courts, and consulted with numerous stakeholders, including the Office of the Attorney General, the Mid-Atlantic Innocence Project, the Innocence Project of Texas, and the Office of the Attorney General of Texas.

Habeas corpus is defined by *Black's Law Dictionary* as "[a] writ employed to bring a person before a court, most frequently to ensure that the person's imprisonment or detention is not illegal." Litigation of *habeas corpus* claims can involve various areas of law, with the most common areas including criminal, civil custody or immigration matters. The current study examines *habeas corpus* in the criminal context.

Staff focused primarily on three areas of relevant law, including the Virginia statutes governing *habeas corpus*, the Virginia statutes governing actual innocence based on nonbiological evidence, and the Texas *habeas corpus* statute on new or changing scientific evidence.

Under Virginia law, *habeas corpus* is a civil proceeding used to challenge and remedy due process violations. It is not a means to prove actual innocence, nor is it a substitute for a criminal appeal. The writ of *habeas corpus* in Virginia requires a probable cause standard of proof. Successive petitions are generally prohibited. The remedy is typically a new trial, sentencing or appeal. Petitions challenging a criminal conviction where the

sentence of death was not imposed must adhere to one of the following deadlines, whichever is later:

- Within two years from the date of final judgment in the trial court; or,
- Within one year from either the final disposition of the direct appeal in state court or the time for filing such an appeal has expired.

Other means of relief exist outside of the writ of *habeas corpus* available under Virginia law. First, a writ of *habeas corpus* can be granted by a federal court. Second, a person can petition the Court of Appeals of Virginia for a writ of actual innocence based on nonbiological evidence. This writ can be used to remedy the wrongful conviction of an actually innocent person. Finally, a petitioner can request a pardon from the Governor.

In 2013, Texas enacted a statute to remedy convictions based on new or changing scientific evidence. This statute was enacted under the *habeas corpus* provisions of the Texas Code of Criminal Procedure. The standard of proof is by a preponderance of the evidence. There is no statute of limitations and successive petitions are generally prohibited. While the remedy is typically setting aside the conviction, there is the possibility of a new trial.

Upon an examination of Texas law, there could be several challenges to enacting a statute similar to Texas Code of Criminal Procedure Article 11.073 in Virginia. First, it may be difficult for a court to determine whether "scientific evidence" has changed and when such change occurred. Second, it could create a "battle of the experts" within the post-conviction area of law. Third, retrying old cases could be difficult due to such issues as missing witnesses and evidence, and incomplete case files and transcripts. Fourth, the courts may struggle with reconciling the new testimony of any expert who has changed his opinion from his testimony at the original trial of the matter. Finally, successive petitions may be difficult to limit in number due to the constant evolution of scientific fields.

There are, however, several benefits to enacting a similar statute in Virginia. First, it would provide a specific remedy not currently available under Virginia's *habeas corpus* or nonbiological actual innocence statutes. Second, it would remove the strict statute of limitations currently imposed under Virginia's *habeas corpus* statutes. Third, it would provide the opportunity for cases without DNA evidence to be heard based on new, changing or discredited scientific evidence. Fourth, it could allow for consideration of any questionable cases identified by the Virginia Department of Forensic Science's microscopic hair comparison case review. Finally, it may take decades for certain scientific fields to be resolved by experts and discredited, which would allow for a natural progression of applications under such a statute.

The Crime Commission reviewed study findings at its October meeting. No motion was made on the following policy option at the October or December meetings:

> **Policy Option 1:** Should legislation be enacted similar to the Texas scientific evidence statute to allow for a mechanism to seek post-conviction relief when new or changing scientific evidence calls into question the outcome of the original trial and DNA evidence is not available?

Background

Over the years, several scientific fields that were once thought to be reliable have been discredited, including bite mark analysis, microscopic hair analysis, and arson investigations. The recent Virginia case of Keith Allen Harward brought attention to the fact that "bite mark" evidence has been discredited as forensic science.[1] Likewise, the FBI has acknowledged significant flaws in its microscopic hair comparison unit and expert witness testimony which occurred prior to the year 2000.[2] Furthermore, the process of conducting arson investigations has changed based on questions about the scientific methods which previously formed the basis of such investigations.[3]

In addition to these fields, the *Washington Post* published an investigative report in 2015 which noted that the science behind the diagnosis of Shaken Baby Syndrome (now commonly referred to as Abusive Head Trauma) has come into doubt amongst experts as new research shows that diseases, genetic conditions, and accidents can produce the same results as observed in Shaken Baby Syndrome.[4] All of these developments are of particular interest to Virginia as the Virginia Department of Forensic Science is currently in the early stages of reviewing past blood typing (serology) and microscopic hair comparison cases conducted by its state labs.[5]

In April 2016, the Mid-Atlantic Innocence Project and the Innocence Project sent a letter to the Crime Commission requesting a study of Virginia's existing post-conviction statutory framework, including writs of actual innocence and *habeas corpus*. The letter requested an examination of how these statutes could be modified to assure that an actually innocent person convicted on the basis of non-DNA scientific evidence could obtain relief. The letter referenced a 2013 Texas statute which allows for a writ of *habeas corpus* on the basis of new or changing scientific evidence.[6]

The question presented was how to resolve claims for post-conviction relief that do not fall within Virginia's existing *habeas corpus* and actual innocence law. This contemplated a situation where new or discredited science casts serious doubt on a conviction, but where there were no due process violations and the petitioner cannot meet the high burden of proving actual innocence.

