



***Habeas Corpus*—Restrictions, Deadlines and Relief**

October 3, 2016

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Study Authorization



- 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*, and how these statutes could be modified to assure that an actually innocent person convicted on the basis of non-DNA scientific evidence can 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.

Study Authorization



- The issue presented was how to resolve claims for post-conviction relief that do not fall within existing *habeas corpus* and actual innocence law.
 - This question contemplates 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 burden of proving actual innocence.
- The Executive Committee of the Crime Commission requested staff to review the writ of *habeas corpus* in Virginia as it relates to the restrictions, statute of limitations, available remedies and relief, and actual innocence.

Background



- Over the years several scientific fields that were once thought to be reliable have been discredited, including arson investigations, microscopic hair analysis, and bite mark analysis.
- Why is this an important issue?
 - The recent case of Keith Allen Harward brought attention to the fact that “bite mark” evidence has been discredited as a forensic science.
 - The FBI has acknowledged significant flaws in its microscopic hair comparison unit and expert testimony which occurred prior to the year 2000.

Background



- In 2015, the *Washington Post* published an investigative report which noted that the science behind the diagnosis of Shaken Baby Syndrome 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.
- Currently, the Virginia Department of Forensic Science (DFS) is in the early stages of reviewing past blood typing (serology) and microscopic hair comparison cases conducted by its state labs.

Background



- *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.”
 - 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.

Background



- Litigation of *habeas corpus* claims can involve various areas of law, with the most common areas including:
 - Criminal matters;
 - Civil custody matters; and,
 - Immigration matters.
- Staff focused on *habeas corpus* in the criminal context.
 - Generally, in the criminal context, petitions for *habeas corpus* allege such claims as ineffective assistance of counsel, failure to disclose exculpatory evidence, new or recanting witness statements, failure of the court to provide sufficient time or expert resources, juror impropriety or bias, etc.

Background



- Staff focused primarily on three areas of relevant law:
 - Virginia statutes governing *habeas corpus*.
 - Va. Code § § 8.01-654 to 8.01-668, with a primary focus on § 8.01-654.
 - Virginia statutes governing actual innocence based on nonbiological evidence.
 - Va. Code § § 19.2-327.10 to 19.2-327.14.
 - Texas *habeas corpus* statute on new or changing scientific evidence.
 - Texas Code Crim. Proc. Art. 11.073 and Art. 11.07.

Virginia Law: *Habeas Corpus*



Habeas Corpus under Virginia Law:

- Civil proceeding used to remedy due process violations - it is not a substitute for a criminal appeal or a means to prove actual innocence.
- Probable cause standard.
- Strict statute of limitations apply at state and federal level.
- Successive petitions are generally prohibited.
- Remedy is generally a new trial, sentencing, or appeal.

Virginia Law: *Habeas Corpus*



Deadlines under Virginia law:

- Petitions challenging a criminal conviction shall adhere to 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.
 - In the 2015 case of Hicks v. Dir., Dep't of Corr., 289 Va. 288, 768 S.E.2d 415, the Supreme Court of Virginia held that a Brady violation tolled these filing provisions.

Virginia Law: *Habeas Corpus*



- The principal statute governing *habeas corpus* claims in Virginia is Va. Code § 8.01-654.
- Over the past 20 years, there have been three significant amendments to Va. Code § 8.01-654:
 - In 1995, new procedures and timelines were enacted relating to petitions filed by petitioners held under the sentence of death;
 - In 1998, filing deadline provisions were added in regard to non-death sentence *habeas corpus* claims; 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.

Virginia Law: *Habeas Corpus*



Death penalty *habeas corpus* claims:

- As of September 2016, there were 7 inmates on death row in Virginia in various stages of litigation.
- The Supreme Court has exclusive jurisdiction to consider and award writs filed by death-sentenced petitioners.
- The circuit court has the authority to conduct evidentiary hearings if directed by the Supreme Court and limited to the subject matter ordered by the Supreme Court.
- Va. Code § 8.01-654.1 provides the filing deadlines for *habeas* petitions related to death-sentenced petitioners.
- Va. Code § 19.2-163.7 provides that if the sentence of death is affirmed on appeal, then the court shall appoint counsel to represent the indigent prisoner in his state *habeas corpus* proceeding.

Virginia Law: *Habeas Corpus*



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.

Total Appeals of Writs and Original Writs of *Habeas Corpus* Filed in the Supreme Court, 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

Other Means of Relief



Federal Law: *Habeas Corpus*

- Pursuant to 28 USCS § 2254, an application for a writ of *habeas corpus* shall not be granted by a federal court unless the applicant has **exhausted all remedies** available in state court.
- Pursuant to 28 USCS § 2244, there is a **filing deadline of one year** for an application for a writ of *habeas corpus* filed by a person in custody under a judgment of a State court. This deadline runs from the date which the judgment became final by the conclusion of the direct review or the expiration of the time for seeking such review.
 - This period is tolled while any related and properly filed application for state post-conviction relief or other collateral review is pending.

Other Means of Relief



Writ of Actual Innocence based on Nonbiological Evidence:

- Used to remedy the wrongful conviction of an actually innocent person.
- Petitioner must establish that the material evidence was not available prior to or within 21 days after the entry of final judgment, that no rational trier of fact would have found him guilty, and that he is actually innocent of the offense.
- Clear and convincing evidence standard.
- No statute of limitations.
- Strict limit of one petition.
- Must have entered a plea of not guilty to a felony offense.
- Remedy is actual innocence or reduction to lesser-included offense.

