COMMONWEALTH of VIRGINIA

Virginia State Crime Commission

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TO: The Honorable Mark Warner, Governor of Virginia

And

Members of the Virginia General Assembly

Section 30-158(3) provides the Commission the power to "conduct studies and gather information and data in order to accomplish its purposes as set forth in § 30-156...and formulate its recommendations to the Governor and the General Assembly."

Enclosed for your review and consideration is the study report on the 21 Day Rule. The Commission received assistance from all affected agencies and gratefully acknowledges their input into this report.

Respectfully submitted,

David B. Albo
Chairman

REPORT OF THE
VIRGINIA STATE CRIME COMMISSION

WRIT OF ACTUAL INNOCENCE BASED ON NON-BIOLOGICAL EVIDENCE

Report Document

COMMONWEALTH OF VIRGINIA
RICHMOND
2004

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I. Authority

The *Code of Virginia*, §30-156, authorizes the Virginia State Crime Commission to study, report and make recommendations on all areas of public safety and protection. Additionally, the Commission is to study matters "… including apprehension, trial and punishment of criminal offenders." Section 30-158(3) provides the Commission the power to "… conduct studies and gather information and data in order to accomplish its purposes as set forth in §30-156. . .and formulate its recommendations to the Governor and the General Assembly."

Using the statutory authority granted to the Crime Commission, the staff conducted a study of the Virginia Supreme Court's proposed rule to provide procedures for the introduction of newly discovered non-biological evidence after 21 days.

II. Executive Summary

In November 2002, the Virginia Supreme Court distributed for public comment a proposed rule to provide procedures that would allow the introduction of newly discovered non-biological evidence more than 21 days after the conclusion of a criminal trial. The Court's proposal would have: allowed for a petition for a new trial in circuit court; mandated hearings if requirements of the petition were met; applied procedures to both those who plead guilty and those who plead not guilty; and, included a legal test where evidence is "such as should produce opposite results on the merits in another trial." In an effort to preempt the implementation of this proposed rule, the Crime Commission introduced legislation during the 2003 legislative session to formally extend through statute the timeframe for the introduction of newly discovered evidence from 21 to 90 days.[1] This legislation passed with a delayed enactment clause allowing study of the issue by the Crime Commission. Consequently, the Virginia State Crime Commission formed a 22 person task force to examine this issue and prepare legislation in November 2003.

The Task Force made the following decisions on eleven issues and incorporated them into legislation that was presented to the Crime Commission for adoption:[2]

1). Filing of Petitions

- Petitions should be filed in the Court of Appeals;
- The Court of Appeals is empowered to decide these cases by panel; and,
- If necessary, the Court of Appeals may remand the case to a trial court for evidence to be taken.

2). Eligibility for Writ Application

[1] Senate Bill 1143 (2003) and 2003 Va. Acts ch. 1017.

[2] 21-Day Rule Task Force, Proposed Legislation for the Writ of Actual Innocence based on Non-biological Evidence. *See* Attachment 1.

- Any person convicted of a felony may apply for a Writ;
- Even someone not incarcerated may file; and,
- If someone pleads guilty, he would not be able to make use of this Writ.

3). Remedies Available To Petitioner
- Having the conviction vacated; or,
- If guilty of a lesser included offense, a new sentencing.

4). Time Deadline for Filing
- There is no deadline for filing a Writ of Actual Innocence based on Non-biological evidence; however,
- Filing may not be used to delay or stay an execution.

5). Ability to Summarily Dismiss Petitions
- The Court of Appeals has the power to summarily dismiss the petition;
- The Court of Appeals may dismiss the petition before receiving a response from the Attorney General's office; and,
- If the Court of Appeals decides not to summarily dismiss, it will then notify the Attorney General that a response is required.

6). Court-Appointed Counsel
- Petitioner is entitled to court-appointed counsel if his/her petition is not summarily dismissed;
- The Court of Appeals may, in its discretion, appoint counsel prior to deciding summary dismissal; and,
- A Public Defender may be appointed, as well as a court-appointed attorney in private practice.

7). Contents of Petition and Elements the Petitioner Must Prove to Obtain Relief
- Crime for which he was convicted;
- Statement that petitioner is actually innocent;
- Exact description of the new evidence;
- Evidence was not known or available to the defendant or his attorney;
- The date and circumstances under which the evidence became known;
- The evidence could not have been discovered through due diligence prior to the conviction becoming final;
- The evidence is material, and will prove no rational trier of fact could have found proof of guilt beyond a reasonable doubt; and,
- The evidence is not merely cumulative, corroborative or collateral.

8). Components of the Petition Must Include
- All relevant allegations of fact;
- All relevant documents, affidavits, and test results; and,
- All previous records, applications and appeals.

9). Types of Evidence Eligible for Claim

- There are no limits on the types of evidence that may be used to support a claim, but human biological evidence may only be used in conjunction with other evidence; and,
- If the evidence consists solely of DNA results, Writ of Actual Innocence would be remedy.

10). Burden of Proof for the Defendant

- The burden of proof for the defendant is a clear and convincing standard; and,
- No rational trier of fact could have found proof of guilt beyond a reasonable doubt.

11). Requirements for Additional Hearings:

- Both the Commonwealth of Virginia and the defendant could petition for an appeal of the decision rendered by the Court of Appeals to the Supreme Court of Virginia;
- Any such appeal to the Supreme Court of Virginia would be discretionary; and,
- There would be no possibility for habeas suits, or other causes of action.

After reviewing Task Force decisions, the Virginia State Crime Commission approved the proposed Task Force legislation with a few technical amendments:

These amendments to the original Task Force legislation were incorporated into Senate Bill 333 (Stolle),[3] which subsequently passed the 2004 Virginia General Assembly with minor changes.[4]

III. Methodology

The Virginia State Crime Commission utilized multiple methodologies to study alternatives to Virginia's 21-day rule. First, the Crime Commission formed a 22 person task force. This 21-day Rule Task Force was composed of legislators from both houses of the General Assembly, criminal defense attorneys, representatives from the Office of the Attorney General of Virginia, Commonwealth's Attorneys, judges from Virginia Circuit Courts and the Virginia Court of Appeals, and also a Justice of the Supreme Court of Virginia. Specifically, the task force included:[5]

Members from the Senate
Senator Kenneth W. Stolle*, Chairman
Senator Janet D. Howell*
Senator Thomas K. Norment, Jr.*

[3] Senate Bill 333 (2004). *See* Attachment 1(a)
[4] 2004 Va. Acts ch. 1024. *See* Attachment 2.
[5] Names identified with an asterisk indicate that the individual is also a member of the Crime Commission.

Members from the House of Delegates
Delegate David B. Albo*
Delegate Robert B. Bell
Delegate H. Morgan Griffith*
Delegate Terry G. Kilgore*
Delegate Robert F. McDonnell*
Delegate Kenneth R. Melvin*
Delegate Brian J. Moran*
Speaker William J. Howell

Virginia Association of Commonwealth's Attorneys
The Honorable William G. Petty (Lynchburg)*
The Honorable Charles S. Sharp (Fredericksburg)

Virginia Private Defense Bar
Mr. Steve Benjamin, Esquire

Other Statewide Representatives
Mr. Robert M. Blue, Esquire (Virginia citizen)
Mr. Richard Goemann, Executive Director (Virginia Public Defender Commission)
The Honorable Johanna L. Fitzpatrick (Virginia Court of Appeals)
The Honorable Gary A. Hicks (Henrico Circuit Court)
The Honorable Robert J. Humphreys (Virginia Court of Appeals)
The Honorable Barbara M. Keenan (Supreme Court of Virginia)
Mr. Rich Savage, Deputy Attorney General (Attorney General's Office)*

Second, staff conducted a 50 state analysis of post-conviction relief mechanisms. Staff also conducted structured telephone surveys and interviews with representatives from all 50 states. Interviews included other states' Attorney General's offices, local prosecutor offices, sentencing commissions, departments of justice and statewide prosecutor associations. Staff conducted the other state research to determine the most time expansive process for the introduction of newly discovered evidence after conviction. Unlike previous analyses, this analysis included reviews of:

- State statutes;
- Civil court rules;
- Criminal court rules;
- Case law;
- State habeas and post-conviction relief acts (when allowed to go forth upon newly discovered evidence alone);
- Common law writs; and,
- Common practice.