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[1] Green, F. (2016, March 12). DNA proves man innocent of 1982 rape and murder in famous 'bite-mark' case, lawyers say. *Richmond Times-Dispatch*. Retrieved from http://www.richmond.com/news/article_05ab68ce-064c-58bb-b57a-211e2bb51ecd.html

[2] Hsu, S. S. (2015, April 18). FBI admits flaws in hair analysis over decades. *The Washington Post*. Retrieved from https://www.washingtonpost.com/local/crime/fbi-overstated-forensic-hair-matches-in-nearly-all-criminal-trials-for-decades/2015/04/18/39c8d8c6-e515-11e4-b510-962fcfabc310_story.html?utm_term=.08607fad8bf2

[3] *See* Phillips, C. (2015, April 2). How arson investigation has changed. Retrieved from http://www.pbs.org/independentlens/blog/how-arson-investigation-has-changed/

[4] *See* Cenziper, D. (2015, March 20). Shaken Science: A disputed diagnosis imprisons parents. *The Washington Post*. Retrieved from https://www.washingtonpost.com/graphics/investigations/shaken-baby-syndrome/

[5] Green, F. (2016, May 11). After Harward exoneration, Va. Proceeds with review of 200 old blood-typing cases. *Richmond Times-Dispatch*. Retrieved from http://www.richmond.com/news/article_5756d670-93ab-50c9-b75e-24d2afc6c6e8.html

[6] Tex. Code Crim. Proc. Ann. art. 11.073 (LexisNexis 2016).

The Executive Committee of the Crime Commission requested that staff review the writ of *habeas corpus* in Virginia as it relates to the restrictions, statute of limitations, available remedies and relief, and actual innocence. Staff reviewed statutory and case law in Virginia and Texas, reviewed other literature on *habeas corpus*, examined newspaper articles on claims of wrongful convictions, gathered data from Virginia and Texas courts, and consulted with numerous stakeholders, including the Office of the Attorney General, the Mid-Atlantic Innocence Project, the Innocence Project of Texas, and the Office of the Attorney General of Texas.

Habeas Corpus

***Habeas Corpus* Generally**

Habeas corpus is defined by *Black's Law Dictionary* as "[a] writ employed to bring a person before a court, most frequently to ensure that the person's imprisonment or detention is not illegal."[7] The writ can also be used to obtain judicial review of the extradition process, bail or the jurisdiction of a court that imposed a criminal sentence.[8]

Litigation of *habeas corpus* claims can involve various areas of law, with the most common areas including criminal, civil custody[9] or immigration matters.[10] The current study examines *habeas corpus* in the criminal context. Generally, in the criminal context, petitions for *habeas corpus* allege such claims as ineffective assistance of counsel,[11] failure to disclose exculpatory evidence, new or recanting witness statements, failure of the court to provide sufficient time or expert resources, and juror impropriety or bias.

In reviewing the topic of *habeas corpus*, staff focused primarily on three areas of relevant law, including the Virginia statutes governing *habeas corpus*,[12] the Virginia statutes governing actual innocence based on non-biological evidence,[13] and the Texas *habeas corpus* statute on new or changing scientific evidence.[14]

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[7] *Habeas corpus, Black's Law Dictionary* (9th Ed. 2009).
[8] *Id*.
[9] *See* Va. Code § 37.2-844(A) (2016). Note that pursuant to Va. Code § 37.2-844(B) (2016), a person committed as a sexually violent predator must challenge his continued detention in accordance with Va. Code § 37.2-910.
[10] *See* Padilla v. Kentucky, 559 U.S. 356 (2010). This decision gave rise to applications for writs of *habeas corpus* in which trial counsel failed to adequately advise a defendant of the immigration consequences of his criminal plea.
[11] *See* Va. Code § 8.01-654(B)(6) (2016). If a petitioner alleges ineffective assistance of counsel, he shall be deemed to waive his privilege regarding communications with counsel to the extent necessary to permit a full and fair hearing on the allegation. According to the guidance provided by the Legal Ethics Opinion 1859, this information is best revealed in a formal proceeding with some form of judicial supervision.
[12] Va. Code §§ 8.01-654 through 8.01-668 (2016).
[13] Va. Code §§ 19.2-327.10 through 19.2-327.14 (2016).
[14] Tex. Code Crim. Proc. Ann. art. 11.073 (LexisNexis 2016).

Virginia Law - *Habeas Corpus*

The term *"habeas corpus"* is referenced twice within the Constitution of Virginia:

> Article I, § 9 provides "that the privilege of the writ of *habeas corpus* shall not be suspended unless when, in cases of invasion or rebellion, the public safety may require..."; and,
>
> Article VI § 1 declares "[t]he Supreme Court shall, by virtue of this Constitution, have original jurisdiction in cases of *habeas corpus*, mandamus, and prohibition; to consider claims of actual innocence presented by convicted felons in such cases and in such manner as may be provided by the General Assembly."

Habeas corpus is a common law writ.[15] The General Assembly has codified procedures governing the writ of *habeas corpus*.[16] Over the past 20 years the General Assembly has made three significant amendments to the principle statute governing *habeas corpus* claims in the Commonwealth,[17] including:

- In 1995, new procedures and timelines were enacted relating to petitions filed by petitioners held under the sentence of death;[18]
- In 1998, filing deadline provisions were added in regard to the non-death sentence *habeas corpus* claims;[19] and,
- In 2005, language was added to clarify that a *habeas corpus* petition filed solely due to the petitioner being deprived of the right to pursue an appeal does not qualify as a previous petition under the statute.[20]

Under Virginia law, the writ of *habeas corpus* is a civil proceeding used to challenge and remedy due process violations. The writ is not a means for proving a criminal defendant's actual innocence.[21] Furthermore, the writ is not a substitute for a criminal appeal.[22] A petition for *habeas corpus* can be used to challenge a due process violation, even if the sentence imposed was suspended or is to be served subsequent to a separate sentence currently being served.[23]

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[15] *See* Va. Code § 1-200 (2016), which provides: "The common law of England…shall continue in full force within the same, and be the rule of decision, except as altered by the General Assembly."