Other Means of Relief



- The Virginia statutes regarding the writ of actual innocence based on nonbiological evidence are contained within Va. Code §§ 19.2-327.10 through 19.2-327.14.
- The Court of Appeals has been granted the authority to issue a writ of actual innocence based on nonbiological evidence.
 - In the event of an appeal, the Virginia Supreme Court has the authority to issue such a writ.
- The court may dispose of the petition in one of the following manners:
 - Dismiss summarily for failure to state a claim or ground upon which relief could be granted;
 - Dismiss the petition for failure to establish that the previously unknown evidence was sufficient to justify the issuance of a writ;
 - Modify the conviction order to find the petitioner guilty of a lesser included offense; or,
 - Grant the writ and vacate the conviction.

Other Means of Relief



- In 2016 case of Fleming v. Commonwealth (Record No. 0031-15-2), 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.
- Fleming had been convicted of murdering her husband and claimed that the Commonwealth's evidence concerning the cause of death (acute methanol poisoning) was inaccurate.
- The Court of Appeals ordered the Circuit Court to conduct a hearing and ultimately dismissed the petition because Fleming failed to meet the burden of proof, failed to rebut the other evidence at trial, and her scientific theory could have been advanced at trial.

Other Means of Relief



A petitioner can also seek redress from the Governor.

Pardons Granted by the 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*

Pardons as defined by the Secretary of the Commonwealth:

Simple Pardon: A statement of official forgiveness; does not remove conviction from criminal record.

Absolute Pardon: Allows for removal of conviction from criminal record.

Conditional Pardon: Available only to incarcerated individuals; typically grants early release with conditions.

Other Means of Relief



- 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 noted:
 - “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 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.**”

Texas Law: *Habeas Corpus*



Texas Code Crim. Proc. Art. 11.073 “Procedure Related to Certain Scientific Evidence”:

- Enacted in 2013 to remedy convictions based on new or changing scientific evidence.
- Preponderance of the evidence standard.
- No statute of limitations.
- Successive petitions are generally prohibited.
- Remedy is setting aside the conviction—but a new trial is possible.

Texas Law: *Habeas Corpus*



Procedure for filing under Texas law:

- The petition is to be filed with the court where the challenged conviction was obtained.
- The convicting court then determines whether any “controverted, previously unresolved facts material to the legality of the applicant’s confinement” exist.
 - If such issues exist, the court may hear evidence and order non-DNA testing before forwarding its findings of fact to the Court of Criminal Appeals.
- The Court of Criminal Appeals may docket and hear the case and shall enter an order either remanding the applicant to custody or ordering his release.

Texas Law: *Habeas Corpus*



Restrictions under Texas law:

- Article 11.073 applies to “***relevant scientific evidence***”:
 - that was not available to be offered by the convicted person at trial; or,
 - that contradicts scientific evidence relied upon by the state at trial.
- In determining whether ***relevant scientific evidence*** was not ascertainable through 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 relevant scientific evidence is based*** has changed.”

Texas Law: *Habeas Corpus*



Relief available under Texas law:

- A court may grant *habeas corpus* relief based on new or changing scientific evidence if:
 - Relevant scientific evidence is currently available which was not available before or during trial through the use of due diligence;
 - Such scientific evidence would be admissible at a trial held on the date of the application; and,
 - The court further finds by a preponderance of the evidence that the person would not have been convicted if the scientific evidence had been presented at trial.

Texas Law: *Habeas Corpus*



Relief available under Texas law (cont.):

- Upon consideration of a claim, the Court of Criminal Appeals shall enter an order either remanding the applicant to custody or ordering his release.
- Per Texas Code Crim. Proc. Art. 11.57, a person who is discharged and later indicted for the same offense may be committed on the new indictment.

Texas Law: *Habeas Corpus*



- As of September 2016, there has only been one writ of *habeas corpus* granted under Article 11.073 in 2014, in the Ex parte Robbins matter (478 S.W.3d 678).
- The writ was granted on the basis that the testifying expert from the 1999 trial changed her opinion regarding the cause and manner of death.
 - In 1999, she testified that the child’s death was asphyxia due to compression of the chest and abdomen and the manner of death was homicide.
 - In 2007, she reviewed the autopsy and recommended that the cause and manner of death be changed to “undetermined.”

Texas Law: *Habeas Corpus*



- The Innocence Project of Texas advised that very few claims have been filed under the new Texas statute.
- They were only 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.

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Policy Considerations



Challenges of Enacting a Similar Statute in Virginia:

- It may be difficult for a court to determine whether “scientific evidence” has changed.
- There may be a “battle of the experts” within the post-conviction area of law.
- Retrying old cases can be difficult – missing witnesses or evidence or old/incomplete case files/transcripts.
- The courts may struggle with reconciling experts who later change their opinion or testimony.
- Successive petitions may be difficult to limit in number.

Policy Considerations



Benefits of Enacting a Similar Statute in Virginia:

- Provides a specific remedy not currently available under *habeas corpus* or actual innocence.
- Removes the strict statute of limitations found under *habeas corpus*.
- Provides the opportunity for cases without DNA evidence to be heard based on changing or discredited science, especially for arson, bite mark analysis, and microscopic hair comparison analysis.
- Could allow an avenue for cases identified in DFS's microscopic hair comparison case review where there may not be evidence remaining for DNA testing.
- Would allow a mechanism for consideration of a 2001 Virginia arson case which may qualify for relief under such a statute.
- May take decades for sciences to be resolved by experts in the field and discredited, which would allow for a natural progression of applications.

Policy Option



Policy Option:

- 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?



Discussion