Specifically, the 50-state analysis centered on four distinct areas related to post-conviction relief: (i) time limits for the introduction of newly discovered evidence, (ii) legal test and burden of proof to be met once evidence is allowed, (iii) procedure for the cognizance and judicial evaluation of potential claims and (iv) the ultimate relief granted.

Staff examined the different legal tests used throughout the country and determined which "prongs" were commonly utilized to evaluate newly discovered evidence in order to determine whether relief should be granted. The analysis also examined the corresponding "burdens of proof" the petitioner must prove to meet each individual prong of the applicable legal test.

The procedure by which a petitioner brings a claim of actual innocence based on newly discovered evidence was also analyzed in all fifty states. This analysis included determining the court in which petitions were first filed, the ability of a court to summarily dismiss petitions, the appealability of a summary dismissal and the ultimate relief granted under post-conviction proceedings. Potential remedies from across the fifty states included the granting of a new trial, re-sentencing and a vacation of the judgment (dismissal of the charge). Finally, staff did a case law analysis of United States Supreme Court and Virginia State Supreme Court rulings impacting post-conviction relief.

IV. Background

In Virginia, an individual has a 21-day window of opportunity, following the close of judicial proceedings, to bring new evidence to court, including evidence that shows innocence. Virginia's "21-day rule" states in pertinent part:

> "All final judgments, orders, and decrees, irrespective of terms of court, shall remain under the control of the trial court and subject to be modified, vacated, or suspended for twenty-one days after the date of entry, and no longer . . . The date of entry of any final judgment, order, or decree shall be the date the judgment, order, or decree is signed by the judge."[6]

After this time period, a claim based on newly discovered evidence that shows innocence, absent an independent constitutional claim, will not state a claim for either State or Federal relief.[7] The remedy for a defendant who does discover new evidence after 21 days have passed is a petition for executive clemency with the Governor.[8]

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[6] *See* Va. Sup. Ct. R. 1:1.

[7] *See* Herrera v. Collins, 506 U.S. 390 (1993) (foreclosing federal habeas relief to a procedurally barred state claim and holding that the imprisonment of one who is "actually innocent," in the absence of an additional constitutional deprivation, is not in and of itself violative of the Federal Constitution); *see also* Townsend v. Sain, 372 U.S. 293, 317 (1963) (stating that Federal Habeas relief is limited to situations in which an individual claims to be imprisoned in violation of the Federal Constitution). According to 22 U.S.C.A. § 2254(a) (2004):

> The Supreme Court, a Justice thereof, a circuit judge, or a district court shall entertain an application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a State court only on the ground that he is in custody in violation of the Constitution or laws or treaties of the United States.

This principle of habeas corpus jurisprudence coming from the common law is also firmly part of Virginia case law. *See also* Lacey v. Palmer, 93 Va. 159, 24 S.E. 930 (1896); Virginia Department of Corrections v. Crowley, 227 Va. 254, 316 S.E.2d (1984).

[8] *See* V.A. Const. art. V, § 12 (2004) ("The Governor shall have power to . . . grant reprieves and pardons after conviction."). The United States Supreme Court also noted in Herrera that the "traditional remedy for

In 2001, Virginia carved out the first narrow exception to the 21-day rule.[9] *Virginia Code* §§ 19.2-327.2 - 327.6 now establishes a procedure for the storage, preservation and retention of human biological evidence in felony cases. These statutes also establish a procedure for a convicted felon to petition the circuit court that entered the conviction to apply for a new scientific investigation of human biological evidence. The following elements must be met for the court to order the testing:

i. the evidence was not known or available at the time the conviction became final or not previously tested because the testing procedure was not available at the Division of Forensic Science at the time;
ii. the chain of custody establishes that the evidence has not been altered, tampered with, or substituted;
iii. the testing is materially relevant, noncumulative, and necessary and may prove the convicted person's actual innocence;
iv. the testing requested involves a scientific method employed by the Division of Forensic Science; and,
v. the convicted person did not unreasonably delay the filing of the petition after the evidence or the test for the evidence became available.

The petition must also state the reasons the evidence was not known or tested by the time the conviction became final and the reasons that the newly discovered or untested evidence may prove the actual innocence of the person convicted.

The statutes also set forth a procedure for the issuance of a writ of actual innocence for persons convicted of a felony upon a plea of not guilty or for any person sentenced to death or convicted of (i) a Class 1 felony, (ii) a Class 2 felony or, (iii) any felony for which the maximum penalty is imprisonment for life. The petition is to be filed with the Supreme Court and must allege:

(a) that the petitioner pleaded not guilty or that he is under a sentence of death or convicted of (i) a Class 1 felony, (ii) a Class 2 felony or (iii) any felony for which the maximum penalty is imprisonment for life;
(b) that the petitioner is actually innocent of the crime for which he was convicted;
(c) an exact description of the human biological evidence and the scientific testing supporting the allegation of innocence;
(d) that the evidence was not previously known or available to the petitioner or his trial attorney of record at the time the conviction became final, or if known, was not subject to the scientific testing for the reasons set forth in the petition; the date the test results under § 19.2-327.1 became known to the petitioner or any attorney of record;
(e) that the petitioner or his attorney of record has filed the petition within 60 days of obtaining the test results under §19.2-327.1;

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claims of innocence based on new evidence, discovered too late in the day to file a new trial motion, has been executive clemency." Herrera, 506 U.S. at 417. Several reforms of the clemency process in Virginia's Executive Branch have recently been made, yet in the case of newly discovered evidence, the Governor's office does not seem to be the proper venue for examining physical evidence and witnesses. *See also* material accompanying note 5 *infra*.

[9] Senate Bill 1366 (2001) and 2001 Va. Acts ch. 873.

(f) that the petitioner is currently incarcerated; the reasons the evidence will prove that no rational trier of fact could have found proof of guilt beyond a reasonable doubt; and,

(g) for any conviction that became final in the circuit court after June 30, 1996, that the evidence was not available for testing under § 9-196.11.

A petitioner filing a writ of actual innocence is entitled to court-appointed counsel in the same manner as an indigent defendant in a criminal case. If the Supreme Court determines that a resolution of the case requires further development of the facts, it may order the circuit court to conduct a hearing to certify findings of fact on certain issues. After considering the petition and the Commonwealth's response, the previous records of the case, the record of any hearing on newly tested evidence and any findings certified from the circuit court, the Supreme Court may dismiss the petition or vacate or modify the conviction.

Even with the remedies of executive clemency and the Writ of Actual Innocence based on DNA evidence, the Virginia Supreme Court's 21-day Rule, coupled with the fact that the incarceration of an innocent person is not itself violative of the Federal Constitution,[10] means that 21 days after the court enters its final decree, there is no judicial remedy for an individual that discovers non-biological evidence, however conclusive, that demonstrates his innocence.

The problem of a lack of legal process, when evidence demonstrating innocence is discovered after a defendant has been tried and convicted, is not isolated to Virginia.[11] With the rise in prevalence of DNA evidence, state and Federal courts and legislatures across the country have been forced to deal with the problem of "actual innocence."[12] Although many state legislatures have dealt with this problem by allowing for the introduction of DNA evidence after all other judicial remedies have been exhausted,[13] a number of states, including Virginia,[14] have yet to create a judicial remedy for the introduction of newly discovered non-biological evidence. In the Commonwealth of

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[10] Herrera, 506 U.S. 390 (1993).