[16] At the time of its incorporation into the 1950 version of the Code of Virginia, the previous version of the statute (Va. Code 1950, § 8-596) provided: "The writ of *habeas corpus ad subjiciendum* shall be granted forthwith by any circuit court or corporation court, or any judge of either in vacation, to any person who shall apply for the same by petition, showing by affidavits or other evidence probably cause to believe that he is detained without lawful authority."

[17] Va. Code § 8.01-654 (2016).

[18] 1995 Va. Acts ch. 503.

[19] 1998 Va. Acts ch. 577.

[20] 2005 Va. Acts ch. 836.

[21] *See* Lacey v. Palmer, 93 Va. 159, 163-164, 24 S.E. 930, 931 (Va. 1896). "…[T]he writ of *habeas corpus* is not to determine the guilt or innocence of the prisoner. The only issue which it presents is whether or not the prisoner is restrained of his liberty by due process of law. A person held under proper process…cannot be discharged upon a writ of *habeas corpus*, however clear his innocence may be…"; *see also* Smyth v. Holland, 199 Va. 92, 97, 97 S.E.2d 745, 748 (Va. 1957). The scope of the inquiry on a writ of *habeas corpus* is limited to whether a prisoner's "detention is by due process of law."

[22] *See* Smyth v. Midgett, 199 Va. 727, 730, 101 S.E.2d 575, 578 (Va. 1958). A writ of *habeas corpus* "cannot be used to perform the function of an appeal or writ of error, to review errors, or to modify or revise a judgment of conviction pronounced by a court of competent jurisdiction."

[23] Va. Code § 8.01-654(B)(3) (2016).

The writ of *habeas corpus* in Virginia requires a probable cause standard of proof.[24] A writ shall be granted by the Supreme Court or any circuit court to any person who applies by petition and demonstrates probable cause that he is detained without lawful authority.[25] The remedy is typically a new trial, sentencing or appeal.[26]

The Virginia statute imposes a strict statute of limitations for the filing of an application for the writ of *habeas corpus*. A petition challenging a criminal conviction where the sentence of death was not imposed must adhere to one of the following deadlines, whichever is later:

- Within two years from the date of final judgment in the trial court; or,
- Within one year from either the final disposition of the direct appeal in state court or the time for filing such an appeal has expired.[27]

Successive petitions for a writ of *habeas corpus* are generally prohibited under Virginia law. [28] The petition for *habeas corpus* shall contain "all allegations the facts of which are known to petitioner at the time of filing" and shall list any previous petitions filed and the disposition of those petitions.[29] No petition shall be granted on the basis of any allegation of fact that the petitioner had knowledge of at the time when any previous petition was filed.[30] A petition for *habeas corpus* which solely alleges that the petitioner was deprived of the right to appeal a conviction or probation revocation does not count as a "previous application," provided that the petitioner has not filed any previous *habeas* petitions attacking the conviction or probation revocation.[31]

Virginia Law - Death Penalty *Habeas Corpus* Claims[32]

The Supreme Court of Virginia has exclusive jurisdiction to consider and award writs of *habeas corpus* upon petitions filed by prisoners held under the sentence of death.[33] The circuit court which entered the judgment order of death shall only have authority to conduct an evidentiary hearing on the petition if directed by order of the Supreme Court.[34] Such an evidentiary hearing shall be limited to the issues specified in the order of the Supreme Court.[35] The Virginia Code prescribes a separate statute of limitations for a petition for *habeas corpus* filed by a person who has been sentenced to death.[36] If

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[24] Va. Code § 8.01-654(A)(1) (2016).
[25] *Id*. *But see* Va. Code § 8.01-654(C)(1) (2016). The Supreme Court of Virginia has exclusive jurisdiction to award writs of *habeas corpus* upon petitions filed by prisoners held under the sentence of death.
[26] *See* 9A Michie's Jurisprudence of Virginia & West Virginia, *Habeas Corpus* § 5 (LexisNexis 2016).
[27] Va. Code § 8.01-654(A)(2) (2016). *But see* Hicks v. Department of Corrections, 289 Va. 288, 768 S.E. 2d 415 (Va. 2015). Failure to disclose exculpatory evidence tolls these filing provisions.
[28] *See* Dorsey v. Angelone, 261 Va. 601, 544 S.E. 2d 350 (Va. 2001).
[29] Va. Code § 8.01-654(B)(2) (2016).
[30] *Id*.
[31] *Id*. *See also* Va. Code §§ 19.2-321.1 and 19.2-321.2 (2016). These statutes provide a mechanism to pursue a delayed appeal due to errors by an attorney, court reporter, or the court.
[32] Per the Office of the Attorney General, as of September 2016 there were seven inmates being held on death sentences in Virginia in various states of litigation.
[33] Va. Code §§ 8.01-654(C)(1), 17.1-310 (2016).
[34] Va. Code § 8.01-654(C)(1) (2016).
[35] Va. Code § 8.01-654(C)(2) (2016).
[36] *See* Va. Code § 8.01-654.1 (2016).

the sentence of death is affirmed on appeal, within 30 days after that decision from the Supreme Court of Virginia, the circuit court must appoint counsel to represent the indigent defendant in his state *habeas corpus* proceeding.[37]

Data on Writs of *Habeas Corpus* in Virginia

As seen in Table 1 below, the total number of appeals of writs filed and original writs filed have decreased in recent years.

