

# Virginia State Crime Commission

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## Joint Motion for Writ of Actual Innocence

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2013

# Joint Motion for Writ of Actual Innocence

## Executive Summary

During the 2013 Regular Session of the Virginia General Assembly, Delegate Charniele Herring introduced House Bill 1919, which sought to allow a defendant and the Commonwealth's Attorney to jointly file a petition for a writ of actual innocence. The bill was referred to the Crime Commission for review.

Crime Commission staff collected literature and obtained data related to the number of petitions filed for a writ of actual innocence. The Crime Commission reviewed study findings at its September meeting and directed staff to draft legislation on two key issues. As a result of the study effort, the Crime Commission endorsed the following legislative recommendations at its December meeting:

**Recommendation 1:** Allow Commonwealth's Attorneys to join in petitions for writs of actual innocence, thereby allowing incarcerated persons to receive a bond hearing, pending a decision on the writ.

**Recommendation 2:** Amend Va. Code § 17.1-513 to allow for the bond hearing to be held in circuit court.

## Background

Virginia's writs of actual innocence are created by statute. Virginia Code § 19.2-327.2 authorizes the Supreme Court of Virginia to issue a writ of actual innocence to a person who can prove that they are innocent of the crime for which they were convicted, if the proof is based upon biological evidence. The second statute, Va. Code § 19.2-327.10 allows for the same process to occur through the Virginia Court of Appeals if the convicted person has nonbiological evidence that may prove innocence.

House Bill 1919 (HB 1919) was introduced by Delegate Charniele Herring during the 2013 Regular Session of the Virginia General Assembly.<sup>1</sup> As introduced, the bill would allow a Commonwealth's Attorney to join a petition for a writ of actual innocence, which would then allow, under the bill, the possible release of a prisoner following a bond hearing. The bond hearing would be heard by the circuit court where the conviction occurred.

House Bill 1919 was introduced as a result of the Jonathan Montgomery case in Hampton, Virginia. Mr. Montgomery was convicted of sexual assault in 2008; however, the victim came forward in late 2012 and recanted her story, claiming Mr. Montgomery was innocent of the crime for which he was convicted.<sup>2</sup> A Hampton circuit court, with the concurrence of the Hampton Commonwealth's Attorney, vacated the conviction, without the proper legal authority. The Attorney General of Virginia asked the Virginia Court of Appeals to exonerate Mr. Montgomery of his conviction. Mr.

Montgomery's writ of actual innocence case was put on hold until the perjury case for his accuser was resolved. There is no procedural vehicle in Virginia that would have allowed Mr. Montgomery to be released from prison while the proceedings moved forward, other than a conditional release by the Governor. Allowing a Commonwealth's Attorney to file jointly for a writ of actual innocence, with a subsequent bond hearing, would allow wrongfully convicted persons to be released on bond pending the decision on the writ by the Virginia Court of Appeals or the Supreme Court of Virginia.

House Bill 1919 proposes the creation of two new Virginia Code sections. Virginia Code § 19.2-327.2:1 would allow for a joint petition to be filed in the Supreme Court of Virginia and Va. Code § 19.2-327.10:1 would allow for a joint petition to be filed in the Virginia Court of Appeals.

It is important to note that both proposed statutes would then allow the petitioner to apply for a bond. If the hearing is held in the circuit court, as proposed by the bill, then Va. Code § 17.1-513 would need to be amended. Currently, circuit courts do not have the subject matter jurisdiction to hold bond hearings for writs of actual innocence. It should also be noted that a Commonwealth's Attorney would not be able to initiate a petition for a writ, only join in a petition for a writ of actual innocence.

## Virginia Data

Crime Commission staff requested data from the Supreme Court of Virginia and the Virginia Court of Appeals to obtain a better understanding of petitions filed based on biological and nonbiological evidence.

The statute regarding actual innocence petitions filed in the Virginia Supreme Court went into effect in 2002. Since July 1, 2002, there have been 49 petitions filed with the Supreme Court of Virginia based on biological evidence.<sup>3</sup> Of those 49 petitions, 39 were refused, and 4 were granted. There were 2 petitions that were docketed, 3 that were procedurally dismissed, and 1 that was withdrawn or dismissed.

The statute regarding actual innocence petitions filed in the Virginia Court of Appeals went into effect in 2004. Since July 1, 2004, there have been 243 petitions filed with the Virginia Court of Appeals based on nonbiological evidence. Of the 243 petitions filed, 3 writs were granted and the conviction was vacated. One petition was withdrawn and 4 are still pending.<sup>4</sup> The remaining 235 petitions were dismissed. A case that is dismissed has typically been reviewed on the merits and it has been determined that the petitioner is not entitled to be deemed innocent of the crime for which he was convicted. Subsequently, the petition for actual innocence is dismissed because it has no merit.

## Conclusion

Because Virginia's writ of actual innocence is created by statute, the Code of Virginia could be amended to allow a Commonwealth's Attorney to jointly file a petition for a writ of actual innocence. If a petition is joined, then the petitioner could be released on bail pending a decision on the writ by the appellate court. Further changes would need to be made to the Code of Virginia to determine where the bond hearing would be held.

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As a result of the study effort, the Crime Commission endorsed the following legislative recommendations at its December meeting:

**Recommendation 1:** Allow Commonwealth’s Attorneys to join in petitions for writs of actual innocence, thereby allowing incarcerated persons to receive a bond hearing, pending a decision on the writ.

**Recommendation 2:** Amend Va. Code § 17.1-513 to allow for the bond hearing to be held in circuit court.

Delegate Charniele Herring introduced House Bill 671 during the 2014 Regular Session of the Virginia General Assembly, based on the Crime Commission recommendation. The bill was continued to the 2015 Session by the House Courts of Justice Criminal Subcommittee.

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<sup>1</sup> H.B. 1919, 2013 Gen. Assem., Reg. Sess. (Va. 2013).

<sup>2</sup> Available at: <http://wtkr.com/2012/11/15/woman-accused-of-lying-in-jonathan-montgomery-case-appears-in-court/>.

<sup>3</sup> Data was last updated September 3, 2013.

<sup>4</sup> Data was last updated August 13, 2013.