[11] *See* Michael J. Muskat, *Substantive Justice and State Interest in the Aftermath of Herrera v. Collins: Finding an Adequate Process for the Resolution of Bare Innocence Claims through State Post-conviction Remedies*, 75 Tex. L. Rev. 131 (1996) (noting that in recent years individuals have been released from incarceration and even from death row based on evidence that was newly discovered and obtained from a host of sources "including testimony by previously undiscovered witnesses, recantation of testimony given by key prosecution witnesses, [a]confession by the real killer, and even newly developed scientific techniques that exculpate the wrongfully convicted inmate").

[12] In fact, the Supreme Court of Virginia, the entity solely responsible for promulgating the Judicial Rules of Procedure, indicated in 2001 that if the legislature did not create a judicial remedy for the cognizance of DNA claims, and other physical evidence, then they would amend rule 1:1 to allow for the introduction of that evidence. Just 2 years later, the Judiciary indicated once again that if an avenue for the introduction of newly-discovered, non-biological evidence was not created by the legislature, that the rule would be changed by the Judiciary.

[13] *See* 2001 Va. Ch. 874, creating Va. Code Ann. §§ 19.2-270.4:1, 19.2-327:1-6. In many respects this Writ of Actual Innocence based on DNA evidence was a starting point for the 21-day Task Force and also served as a template for creating the Writ of Actual Innocence based on Non-biological Evidence.

[14] *See* Attachment 3**,** Virginia State Crime Commission, 21-day Rule Task Force, Table (Avenues for the Introduction of New Evidence (2003)).

Virginia, if there are no physical samples to test for DNA evidence, then the defendant cannot proceed under the Writ of Actual Innocence based on DNA Evidence. Evidence such as fingerprints, an alternate confession,[15] or witness recantation[16] would all be considered non-biological evidence. Even a videotape showing that someone else in fact committed the crime could not be introduced under the Writ of Actual Innocence based on DNA evidence created by the Virginia General Assembly in 2001.

As mentioned above, the United States Supreme Court has found that the post-conviction discovery of evidence, even evidence that shows innocence, does not warrant federal habeas corpus relief unless accompanied by an independent constitutional violation.[17] With federal habeas relief not an option in many cases, the question becomes whether the state offers any possible judicial remedies to correct what might be a clear miscarriage of justice. Those few states that have not addressed this issue recently by enacting legislation normally cite the executive remedy of clemency as the primary safeguard against the tragedy of incarcerating or executing one who is "actually innocent."

While it is axiomatic that the dual functions of the criminal justice system are to protect the innocent and to punish the guilty, there is much disagreement as to what extent innocence should be able to trump procedural predictability, finality, and comity. In weighing these different interests, states have been left to make legislative determinations, choosing between protecting those defendants who might possibly be innocent, on the one hand, and preserving the finality of the trial process on the other.

In the wake of Herrera, many state legislatures began to address "actual innocence" in the DNA context. Some not only provided for the introduction of newly discovered DNA evidence, but also for other evidence that showed innocence. Even so, these legislative decisions (whether imposed by statute or court rule) normally limited the scope of "actual innocence" claims to capital cases and limited the evidence to DNA or biological evidence.

V. Other State Findings

To assist the 21 Day Rule Task Force deliberations, Virginia State Crime Commission staff analyzed post-conviction relief mechanisms in all 50 states. However, while researching the topic of post-conviction relief, it became evident that in certain states, there could be different processes simultaneously available to introduce new

[15] *See supra* note 7 and accompanying text.

[16] *See* Lawrence Hammock, *Crime Commission Endorses Change to 21-day rule on New Evidence*, Roanoke Times, November 20, 2003 (highlighting a Virginia case in which a man currently serving a 38-year prison sentence for molesting a girl who has since recanted her testimony cannot present evidence of the recantation because the exculpatory evidence "came more that 21 days after his case was completed").

[17] Herrera, 506 U.S. at 390 (1993) ("[C]laims of Actual Innocence based on newly discovered evidence have never been held to state a ground for federal habeas relief absent an independent constitutional violation occurring in the course of the underlying state criminal proceeding."). In other words, it is arguably not violative of the Constitution to imprison or (perhaps) even to execute an individual who is factually innocent of the crime for which he was convicted.

evidence. For example, a state might have a Court rule that allows for introduction of new evidence up to two years after trial, a Post-Conviction Procedure Act that allows for introduction of new evidence up to five years later, and a Writ of Coram Nobis that allows introduction of new evidence in the interest of justice with no time limit. Each of these avenues to introduce new evidence might have slightly different tests, some more stringent and some less. For purposes of this analysis, staff always deferred to the most expansive time limit where a remedy was available. In the hypothetical example above, for that state "No Time Limit" would be listed and the avenue of relief would be "Writ of Coram Nobis."

In addition, some states have entirely different processes, standards, and timelines for different kinds of cases and different types of evidence. For the purposes of this analysis, the Crime Commission research is limited to the new evidence in the broadest category of a generic criminal case. Therefore, for states with different processes, the information contained in the analysis is for non-DNA evidence in a non-capital case.

After considerable research and conversation with state experts, it became apparent that in some states, the time limits and procedures listed in either court rules or the state Code did not represent common post-conviction practice, and in some instances had even been overruled by case law. In those states, the supreme court of the state had constitutional authority to set forth court procedures. Although the legislature had enacted a statutory time limit, the supreme court had held such a statute to be procedural in nature, and therefore not binding upon the courts. In a few states, experts commented that trial judges had been known to disregard statutory time limits, although there was no clear authority for them to do so.

As the above indicates, the topic of post-conviction relief is extremely complex. Different states will appear to have similar methods for handling claims of newly discovered evidence, but a closer examination reveals that each handles similar statutory language in an entirely different manner. For example, one state might create by statute a "post-Conviction Relief Act," which expressly abolishes all other forms of belated appeals or post-conviction remedies. In a second state, the state supreme court might hold that an identical Post-Conviction Relief Act only abolishes criminal appeals and actions; defendants could continue to make use of a new trial motion pursuant to Civil Court Rules.

Additionally, in some states, multiple avenues exist through which new evidence can be introduced, without time limits, but outside of any specific relief mechanism. The statute or court rule discusses the introduction of new evidence, but does not state anything about the court granting relief. Presumably, after the evidence is entered on the record, relief can then be sought, but only through another avenue. (In one state, this was through a common law Writ that can be applied "in the interests of justice.")

Finally, staff analysis found that some states do not have definite answers to these questions. Their post-conviction relief procedures so rarely proceed past the petition stage that there is no direct case law on point to give further guidance as to how specific

tests or statutory phrases are to be interpreted. In at least one state, it appears are such petitions are almost never filed.

Staff analysis concentrated upon the actual practices of the states. The results were a surprising mixture of statutes, court rules, case law, common law writs, and even observations that trial judges would occasionally bend or ignore time limits. The structured telephone interviews were essential in helping to determine whether certain statutes were relevant, or even followed. For purposes of this study, staff strongly deferred to the interviewees' opinions, due to their extensive practical knowledge of post-conviction relief mechanisms in their own states. If an interviewee dismissed a statute as irrelevant, staff would attempt to double-check and sometimes triple-check such an assertion. For some states, more than one person was contacted.[18]

Findings

As Table 1 illustrates, a chronologically expansive view of introducing newly discovered evidence reveals that 38 states have no time limit for the introduction of new evidence. These numbers include relief based on the new evidence available through statute, court rule, case law, state habeas, and common law Writs, as well as common practice exceptions (such as "in the interest of justice"). As will be noted, the number of states with no time limitations is higher than previous analyses. This is due to the more expansive criteria used here, as well as the input from experts familiar with the intricacies of their states' procedures.