Table 1: Total Appeals of Writs and Original Writs of *Habeas Corpus* Filed in the Supreme Court of Virginia, CY11-CY15

CY	Appeals of Writs Filed	Original Writs Filed
2011	119	358
2012	124	317
2013	130	330
2014	113	266
2015	92	253

Source: Supreme Court of Virginia.

Table 2 below illustrates the total number of writs filed in Virginia circuit courts between CY13-CY15.

Table 2: Writs of *Habeas Corpus* Filed in the Circuit Courts, CY13-CY15

CY	Total Filings*
2013	420
2014	317
2015	327

Source: Supreme Court of Virginia.
*Does not include Fairfax and Alexandria.

[37] Va. Code § 19.2-163.7 (2016). Note that the Virginia Code does not mandate the appointment of counsel on a *habeas corpus* claim for an individual who has not been sentenced to death.

Other Means of Relief

Federal *Habeas Corpus*

A federal court shall only entertain an application for a writ of *habeas corpus* on behalf of a person in custody pursuant to a state judgment on the ground that such custody is in violation of the Constitution or laws and treaties of the United States.[38] Generally the application for a writ of *habeas corpus* shall not be granted unless the applicant has first exhausted all remedies available in state court.[39]

A writ of *habeas corpus* that was adjudicated on the merits in state court shall not be granted unless the adjudication of the claim was contrary to, or involved the unreasonable application of clearly established federal law,[40] or resulted in a decision based on an unreasonable determination of the facts in light of the evidence at the state court proceeding.[41] Generally if a petitioner's claim for *habeas corpus* is dismissed by a state court on procedural grounds, and the state procedural rule provided an independent and adequate ground for the dismissal, then the petitioner has defaulted on his federal *habeas corpus* claim.[42]

The federal code provides a one year statute of limitations for an application for a writ of *habeas corpus* by a person in custody under a judgment of a state court.[43] The statute of limitations most commonly begins running on the date which the judgment became final in the state court by the conclusion of the direct review or the expiration of the time for seeking such review.[44] The statute of limitations is tolled while any related and properly filed application for state post-conviction relief or other collateral review is pending.[45]

The federal code generally prohibits the filing of successive applications for a writ of *habeas corpus*.[46] A federal court shall not be required to entertain an application for a writ of *habeas corpus* if it appears the legality of the detention has previously been determined by a United States court on a prior application.[47] The court shall dismiss a claim presented in a second or subsequent application that was presented in a prior application.[48]

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[38] 28 U.S.C.S. § 2254(a) (LexisNexis 2016).
[39] 28 U.S.C.S. § 2254(b)(1)(A). *See also* Gray v. Netherland, 518 U.S. 152 (1996).
[40] 28 U.S.C.S. § 2254(d)(1) (LexisNexis 2016).
[41] 28 U.S.C.S. § 2254(d)(2) (LexisNexis 2016).
[42] *See* Wallace v. Jarvis, 726 F. Supp. 2d 642,645 (W.D. Va. 2010).
[43] 28 U.S.C.S. § 2244(d)(1) (LexisNexis 2016).
[44] 28 U.S.C.S. § 2244(d)(1)(A) (LexisNexis 2016).
[45] 28 U.S.C.S. § 2244(d)(2) (LexisNexis 2016).
[46] *But see* 28 U.S.C.S. § 2244(b)(2) (LexisNexis 2016) for exceptions to this general rule.
[47] 28 U.S.C.S. § 2244(a) (LexisNexis 2016). An exception to this rule is found in 28 U.S.C.S. § 2255 for prisoners in custody under a sentence of a court established by Act of Congress.
[48] 28 U.S.C.S. § 2244(b)(1) (LexisNexis 2016).

Writ of Actual Innocence Based on Nonbiological Evidence

A petitioner can file a writ of actual innocence based on nonbiological evidence to remedy the wrongful conviction of an actually innocent person.[49] The legislature has provided the Court of Appeals the authority to grant writs of actual innocence based on nonbiological evidence.[50] A petitioner may only file one petition alleging actual innocence based on nonbiological evidence.[51] A petition may only be granted to a petitioner who pled not guilty and was found guilty or adjudicated delinquent of a felony by a circuit court.[52] The circuit court that entered the conviction shall have the authority to conduct hearings as directed by the Court of Appeals.[53] Either the petitioner or the Commonwealth may appeal the decision of the Court of Appeals to the Supreme Court of Virginia.[54]

The petition for actual innocence must be made under oath and must include certain specified contents[55] as well as all relevant allegations of facts that are known to the petitioner at the time of filing.[56] The petitioner is entitled to representation by counsel if the Court of Appeals does not summarily dismiss the petition.[57] However, the Court of Appeals may appoint counsel prior to deciding whether a petition should be summarily dismissed.[58] The Virginia Code does not impose any statute of limitations for the filing of a petition for a writ of actual innocence based on nonbiological evidence.