Table 1:
Other State Time Limitations for Newly Discovered Evidence

No Time Limit	38 States
3 Years	1 State
2 Years	7 States
1 Year	1 State
90 Days	1 State
25 Days	1 State
21 Days	1 State

Source: Virginia State Crime Commission analysis of other state mechanisms for post-conviction relief, May 2003.

For each state, authority for courts to receive newly discovered evidence stems from a variety of sources. In this analysis, research showed the common time limits

[18] Examples of persons contacted from other states were: Chief Assistant Attorney General, Supervising Deputy Attorney General – Criminal Division, Director of Criminal Appellate Section, Senior Assistant to the Chief State's Attorney, Chief Deputy District Attorney, Assistant Deputy District Attorney, Appellate Services Bureau Chief, Chief of Criminal Bureau, Counsel to the Criminal Division, Special Deputy Attorney General, Chief of Criminal Appeals, Assistant Chief of the Post-Conviction Relief Act, and Director of Government Relations – District Attorney Association.

created in 23 states through statute alone, in 18 states through court rules, in 3 states by a combination of court rules and statue, in four states through case law modifying and extending other avenues, and in two states through habeas relief. (In those states, habeas is not only the sole means of seeking relief, but has been statutorily modified to allow claims of innocence based upon new evidence). While some states may have other avenues for relief in addition to the one listed, the figures in Table 1 represent the procedure which has the lengthiest time limit.[19] A complete analysis can be found in Attachment 3.

Additionally, specific standards and proceedings regarding the introduction of newly discovered evidence were also researched by staff. These proceedings include: ultimate relief granted by the states, procedures for introducing new evidence, legal representation, legal test criteria and the burden of proof required. Summary findings for the 50 states can be found in Table 2. Attachments 4-7 detail the findings for each state with regards to the standards and procedures summarized in Table 2.[20]

Table 2: Other State Standards and Procedures	
Ultimate Relief Granted	
43 States	New Trial
27 States	Vacate Conviction
23 States	New Sentence
Procedure for Introducing New Evidence	
47 States	Petition Filed in Trial Court
44 States	Allow for Summary Dismissal
39 States	Summary Dismissal is Appealable
Legal Representation	
40 States	Allow for Court Appointed Counsel
27 States	Appoint Counsel After Filing of Petition
38 States	Prosecutor/District Attorney Represents State
Legal Test Criteria	
35 States	Evidence Discovered Since Trial
32 States	Could Not Have Been Discovered Through Due Diligence
24 States	Must be Material
29 States	Likely to Produce Different Verdict
25 States	Not Merely Cumulative, Corroborative, or Collateral[21]
Burden of Proof	
17 States	Explicitly Specify "Preponderance of Evidence"

Source: Virginia State Crime Commission analysis of other state mechanisms for post-conviction relief, May 2003.

[19] Virginia State Crime Commission, 21 Day Rule Task Force, Table (Avenues for Introduction of New Evidence (2003)). *See* Attachment 3.

[20] Virginia State Crime Commission, 21 Day Rule Task Force, Table (Ultimate Relief Granted (2003)). *See* Attachment 4. Virginia State Crime Commission, 21 Day Rule Task Force, Table (Procedure for Introducing New Evidence (2003)). *See* Attachment 5. Virginia State Crime Commission, 21 Day Rule Task Force, Table (Legal Representation (2003)). *See* Attachment 6. Virginia State Crime Commission, 21 Day Rule Task Force, Table (Legal Test Criteria and Burden of Proof (2003)). *See* Attachment 7.

[21] Pauley v. Commonwealth, 151 Va. 510 (1928).

VI. Virginia and Actual Innocence

Virginia's "21-day Rule" is actually a procedural rule promulgated by the Supreme Court of Virginia.[22] The rule requires all final judgments to "remain under the control of the trial court and subject to be modified, vacated, or suspended for twenty-one days after the date of entry, and no longer."[23] The rules of the Supreme Court of Virginia are promulgated by the court itself and are not subject to legislative review and possible amendment as are the Federal Rules of Criminal and Civil Procedure in the Federal System.[24] However, these procedural rules are not to conflict with legislation passed by the Virginia General Assembly.[25]

Since 2000, the Supreme Court of Virginia has intimated that it would modify the 21-Day rule on at least two occasions.[26] It was these intimations that, at least in part, served as the impetus for legislation creating the Writ of Actual Innocence based on DNA evidence and the proposed need for a Writ of Actual Innocence based on Non-biological evidence.

Like many other states, Virginia also struggled with the pervasive use of DNA technology and its application to convictions occurring before recent advances in this field. During the 2001 General Assembly Session, the Virginia State Crime Commission proposed a "Writ of Actual Innocence" that provided for the storage and testing of biological evidence, and began the process of amending the Constitution of Virginia to allow the Supreme Court to have jurisdiction over claims of "actual innocence."[27]

Although the passage of the legislation enabling this writ and the constitutional amendment may have addressed the issue of DNA evidence and the "actual innocence" problem, there were several areas left untouched. The problem remained of how an incarcerated individual who maintained his innocence and had newly discovered evidence supporting this claim, could prove his innocence if the new evidence was not biological in nature. For individuals who did not have this type of evidence, the Writ of Actual Innocence based on DNA evidence meant nothing. Thus, the Virginia State Crime Commission began in Summer 2003 studying possibilities for expanded post-conviction relief.

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[22] *Id*.
[23] *Id*.
[24] V.A. Const. art. VI, § 5 ("The Supreme Court shall have the authority to make rules governing the course of appeals and the practice and procedures to be used in the courts of the Commonwealth, but such rules shall not be in conflict with the general law as the same shall, from time to time, be established by the General Assembly.").
[25] *Id*.
[26] *See supra* note 8.
[27] V.A. Const. art. VI, § 1 ("The 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."). This amendment was ratified November 5, 2002, by the people of the Commonwealth of Virginia during a general election. The amendment inserted after "mandamus, and prohibition" included the words, "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."

Genesis of the Proposed Legal Test for Non-Biological Evidence

Although Virginia has never had a post-conviction relief mechanism for the introduction of newly-discovered evidence, courts in the Commonwealth have long applied a strict standard for new trial motions based on such evidence.[28] In Pauley v. Commonwealth, the Virginia Supreme Court announced the suspicion with which it would view any attempts to disturb a verdict or judgment of conviction[29] and the ways in which the rules of court would apply.[30] The legal test announced by the court included four distinct inquiries.[31]

The first requirement was that the "evidence must have been discovered since the trial."[32] In this way, evidence discovered before the close of trial but ruled inadmissible, or evidence found before the trial that was not presented to the court but was withheld for tactical reasons, would not be accepted.

After the evidence was shown to be newly-discovered, it further had to be shown that the evidence "could not, by the exercise of diligence, have been discovered before the trial terminated."[33] The concept of due diligence[34] in this context refers not only to due diligence exercised by the attorney, but it also describes the standard of care that must be exercised by the defendant.[35] In this way, if either the defendant or the defendant's attorney could have discovered the evidence through the exercise of due

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[28] *See* Pauley v. Commonwealth, 151 Va. 510 (1928).

[29] *See* 151 Va. at 518. This decision announced that:

> [T]he policy of the law is to give to every litigant one, and only one, opportunity of presenting his case to the jury or before the court, and when this has been had, the results of the trial will not usually be disturbed unless the party moving can place himself within the rules as frequently announced by the Supreme Court.

[30] *Id*.

[31] *See* 151 Va. at 518. The Legal Test articulated by the Virginia Supreme Court required that four factors be met:

> 1. The evidence must have been discovered since the trial. 2. It must be such as could not, by the exercise of diligence, have been discovered before the trial terminated. 3. It must be material, and such as ought to produce a different result on the next trial. 4. It must not be merely cumulative, corroborative or collateral.

(internal quotation marks omitted).

[32] *Id*.

[33] *Id*.

[34] Black's Law Dictionary (7th ed. 1999) (According to Black's Law Dictionary, due diligence is defined as "[t]he diligence reasonably expected from, and ordinarily exercised by, a person who seeks to satisfy a legal requirement or to discharge an obligation.").

[35] The exercise of due diligence is a prerequisite for introducing newly-discovered evidence. Also, both a defendant and his attorney are required to exercise this level of diligence in searching for and discovering evidence. Therefore, under this requirement, the anomalous situation is created where a defendant may bring a claim of ineffective assistance of counsel against his attorney for failure to exercise due diligence, but if the defendant failed to exercise due diligence, evidence that showed innocence would be barred from judicial consideration. *See also* U.S. Const. amend. VI ("In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State … to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense.").

diligence, but did not, then the fact that the evidence was not discovered until after the trial had terminated is immaterial.

The third requirement for newly-discovered evidence is that "[i]t must be material, and such as ought to produce a different result on the next trial."[36] Beyond requiring that the evidence be material, this legal prong also contemplates the legal burden of proof that will be required.[37] Therefore, the materiality of the newly-discovered evidence is tested by the court in light of the effect that the evidence would have if the defendant were able to introduce the evidence in a new trial.[38]

The final requirement was that the newly discovered evidence "must not be merely cumulative, corroborative or collateral."[39] Implicitly, this requirement emphasizes the importance of the appellate court examining the newly-discovered evidence in light of the trial record.[40] The concern addressed by this prong is that the appellate court not have to re-examine unsuccessful theories previously advanced by the defendant at trial.[41]

This legal test has previously been used by Virginia courts to evaluate newly-discovered evidence found within 21 days of the end of the trial and served as a basis for the Writ of Actual Innocence based on non-biological evidence test.

VII. Proposal for a Writ of Actual Innocence Based on Non-biological Evidence

The Crime Commission addressed five areas in the proposed legislation: procedural issues; contents of the petition; evidence; burden of proof, and additional hearings.

Procedural Issues

As for the procedural issues, the 21 Day Rule Task Force recommended that petitions should be filed in the Court of Appeals because this Court is empowered to hear cases by panel. The Writ of Actual Innocence based on DNA Evidence provided that all petitions for a writ were to be filed in the Supreme Court of Virginia.[42] However, the Task Force determined that the Writ of Actual Innocence based on Non-biological Evidence should be first reviewed by the Court of Appeals. From the inception of the task force, legislators and judges on the task force emphasized the importance of the reviewing court's authority to be able to summarily dismiss non-conforming petitions. Therefore, as recommended in the Crime Commission's proposed bill, the Virginia Court of Appeals may dismiss the petition before receiving a response from the Attorney

[36] Pauley v. Commonwealth, 151 Va. at 518 (1928).
[37] *Id.*
[38] *Id.*
[39] *Id.*
[40] *Id.*
[41] *Id.*
[42] *See* 2001 Va. Ch. 874, creating Va. Code ann. §§ 19.2-270.4:1, 19.2-327.1-6; *see also supra* note 9.

General's office. If the Court decides not to summarily dismiss, it will then notify the Attorney General that a response is required. In this situation, a petitioner would be entitled to court appointed counsel if his/her petition is not summarily dismissed. If necessary, the Court could remand the case to the trial court for additional evidence to be taken.

Any person convicted of a felony may apply for a Writ. Even someone not incarcerated may file, which makes this different from the Writ of Actual Innocence based on DNA evidence. However, if someone pled guilty, he would not be able to make use of this Writ. According to the Crime Commission's research, none of the thirty-eight states with no time limit foreclosed a remedy to those that had pled guilty at trial. Indeed, this requirement was not found in any of the 49 other state's post-conviction relief procedures.

There is no time deadline for filing the Writ, but filing may not be used to delay or stay an execution. Once a Writ of Actual Innocence based on Non-biological evidence is filed, the remedies available to a petitioner are having the conviction vacated, or if guilty of a lesser included offense, a new sentencing.

Contents of the Petition

The legal test formulated by the 21-day Rule Task Force and adopted by the Crime Commission requires 8 legal prongs to be met in order for an individual to succeed on a claim of "actual innocence." Under the proposed legislation, the petitioner must allege all of the following in a petition:

(i) the crime for which the petitioner was convicted, and that such conviction was upon a plea of not guilty;

(ii) that the petitioner is actually innocent of the crime for which he was convicted;

(iii) an exact description of the newly discovered evidence supporting the allegation of innocence;

(iv) that the newly discovered evidence was not previously known or available to the petitioner or his trial attorney of record at the time the conviction became final in the circuit court;

(v) the date the newly discovered evidence became known or available to the petitioner, and the circumstances under which it was discovered;

(vi) that the newly discovered evidence is such as could not, by the exercise of diligence, have been discovered or obtained before the conviction became final;

(vii) the newly discovered evidence is material and when considered with all of the other evidence in the current record, will prove that no rational trier of fact could have found proof of guilt beyond a reasonable doubt; and,

(viii) the newly discovered evidence is not merely cumulative, corroborative or collateral.

The petitioner must prove all of these prongs of the test such that, in consideration of all of the other evidence that was admitted at trial, that "no rational trier of fact could

have found proof of guilt beyond a reasonable doubt" had the newly-discovered evidence been available at the petitioner's original trial. Additionally, the petition must include: all relevant allegations of fact; all relevant documents, affidavits, and test results; and, all previous records, applications and appeals.

Evidence

The 21 Day Rule Task Force proposed that there can be no limits to the types of evidence proposed. However, human biological evidence may only be used in conjunction with other evidence. If the evidence consists solely of DNA results, the Writ of Actual Innocence would be the remedy. The Task Force also proposed that the burden of proof for the defendant would be the clear and convincing standard, and no rational trier of fact could have found proof of guilty beyond a reasonable doubt.

Burden of Proof

The 21-day Task Force determined that the burden of proof by which each individual prong of the legal test would have to be shown would be clear and convincing evidence. Even though this standard seems facially less than the normal burden of proof in a criminal proceeding, the proposed legislation goes on to require that there also be a showing that "no rational trier of fact could have found proof of guilt beyond a reasonable doubt." In this way, in reviewing a petition for the Writ the Virginia Court of Appeals will necessarily have to read the "no rational trier of fact" standard into the requisite burden proof of clear and convincing evidence. Thus, the burden of proof on the petitioner is so high a spurious claim would not survive summary dismissal – much less merit relief under the Writ.

Additional Hearings

Under this proposal, either party would be able to appeal the final decision rendered by the Court of Appeals. Under current law, both the Commonwealth and the defendant could petition for an appeal to the Supreme Court. However, any such appeal would be discretionary. Additionally, under this proposal there would be no possibility for habeas suits or other causes of actions if the petition were unsuccessful.

In conclusion, the Virginia State Crime Commission's proposed 21 Day Rule bill is modeled after Virginia's existing Writ of Actual Innocence based on DNA evidence. It uses the same high level of proof that must be met in order to obtain relief. Specifically, the bill states that "no rational trier of fact could have found proof of guilt beyond a reasonable doubt. However, unlike the Writ of Actual Innocence, the petitioner must have originally pled not guilty. The bill sets forth stringent requirements as to what evidence may be sued in support of such a writ. For example, the evidence must have been previously unknown or unavailable to petitioner or his lawyer at the time the conviction became final. Additionally, the evidence could not have been previously discovered by the exercise of due diligence and it must be material. Evidence that is merely cumulative, corroborative or collateral will be insufficient.