Upon consideration of the petition, the Court of Appeals may dispose of said petition in one of the following manners:

- Dismiss the petition summarily for failure to state a claim or ground upon which relief could be granted; or, if such a claim or grounds have been established,
- Dismiss the petition for failure to establish that the previously unknown evidence was sufficient to justify the issuance of the writ;
- Modify the conviction order to find the petitioner guilty of a lesser included offense; or,
- Grant the writ and vacate the conviction.[59]

The burden of proof in the proceeding is upon the person petitioning the court for the writ of actual innocence.[60] In order to grant the writ of actual innocence based on nonbiological evidence, the court must find that the petitioner has proven by clear and convincing evidence that the evidence: (i) was unknown or unavailable at the time the conviction became final in the circuit court; (ii) could not have been discovered through the exercise of due diligence before the 21 days following the entry of the final order

[49] *See* Va. Code §§ 19.2-327.10 through 19.2-327.14 (2016).
[50] Va. Code § 19.2-327.10 (2016).
[51] *Id*.
[52] *Id*.
[53] *Id*. *See also* Va. Code § 19.2-327.12 (2016).
[54] *Id*.
[55] Va. Code § 19.2-327.11(A) (2016).
[56] Va. Code § 19.2-327.11(B) (2016).
[57] Va. Code § 19.2-327.11(E) (2016).
[58] *Id*.
[59] Va. Code § 19.2-327.13 (2016).
[60] Va. Code § 19.2-327.13 (2016).

expired; (iii) was material and would prove that no rational trier of fact would have found proof of guilt beyond a reasonable doubt; and, (iv) was not merely cumulative, corroborative, or collateral.[61] The petitioner must also establish that he is "factually innocent" of the criminal offense.[62] The legislature has specifically barred any action under this chapter, or the performance of any attorney representing a petitioner, from forming the basis of relief in any future *habeas corpus* or appellate proceeding.[63]

Data on Writs of Actual Innocence for Nonbiological Evidence

Table 3 illustrates the number of petitions for writs of actual innocence for non-biological evidence filed in the Court of Appeals between CY11-CY15, as reported in the Supreme Court of Virginia's *Report to the General Assembly*.

Table 3: Petitions for Writs of Actual Innocence (Nonbiological) Filed in the Circuit Courts, CY11-CY15

FY	Total Filings
2011	19
2012	24
2013	27
2014	16
2015	16

Source: Supreme Court of Virginia

Fleming v. Commonwealth

In Fleming v Commonwealth, the Virginia Court of Appeals issued a ruling on a petition for a writ of actual innocence based on nonbiological evidence involving a scientific dispute.[64] While this case did not involve new or changing scientific evidence, the matter did provide an example of how claims involving nonbiological scientific evidence are presently being adjudicated in Virginia.

In 2002, Fleming was convicted of the murder of her husband. The Commonwealth contended the cause of death was acute methanol poisoning. Fleming had been observed mixing creatine into Gatorade bottles for her husband shortly before his death. After his death, police collected a total of four bottles of Gatorade from the husband's office and residence. Analysis showed that each bottle contained 3.3%-4.7% methanol, which when ingested causes organ failure and brain death.

[61] *Id*.
[62] *See* Altizer v. Commonwealth, 63 Va. App. 317, 328, 757 S.E. 2d 565, 570 (Va. Ct. App. 2014).
[63] Va. Code § 19.2-327.14 (2016).
[64] Court of Appeals of Virginia, Record No. 0031-15-2 (2016). (No citation available as of June 26, 2017).

Forensic examination of the husband's computer showed three internet visits relating to methanol poisoning or methanol approximately a month before his death. After her husband's death, Fleming asked a neighbor to keep a computer tower for her. Fleming later retrieved the tower from the neighbor, took it back to her home, and threw it out. There was also evidence presented as to the potential motives for the crime, including two life insurance policies on the husband valued at $400,000 and an affair the husband had four years prior.

Fleming filed a petition for actual innocence based on nonbiological evidence alleging that the prosecution's theory of methanol poisoning was wrong and that her husband had instead died as a result of "an adverse event upon consumption of creatine, primed by his alcoholism, undiagnosed kidney disease and dehydration from playing excessive sports on a hot day." The Court of Appeals remanded the matter to the circuit court for a hearing in regard to the potential for a false positive for methanol in the husband's blood stream, the potential for retesting the recovered Gatorade bottles, and any other relevant findings relating to those two issues. The circuit court conducted a two-day hearing on these issues, considered testimony from several expert witnesses on behalf of both Fleming and the Commonwealth, and forwarded its findings of fact to the Court of Appeals.

The Court of Appeals subsequently dismissed Fleming's petition on three primary grounds: (i) Fleming failed to meet the clear and convincing burden of proof standard to sustain the petition; (ii) the theory Fleming advanced in her petition could have been presented at trial; and (iii) Fleming failed to rebut the other evidence adduced against her at trial, including that she mixed the Gatorade found to contain methanol, that she ran computer searches for methanol poisoning, and that she attempted to conceal a computer with a friend and later destroyed it.[65]

Gubernatorial Pardon

A petitioner can request a pardon from the Governor. Authority for this remedy is provided by the Virginia Constitution[66] and is also codified in the Virginia Code.[67] As an example, in 2015 the Governor granted an absolute pardon to Davey James Reedy for his convictions of first degree murder (2 counts) and arson in the daytime. In granting the absolute pardon, the Governor wrote:

> *Having reviewed the multiple reports refuting the cause of the fire which led to Davey Reedy's conviction, the conflicting reports on the presence of gasoline products within the Commonwealth's own Department of*

[65] According to the Court of Appeals of Virginia Appellate Case Management System, Fleming filed a notice of appeal to the Supreme Court of Virginia on April 25, 2016. A review of the Supreme Court of Virginia Appellate Case Management System on June 26, 2017, does not list the matter as being in either active or inactive status before the Supreme Court.
[66] Pursuant to Art. V, § 12 of the Virginia Constitution, the Governor has the "power to remit fines and penalties…to grant reprieves and pardons after conviction except when the prosecution has been carried on by the House of Delegates…to remove political disabilities consequent upon conviction…and to commute capital punishment."
[67] Va. Code § 53.1-229 (2016) provides that "…the power to commute capital punishment and to grant pardons or reprieves is vested in the Governor."