VIII. Study Recommendations

Senate Bill 1143, introduced during the 2003 Virginia General Assembly Session, extended the timeframe for the introduction of newly discovered evidence from 21 to 90 days through statute.[43] This legislation passed with a delayed enactment clause allowing study of the issue by the Crime Commission. Consequently, the Virginia State Crime Commission formed a 22 person task force to examine this issue and draft legislation. The following recommendations of the Task Force were agreed to by the Virginia State Crime Commission and sponsored through legislation:[44]

Decisions Regarding Filing of Petitions

- Petitions should be filed in the Court of Appeals;
- The Court of Appeals is empowered to decide these cases by panel; and,
- If necessary, the Court of Appeals may remand the case to a trial court for evidence to be taken.

Regarding Eligibility for Writ Applications

- Any person convicted of a felony may apply for a Writ;
- Even someone not incarcerated may file; and,
- If someone pleads guilty, he would not be able to make use of this Writ.

Decisions Regarding Available Remedies To Petitioner

- Having the conviction vacated; or,
- If guilty of a lesser included offense, a new sentencing.

Decisions Regarding Time Deadline for Filing

- There is no deadline for filing a Writ of Actual Innocence based on Non-biological evidence; however,
- Filing may not be used to delay or stay an execution.

Decisions Regarding the Ability to Summarily Dismiss Petitions

- The Court of Appeals has the power to summarily dismiss the petition;
- The Court of Appeals may dismiss before receiving a response from the Attorney General's office; and,
- If the Court of Appeals decides not to summarily dismiss, it will then notify the Attorney General that a response is required.

Decisions Regarding Court-Appointed Counsel

- Petitioner is entitled to court-appointed counsel if his/her petition is not summarily dismissed;
- The Court of Appeals may, in its discretion, appoint counsel prior to deciding summary dismissal; and,

[43] Senate Bill 1143 (2003) and 2003 Va. Acts ch. 1017.
[44] Senate Bill 333 (2004). *See* Attachment 1 (a).

- A Public Defender may be appointed, as well as a court-appointed attorney in private practice.

Decisions Regarding Contents of Petition and Elements the Petitioner Must Prove to Obtain Relief

- Crime for which he was convicted;
- That petitioner is actually innocent;
- Exact description of the new evidence;
- Evidence was not known or available to defendant or his attorney;
- The date and circumstances under which the evidence became known;
- The evidence could not have been discovered through due diligence prior to the conviction becoming final;
- The evidence is material, and will prove no rational trier of fact could have found proof of guilt beyond a reasonable doubt; and,
- The evidence is not merely cumulative, corroborative or collateral.

Decisions Regarding What Petition Must Include

- All relevant allegations of fact;
- All relevant documents, affidavits, and test results; and,
- All previous records, applications and appeals.

Decisions Regarding Types of Evidence

- There are no limits on the types of evidence that may be used to support a claim, but human biological evidence may only be used in conjunction with other evidence.
- If the evidence consists solely of DNA results, Writ of Actual Innocence would be remedy.

Decisions on Burden of Proof for the Defendant

- The burden of proof for the defendant is a clear and convincing standard; and,
- No rational trier of fact could have found proof of guilt beyond a reasonable doubt.

Decisions Regarding Additional Hearings

- Both the Commonwealth of Virginia and the defendant could petition for an appeal the decision rendered by the Court of Appeals to the Supreme Court of Virginia;
- Any such appeal would be discretionary; and,
- There would be no possibility for habeas suits, or other causes of action.

These recommendations were incorporated into Senate Bill 333 (Stolle),[45] which subsequently passed the 2004 Virginia General Assembly with minor changes.[46]

[45] Senate Bill 333 (2004). *See* Attachment 1 (a).
[46] 2004 Va. Acts ch. 1024. *See* Attachment 2.

IX. Acknowledgements

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

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Office of the Executive Secretary
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Honorable William G. Petty

Honorable Charles S. Sharp

Supreme Court of Virginia
Honorable Barbara M. Keenan
Honorable Leroy Rountree Hassell, Sr., Chief Justice

Virginia Court of Appeals
Honorable Johanna L. Fitzpatrick
Honorable Robert J. Humphreys

Virginia House of Delegates
Delegate David B. Albo
Delegate Robert B. Bell
Delegate H. Morgan Griffith
Delegate Terry G. Kilgore
Delegate Robert F. McDonnell
Delegate Kenneth R. Melvin
Delegate Brian J. Moran
Speaker William J. Howell

Virginia Indigent Defense Commission
Mr. Richard Goemann, Executive Director

Virginia Senate
Senator Janet D. Howell
Senator Thomas K. Norment, Jr.
Senator Kenneth W. Stolle

Attachment 1

Issuance of writ of actual innocence based on non-biological evidence

Notwithstanding any other provision of law or rule of court, upon a petition of a person who was convicted of a felony upon a plea of not guilty, the Court of Appeals shall have the authority to issue writs under this chapter. The writ shall lie to the court that entered the conviction; and that court shall have the authority to conduct hearings, as provided for in this chapter, on such a petition as directed by order from the Court of Appeals. In accordance with §§ 17.1-411 and 19.2-317, either party may appeal a final decision of the Court of Appeals to the Supreme Court of Virginia. Upon an appeal from the Court of Appeals, the Supreme Court of Virginia shall have the authority to issue writs in accordance with the provisions of this Chapter.

Contents and form of the petition based on previously unknown evidence of actual innocence

A. The petitioner shall allege categorically and with specificity, under oath, all of the following: (i) the crime for which the petitioner was convicted; (ii) that the petitioner is actually innocent of the crime for which he was convicted; (iii) an exact description of the new evidence supporting the allegation of innocence; (iv) that the evidence was not previously known or available to the petitioner or his trial attorney of record at the time the conviction became final in the circuit court; (v) the date the new evidence became known to the defendant, and the circumstances under which it was discovered; (vi) that the new evidence is such as could not, by the exercise of diligence, have been discovered before the conviction became final; (vii) the new evidence is material and will prove that no rational trier of fact could have found proof of guilt beyond a reasonable doubt; and (viii) the new evidence is not merely cumulative, corroborative or collateral. Nothing in this chapter shall constitute grounds to delay setting an execution date pursuant to § 53.1-232.1 or to grant a stay of execution that has been set pursuant to § 53.1-232.1 (iii) or (iv). Human biological evidence may not be used as the sole basis for seeking relief under this Writ, but may be used in conjunction with other evidence.

B. Such petition shall contain all relevant allegations of facts that are known to the petitioner at the time of filing, shall be accompanied by all relevant documents, affidavits and test results, and shall enumerate and include all relevant previous records, applications, petitions, appeals and their dispositions. The petition shall be filed on a form provided by the Supreme Court. If the petitioner fails to submit a completed form, the Court of Appeals may dismiss the petition or return the petition to the prisoner pending the completion of such form. The petitioner shall be responsible for all statements contained in the petition. Any false statement in the petition, if such statement is knowingly or willfully made, shall be a ground for prosecution and conviction of perjury as provided for in § 18.2-434.

C. In cases brought by counsel for the petitioner, the Court of Appeals shall not accept the petition unless it is accompanied by a duly executed return of service in the form of a verification that a copy of the petition and all attachments has been served on the attorney for the Commonwealth of the jurisdiction where the conviction occurred and the Attorney General or an acceptance of service signed by these officials, or any combination thereof. In cases brought by petitioners pro se, the Court of Appeals shall not accept the petition unless it is accompanied by a certificate that a copy of the petition and all attachments has been sent, by certified mail, to the attorney for the Commonwealth of the jurisdiction where the conviction occurred and the Attorney General. If the Court of Appeals does not summarily dismiss the petition, it shall notify in writing the Attorney General, the attorney for the Commonwealth, and the petitioner. The Attorney General shall have 60 days after receipt of such notice in which to file a response to the petition; however, nothing shall prevent the Attorney General from filing an earlier response. The response may contain a proffer of any evidence pertaining to the guilt of the defendant that is not included in the record of the case, including evidence that was suppressed at trial.

D. The Court of Appeals may, when the case has been before a trial or appellate court, inspect the record of any trial or appellate court action, and the Court may, in any case, award a writ of certiorari to the clerk of the respective court below, and have brought before the Court the whole record or any part of any record. If, in the judgment of the Court, the petition fails to state a claim, or if the assertions of newly discovered evidence, even if true, would fail to qualify for the granting of relief under this Chapter, the Court may dismiss the petition summarily, without any hearings or a response from the Attorney General.

E. In any petition filed pursuant to this chapter that is not summarily dismissed, the defendant is entitled to representation by counsel subject to the provisions of Article 3 (§ 19.2-157 et seq.) and Article 4 (§ 19.2-163.1 et seq.) of Chapter 10 of this title. The Court of Appeals may, in its discretion, appoint counsel prior to deciding whether a petition should be summarily dismissed.

Determination by the Court of Appeals for findings of fact by the circuit court.

If the Court of Appeals determines from the petition, from any hearing on the petition, from a review of the records of the case, or from any response from the Attorney General that a resolution of the case requires further development of the facts under this chapter, the court may order the circuit court to conduct a hearing within ninety days after the order has been issued to certify findings of fact with respect to such issues as the Court of Appeals shall direct. The record and certified findings of fact of the circuit court shall be filed in the Court of Appeals within thirty days after the hearing is concluded. The petitioner or his attorney of record, the attorney for the Commonwealth and the Attorney General shall be served a copy of the order stating the specific purpose and evidence for which the hearing has been ordered.

Relief under writ.

Upon consideration of the petition, the response by the Commonwealth, previous records of the case, the record of any hearing held under this chapter and if applicable, any findings certified from the circuit court pursuant to an order issued under this chapter, the Court of Appeals, if it has not already summarily dismissed the petition, shall either dismiss the petition for failure to state a claim or assert grounds upon which relief shall be granted; or upon a hearing the Court shall (i) dismiss the petition for failure to establish allegations sufficient to justify the issuance of the writ, or (ii) only upon a finding that the petitioner has proven by clear and convincing evidence all of the allegations contained in clauses (iv) through (viii) of **THE SECOND- TO-LAST STATUTE [insert appropriate statute number]**, and upon a finding that no rational trier of fact could have found proof of guilt beyond a reasonable doubt, grant the writ, and vacate the conviction, or in the event that the Court finds that no rational trier of fact could have found sufficient evidence beyond a reasonable doubt as to one or more elements of the offense for which the petitioner was convicted, but the Court finds that there remains in the original trial record evidence sufficient to find the petitioner guilty beyond a reasonable doubt of a lesser included offense, the court shall modify the conviction accordingly and remand the case to the circuit court for resentencing. The burden of proof in a proceeding brought pursuant to this chapter shall be upon the convicted person seeking relief.

Claims of relief.

An action under this chapter or the performance of any attorney representing the petitioner under this chapter shall not form the basis for relief in any habeas corpus proceeding. Nothing in this chapter shall create any cause of action for damages against the Commonwealth or any of its political subdivisions or any officers, employees or agents of the Commonwealth or its political subdivisions.

NOTE: Under §§ 17.1-411 and 19.2-317, both the petitioner and the Commonwealth would have the ability to petition for an appeal to the Supreme Court after the Court of Appeals had either dismissed a petition or granted relief.

Attachment 1(a)

040776134

SENATE BILL NO. 333

Offered January 14, 2004

Prefiled January 14, 2004

A BILL to amend the Code of Virginia by adding in Title 19.2 a chapter numbered 19.3, consisting of sections numbered 19.2-327.10 through 19.2-327.14, relating to post-conviction relief.

Patrons—Stolle, Howell and Norment; Delegates: Albo, Kilgore, McDonnell and Moran

Referred to Committee for Courts of Justice

Be it enacted by the General Assembly of Virginia:

1. That the Code of Virginia is amended by adding in Title 19.2 a chapter numbered 19.3, consisting of sections numbered 19.2-327.10 through 19.2-327.14, as follows:

CHAPTER 19.3.

ISSUANCE OF WRIT OF ACTUAL INNOCENCE BASED ON NONBIOLOGICAL EVIDENCE.

§ 19.2-327.10. Issuance of writ of actual innocence based on nonbiological evidence.

Notwithstanding any other provision of law or rule of court, upon a petition of a person who was convicted of a felony upon a plea of not guilty, the Court of Appeals shall have the authority to issue writs of actual innocence under this chapter. The writ shall lie to the court that entered the conviction; and that court shall have the authority to conduct hearings, as provided for in this chapter, on such a petition as directed by order from the Court of Appeals. In accordance with §§ 17.1-411 and 19.2-317, either party may appeal a final decision of the Court of Appeals to the Supreme Court of Virginia. Upon an appeal from the Court of Appeals, the Supreme Court of Virginia shall have the authority to issue writs in accordance with the provisions of this chapter.

§ 19.2-327.11. Contents and form of the petition based on newly discovered evidence of actual innocence.

A. The petitioner shall allege categorically and with specificity, under oath, all of the following: (i) the crime for which the petitioner was convicted, and that such conviction was upon a plea of not guilty; (ii) that the petitioner is actually innocent of the crime for which he was convicted; (iii) an exact description of the newly discovered evidence supporting the allegation of innocence; (iv) that the newly discovered evidence was not previously known or available to the petitioner or his trial attorney of record at the time the conviction became final in the circuit court; (v) the date the newly discovered evidence became known or available to the petitioner, and the circumstances under which it was discovered; (vi) that the newly discovered evidence is such as could not, by the exercise of diligence, have been discovered or obtained before the conviction became final; (vii) the newly discovered evidence is material and when considered with all of the other evidence in the current record, will prove that no rational trier of fact could have found proof of guilt beyond a reasonable doubt; and (viii) the newly discovered evidence is not merely cumulative, corroborative or collateral. Nothing in this chapter shall constitute grounds to delay setting an execution date pursuant to § 53.1-232.1 or to grant a stay of execution that has been set pursuant to clause (iii) or clause (iv) of § 53.1-232.1. Human biological evidence may not be used as the sole basis for seeking relief under this writ but may be used in conjunction with other evidence.

B. Such petition shall contain all relevant allegations of facts that are known to the petitioner at the time of filing, shall be accompanied by all relevant documents, affidavits and test results, and shall enumerate and include all relevant previous records, applications, petitions, appeals and their dispositions. The petition shall be filed on a form provided by the Supreme Court. If the petitioner fails to submit a completed form, the Court of Appeals may dismiss the petition or return the petition to the petitioner pending the completion of such form. Any false statement in the petition, if such statement is knowingly or willfully made, shall be a ground for prosecution of perjury as provided for in § 18.2-434.

C. In cases brought by counsel for the petitioner, the Court of Appeals shall not accept the petition unless it is accompanied by a duly executed return of service in the form of a verification that a copy of the petition and all attachments have been served on the attorney for the Commonwealth of the jurisdiction where the conviction occurred and the Attorney General, or an acceptance of service signed by these officials, or any combination thereof. In cases brought by petitioners pro se, the Court of Appeals shall not accept the petition unless it is accompanied by a certificate that a copy of the petition and all attachments have been sent, by certified mail, to the attorney for the Commonwealth of the jurisdiction where the conviction occurred and the Attorney General. If the Court of Appeals does not summarily dismiss the petition, it shall so notify in writing the Attorney General, the attorney for the Commonwealth, and the petitioner. The Attorney General shall have 60 days after receipt of such notice

in which to file a response to the petition; however, nothing shall prevent the Attorney General from filing an earlier response. The response may contain a proffer of any evidence pertaining to the guilt of the petitioner that is not included in the record of the case, including evidence that was suppressed at trial.

D. The Court of Appeals may inspect the record of any trial or appellate court action, and the Court may, in any case, award a writ of certiorari to the clerk of the respective court below, and have brought before the Court the whole record or any part of any record. If, in the judgment of the Court, the petition fails to state a claim, or if the assertions of newly discovered evidence, even if true, would fail to qualify for the granting of relief under this chapter, the Court may dismiss the petition summarily, without any hearing or a response from the Attorney General.