> *Forensic Science, and the testimony presented at trial, it is now clear that Davey Reedy's convictions…are not supported by the forensic evidence relied upon."*[68]

Table 4 illustrates the types of pardons granted by the Governor between January 15, 2009, and January 8, 2016.[69]

Table 4: Pardons Granted by Governor, January 15, 2009 - January 8, 2016

Date Range	Simple Pardon	Absolute Pardon	Conditional Pardon
1/15/09 to 1/15/10	53	3	8
1/16/10 to 1/16/11	1	0	0
1/17/11 to 1/16/12	5	0	0
1/17/12 to 1/16/13	1	0	2
1/17/13 to 1/10/14	46	0	6
1/11/14 to 1/16/15	6	0	0
1/17/15 to 1/08/16	32	2	5

Source: Governor's Annual Report to the General Assembly—*List of Pardons, Commutations, Reprieves and Other Forms of Clemency.*

Texas Law – *Habeas Corpus*

Habeas Corpus Generally

The law governing *habeas corpus* in Texas is contained within Chapter 11 of Title 1 of the Texas Code of Criminal Procedure.[70] "The writ of *habeas corpus* is the remedy to be used when any person is restrained in his liberty."[71] It is an order is by a court commanding anyone having a person in his custody to produce said person and show why he is held in custody or restrained.[72] The writ is intended to apply to all cases of

[68] List of Pardons, Commutations, Reprieves and Other Forms of Clemency (2016). *Governor's Annual Report to the General Assembly*.
[69] Pardons as defined by the Secretary of the Commonwealth include, 1) *simple pardon*: a statement of official forgiveness; does not remove conviction from criminal record; 2) *absolute pardon*: allows for removal of conviction from criminal record; and 3) *conditional pardon*: available only to incarcerated individuals; typically grants early release with conditions. Retrieved from: https://commonwealth.virginia.gov/judicial-system/pardons/
[70] Tex. Code Crim. Proc. Ann. art. 11.01 through 11.65 (LexisNexis 2016).
[71] Tex. Code Crim. Proc. Ann. art. 11.01 (LexisNexis 2016).
[72] *Id*.

confinement and restraint where the person exercising the power has no lawful right to do so or where the exercise of power does not conform to the law.[73]

After reviewing all the documents and hearing all the testimony in regard to a writ of *habeas corpus*, the court shall remand the person into custody, admit him to bail or discharge him from custody.[74] The court may not discharge any defendant after indictment without setting a bail.[75]

Procedure after Felony Conviction without the Death Penalty[76]

Texas law sets out a specific procedure for filing an application for a writ of *habeas corpus* by a person charged with a felony where the death penalty was not imposed.[77] If the writ is filed after the felony indictment but before a conviction, it must be filed in the county where the offense was alleged to have been committed.[78] If a writ is filed after a final conviction in a felony case, it must be made returnable to the Court of Criminal Appeals of Texas at Austin, Texas (the highest criminal court in Texas).[79] The application for the writ after a felony conviction must be filed in the court where the conviction was obtained, and when said application is filed, a writ of *habeas corpus* returnable to the Court of Criminal appeals issues by operation of law.[80]

After the petition is filed, the convicting court must then decide whether there are "…controverted, previously unresolved facts material to the legality of the applicant's confinement."[81] The term "confinement" means confinement or any collateral consequence resulting from the conviction.[82] If the convicting court finds that there are no such issues, the clerk shall forward that finding along with the court papers to the Court of Criminal Appeals.[83]

If the convicting court decides that there are controverted, previously unresolved facts that are material, then it shall enter an order setting a time for the state to reply and designating the issues of fact to be resolved.[84] The court may use personal recollection, or may order affidavits, depositions, interrogatories, additional forensic testing, and hearings to resolve the issues of fact.[85] The court may appoint an attorney or a magistrate to hold a hearing and make findings of fact.[86] After the court makes findings

[73] Tex. Code Crim. Proc. Ann. art. 11.23 (LexisNexis 2016).
[74] Tex. Code Crim. Proc. Ann. art. 11.44 (LexisNexis 2016).
[75] *Id*.
[76] Note that separate procedures are set out for cases in which the death penalty was imposed (Tex. Code Crim. Proc. Ann. art. 11.071 (LexisNexis 2016)) and in felony or misdemeanor cases in which community supervision was imposed (Tex. Code Crim. Proc. Ann. art. 11.072 (LexisNexis 2016)).
[77] Tex. Code Crim. Proc. Ann. art. 11.07(1) (LexisNexis 2016).
[78] Tex. Code Crim. Proc. Ann. art. 11.07(2) (LexisNexis 2016).
[79] Tex. Code Crim. Proc. Ann. art. 11.07(3)(a) (LexisNexis 2016).
[80] Tex. Code Crim. Proc. Ann. art. 11.07(3)(b) (LexisNexis 2016).
[81] Tex. Code Crim. Proc. Ann. art. 11.07(3)(c) (LexisNexis 2016).
[82] *Id*.
[83] *Id*.
[84] Tex. Code Crim. Proc. Ann. art. 11.07(3)(d) (LexisNexis 2016).
[85] *Id*. *But see* Tex. Code Crim. Proc. Ann. art. 11.07(3)(e) (LexisNexis 2016)., which provides that "additional forensic testing" does not include forensic DNA testing as provided for in Tex. Code Crim. Proc. Ann. art. 64 (LexisNexis 2016).
[86] *Id*.

of fact or approves the findings of the person designated to make them, the clerk shall immediately transmit the application, any answers filed, any motions filed, transcripts of all depositions and hearings, any affidavits, and any other matters used by the court in resolving issues of fact to the Court of Criminal Appeals.[87]

If a subsequent application for writ of *habeas corpus* is filed after the final disposition of the first application challenging the same conviction, the court may not consider the merits of the subsequent application or grant relief unless the application establishes one of two exceptions.[88] The first exception requires the petitioner to establish that the current claims and issues have not been and could not have been presented in a previous application because the factual or legal basis for the claim was unavailable on the date the previous application was filed.[89] The second exception requires the petitioner to establish by a preponderance of the evidence that but for a violation of the U.S. Constitution, no rational juror could have found the petitioner guilty beyond a reasonable doubt.[90]

The Court of Criminal Appeals may deny the relief requested based upon the findings and conclusions of the hearing judge without docketing the case.[91] Alternatively, the court may docket the case and hear the matter as an appeal or as though it is being originally presented.[92] Upon reviewing the record, the Court of Criminal Appeals shall then enter a judgment either remanding the petitioner to custody or ordering his release.[93]

Procedure Related to Certain Scientific Evidence[94]

The letter requesting the present study specifically referenced Texas Code of Criminal Procedure Article 11.073, entitled "Procedure Related to Certain Scientific Evidence." This article allows for a writ of *habeas corpus* on the basis of new or changing scientific evidence. The article only applies to relevant scientific evidence that was not available to be offered by the convicted person at the time of his trial[95] or evidence which contradicts scientific evidence that was relied on by the state at the time of trial.[96]

Several conditions must be met in order for a court to grant relief under this provision. The petitioner must first file an application in accordance with the applicable statutory procedure.[97] The court may then grant the petition and issue a writ of *habeas corpus* based on new or changing scientific evidence if:

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[87] *Id*.
[88] Tex. Code Crim. Proc. Ann. art. 11.07(4)(a) (LexisNexis 2016).
[89] Tex. Code Crim. Proc. Ann. art. 11.07(4)(a)(1) (LexisNexis 2016).
[90] Tex. Code Crim. Proc. Ann. art. 11.07(4)(a)(2) (LexisNexis 2016).
[91] Tex. Code Crim. Proc. Ann. art. 11.07(5) (LexisNexis 2016).
[92] *Id*.
[93] *Id*.
[94] *See* Tex. Code Crim. Proc. Ann. art. 11.073 (LexisNexis 2016). This provision was originally enacted effective September 1, 2013. The provision only applies to applications for writs filed on or after the effective date. Applications filed prior to the effective date are governed by the law in effect at the time of filing. The present language includes a 2015 amendment which added the phrase "a testifying expert's scientific knowledge" in subsection (d).
[95] Tex. Code Crim. Proc. Ann. art. 11.073(a)(1) (LexisNexis 2016).
[96] Tex. Code Crim. Proc. Ann. art. 11.073(a)(2) (LexisNexis 2016).
[97] *See* Tex. Code Crim. Proc. Ann. art. 11.07 (LexisNexis 2016) (conviction without death penalty), Tex. Code Crim. Proc.

- Relevant scientific evidence is currently available which was not available before or during trial through the use of due diligence;[98]
- Such scientific evidence would be admissible at a trial held on the date of the application;[99] and,
- The court finds by a preponderance of the evidence that the person would not have been convicted if the scientific evidence had been presented at trial.[100]

In determining whether relevant scientific evidence was not ascertainable through the exercise of due diligence on or before a specific date, the court shall consider whether the field of scientific knowledge, a testifying expert's scientific knowledge, or a scientific method on which the evidence was based has changed.[101] If the application for a writ of *habeas corpus* under this section is the original, the change in scientific evidence must have occurred since the trial date.[102] If the application is for a subsequent writ of *habeas corpus*, the change in scientific evidence must have occurred since the date the original application or a prior application was filed.[103]

Article 11.073 creates an exception to the general prohibition against successive petitions. A claim under this article is not considered a claim which could have been previously presented or considered under a prior *habeas corpus* application if the claim is based on relevant scientific evidence that was not ascertainable through the exercise of due diligence on or before the date when the original or previous application was filed.[104]

The article governing claims of *habeas corpus* for new or changing scientific evidence does not include a statute of limitations. A person who is discharged from custody under a writ of *habeas corpus* can later be indicted for the same offense and may be committed to custody on the new indictment.[105]

Staff contacted the Judicial Information Section of the Texas Office of Court Administration in an attempt to determine how many applications for *habeas corpus* were filed pursuant to Article 11.073. According to the Annual Statistical Report for the Texas Judiciary, there were 4,698 applications for writs of *habeas corpus* filed with the Texas Court of Criminal Appeals in 2015.[106] Unfortunately, these *habeas corpus* filings are only captured generally and it could not be determined how many filings were specifically filed under Article 11.073.

Ann. art. 11.071 (LexisNexis 2016) (death penalty case), and Tex. Code Crim. Proc. Ann. art. 11.072 (LexisNexis 2016) (community supervision case).

[98] Tex. Code Crim. Proc. Ann. art. 11.073(b)(1)(A) (LexisNexis 2016).

[99] Tex. Code Crim. Proc. Ann. art. 11.073(b)(2)(B) (LexisNexis 2016).

[100] Tex. Code Crim. Proc. Ann. art. 11.073(b)(2) (LexisNexis 2016).

[101] Tex. Code Crim. Proc. Ann. art. 11.073(d) (LexisNexis 2016). Note that the consideration of "a testifying expert's scientific knowledge" was added to the statute in an amendment effective September 1, 2015.

[102] Tex. Code Crim. Proc. Ann. art. 11.073(d)(1) (LexisNexis 2016).

[103] Tex. Code Crim. Proc. Ann. art. 11.073(d)(2) (LexisNexis 2016).

[104] Tex. Code Crim. Proc. Ann. art. 11.073(c) (LexisNexis 2016).

[105] Tex. Code Crim. Proc. Ann. art. 11.57 (LexisNexis 2016).

[106] Annual Statistical Report for the Texas Judiciary: FY 2015. *Texas Judicial Council*. Retrieved from: http://www.txcourts.gov/media/1308021/2015-ar-statistical-print.pdf

Staff also contacted the Innocence Project of Texas and were advised that very few claims have been filed under the new Texas statute.[107] That organization was aware of three cases in which the trial judge recommended that the Court of Criminal Appeals grant the writ: a case involving bite mark evidence; a case involving new medical studies concerning physical signs of sexual abuse in young girls; and, an arson case involving a misunderstanding of when a gas chromatography test showed the presence of an accelerant.

Ex parte Robbins

The seminal case on Article 11.073 is Ex parte Robbins, which was decided in 2014 and reaffirmed in 2016.[108] In 1999, Robbins was convicted of the capital murder of his girlfriend's 17-month old daughter and was sentenced to life in prison. At trial, the state's expert witness testified that the cause of the child's death was asphyxia due to compression of the chest and abdomen and that the manner of death was homicide. The defense's expert witness testified that the child's cause of death could not be determined. In rebuttal, the state called witnesses to contradict the defense expert's claims in regard to an EKG reading and the time of death.

In March 2007, an acquaintance of Robbins requested that the state's Medical Examiner's Office conduct a review of its prior autopsy findings. In May 2007, the Deputy Chief Medical Examiner concluded that the cause and manner of death were "undetermined." Later in May 2007, both the state's expert from the 1999 case and her former supervisor from that time period reviewed the autopsy and recommended that the cause and manner of death be changed to "undetermined." In June 2007, Robbins filed a petition for *habeas corpus* alleging newly discovered evidence. In August 2007, the trial court appointed an expert to conduct an independent pathological examination. Upon review, this expert could not rule out suffocation or asphyxiation as the cause of death, but he could not see any physical findings which would support any particular conclusion as to the cause of death.

In October 2007, the trial court appointed a separate expert to conduct an independent forensic examination of the evidence. This expert concluded that the child's death was a homicide and the manner of death was "asphyxia by suffocation." In May 2008, the trial court amended the death certificate to reflect a cause of death as "asphyxia due to suffocation." The previous homicide finding was left unchanged. In June 2011, the Court of Criminal Appeals of Texas denied Robbins' petition for a writ of *habeas corpus*.

On September 3, 2013, two days after Article 11.073 was enacted, Robbins filed a petition for *habeas corpus* pursuant to the new Code section. In November 2014, the Court of Criminal Appeals granted the writ and set aside Robbins' conviction. The Court found that the State expert's revision of her opinion to an "undetermined" cause and manner of death constituted a change in "scientific evidence" and had this evidence been presented at trial, the petitioner would not have been convicted.

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[107] E-mail correspondence with a representative of the Innocence Project of Texas (September 29, 2016).
[108] 478 S.W. 3d 678.

Summary and Conclusion

Upon an examination of Texas law, there could be several challenges to enacting a statute similar to Texas Code of Criminal Procedure Article 11.073 in Virginia. First, it may be difficult for a court to determine whether "scientific evidence" has changed and when such change occurred. Second, it could create a "battle of the experts" within the post-conviction area of law. Third, retrying old cases could be difficult due to such issues as missing witnesses and evidence, and incomplete case files and transcripts. Fourth, the courts may struggle with reconciling the new testimony of any expert who has changed his opinion from his testimony at the original trial of the matter. Finally, successive petitions may be difficult to limit in number due to the constant evolution of scientific fields.

There are, however, several benefits to enacting a similar statute in Virginia. First, it would provide a specific remedy not currently available under Virginia's *habeas corpus* or nonbiological actual innocence statutes. Second, it would remove the strict statute of limitations currently imposed under Virginia's *habeas corpus* statutes. Third, it would provide the opportunity for cases without DNA evidence to be heard based on new, changing or discredited scientific evidence. Fourth, it could allow for consideration of any questionable cases identified by the Virginia Department of Forensic Science's microscopic hair comparison case review. Finally, it may take decades for certain scientific fields to be resolved by experts and discredited, which would allow for a natural progression of applications under such a statute.

The Crime Commission reviewed study findings at its October meeting. No motion was made on the following policy option at the October or December meetings:

> **Policy Option 1:** Should legislation be enacted similar to the Texas scientific evidence statute to allow for a mechanism to seek post-conviction relief when new or changing scientific evidence calls into question the outcome of the original trial and DNA evidence is not available

Acknowledgements

The Virginia State Crime Commission extends its appreciation to the following agencies and organizations for their assistance and cooperation on this study:

Innocence Project

Innocence Project of Texas

Mid-Atlantic Innocence Project

Office of the Attorney General

Office of the Attorney General of Texas