E. In any petition filed pursuant to this chapter that is not summarily dismissed, the defendant is entitled to representation by counsel subject to the provisions of Article 3 (§ 19.2-157 et seq.) and Article 4 (§ 19.2-163.1) of Chapter 10 of this title. The Court of Appeals may, in its discretion, appoint counsel prior to deciding whether a petition should be summarily dismissed.

§ 19.2-327.12. Determination by Court of Appeals for findings of fact by the circuit court.

If the Court of Appeals determines from the petition, from any hearing on the petition, from a review of the records of the case, or from any response from the Attorney General that a resolution of the case requires further development of the facts, the court may order the circuit court in which the order of conviction was originally entered to conduct a hearing within 90 days after the order has been issued to certify findings of fact with respect to such issues as the Court of Appeals shall direct. The record and certified findings of fact of the circuit court shall be filed in the Court of Appeals within 30 days after the hearing is concluded. The petitioner or his attorney of record, the attorney for the Commonwealth and the Attorney General shall be served a copy of the order stating the specific purpose and evidence for which the hearing has been ordered.

§ 19.2-327.13. Relief under writ.

Upon consideration of the petition, the response by the Commonwealth, previous records of the case, the record of any hearing held under this chapter and, if applicable, any findings certified from the circuit court pursuant to an order issued under this chapter, the Court of Appeals, if it has not already summarily dismissed the petition, shall either dismiss the petition for failure to state a claim or assert grounds upon which relief shall be granted; or upon a hearing the Court shall (i) dismiss the petition for failure to establish newly discovered evidence sufficient to justify the issuance of the writ, or (ii) only upon a finding that the petitioner has proven by clear and convincing evidence all of the allegations contained in clauses (iv) through (viii) of subsection A of § 19.2-327.11, and upon a finding that no rational trier of fact could have found proof of guilt beyond a reasonable doubt, grant the writ, and vacate the conviction, or in the event that the Court finds that no rational trier of fact could have found sufficient evidence beyond a reasonable doubt as to one or more elements of the offense for which the petitioner was convicted, but the Court finds that there remains in the original trial record evidence sufficient to find the petitioner guilty beyond a reasonable doubt of a lesser included offense, the court shall modify the order of conviction accordingly and remand the case to the circuit court for resentencing. The burden of proof in a proceeding brought pursuant to this chapter shall be upon the convicted person seeking relief.

§ 19.2-327.14. Claims of relief.

An action under this chapter or the actions of any attorney representing the petitioner under this chapter shall not form the basis for relief in any habeas corpus proceeding. Nothing in this chapter shall create any cause of action for damages against the Commonwealth or any of its political subdivisions.

Attachment 2

VIRGINIA ACTS OF ASSEMBLY -- 2004 RECONVENED SESSION

CHAPTER 1024

An Act to amend the Code of Virginia by adding in Title 19.2 a chapter numbered 19.3, consisting of sections numbered 19.2-327.10 through 19.2-327.14, relating to post-conviction relief.

[S 333]

Approved May 21, 2004

Be it enacted by the General Assembly of Virginia:

1. That the Code of Virginia is amended by adding in Title 19.2 a chapter numbered 19.3, consisting of sections numbered 19.2-327.10 through 19.2-327.14, as follows:

CHAPTER 19.3.

ISSUANCE OF WRIT OF ACTUAL INNOCENCE BASED ON NONBIOLOGICAL EVIDENCE.

§ 19.2-327.10. Issuance of writ of actual innocence based on nonbiological evidence.

Notwithstanding any other provision of law or rule of court, upon a petition of a person who was convicted of a felony upon a plea of not guilty, the Court of Appeals shall have the authority to issue writs of actual innocence under this chapter. Only one such writ based upon such conviction may be filed by a petitioner. The writ shall lie to the court that entered the conviction; and that court shall have the authority to conduct hearings, as provided for in this chapter, on such a petition as directed by order from the Court of Appeals. In accordance with §§ 17.1-411 and 19.2-317, either party may appeal a final decision of the Court of Appeals to the Supreme Court of Virginia. Upon an appeal from the Court of Appeals, the Supreme Court of Virginia shall have the authority to issue writs in accordance with the provisions of this chapter.

§ 19.2-327.11. Contents and form of the petition based on previously unknown or unavailable evidence of actual innocence.

A. The petitioner shall allege categorically and with specificity, under oath, all of the following: (i) the crime for which the petitioner was convicted, and that such conviction was upon a plea of not guilty; (ii) that the petitioner is actually innocent of the crime for which he was convicted; (iii) an exact description of the previously unknown or unavailable evidence supporting the allegation of innocence; (iv) that such evidence was previously unknown or unavailable to the petitioner or his trial attorney of record at the time the conviction became final in the circuit court; (v) the date the previously unknown or unavailable evidence became known or available to the petitioner, and the circumstances under which it was discovered; (vi) that the previously unknown or unavailable evidence is such as could not, by the exercise of diligence, have been discovered or obtained before the expiration of 21 days following entry of the final order of conviction by the court; (vii) the previously unknown or unavailable evidence is material and when considered with all of the other evidence in the current record, will prove that no rational trier of fact could have found proof of guilt beyond a reasonable doubt; and (viii) the previously unknown or unavailable evidence is not merely cumulative, corroborative or collateral. Nothing in this chapter shall constitute grounds to delay setting an execution date pursuant to § 53.1-232.1 or to grant a stay of execution that has been set pursuant to clause (iii) or clause (iv) of § 53.1-232.1 or to delay or stay any other post-conviction appeals or petitions to any court. Human biological evidence may not be used as the sole basis for seeking relief under this writ but may be used in conjunction with other evidence.

B. Such petition shall contain all relevant allegations of facts that are known to the petitioner at the time of filing, shall be accompanied by all relevant documents, affidavits and test results, and shall enumerate and include all relevant previous records, applications, petitions, appeals and their dispositions. The petition shall be filed on a form provided by the Supreme Court. If the petitioner fails to submit a completed form, the Court of Appeals may dismiss the petition or return the petition to the petitioner pending the completion of such form. Any false statement in the petition, if such statement is knowingly or willfully made, shall be a ground for prosecution of perjury as provided for in § 18.2-434.

C. In cases brought by counsel for the petitioner, the Court of Appeals shall not accept the petition unless it is accompanied by a duly executed return of service in the form of a verification that a copy of the petition and all attachments have been served on the attorney for the Commonwealth of the jurisdiction where the conviction occurred and the Attorney General, or an acceptance of service signed by these officials, or any combination thereof. In cases brought by petitioners pro se, the Court of Appeals shall not accept the petition unless it is accompanied by a certificate that a copy of the petition and all attachments have been sent, by certified mail, to the attorney for the Commonwealth of the jurisdiction where the conviction occurred and the Attorney General. If the Court of Appeals does not summarily dismiss the petition, it shall so notify in writing the Attorney General, the attorney for the Commonwealth, and the petitioner. The Attorney General shall have 60 days after receipt of such notice in which to file a response to the petition that may be extended for good cause shown; however, nothing

shall prevent the Attorney General from filing an earlier response. The response may contain a proffer of any evidence pertaining to the guilt of the petitioner that is not included in the record of the case, including evidence that was suppressed at trial.

D. The Court of Appeals may inspect the record of any trial or appellate court action, and the Court may, in any case, award a writ of certiorari to the clerk of the respective court below, and have brought before the Court the whole record or any part of any record. If, in the judgment of the Court, the petition fails to state a claim, or if the assertions of previously unknown or unavailable evidence, even if true, would fail to qualify for the granting of relief under this chapter, the Court may dismiss the petition summarily, without any hearing or a response from the Attorney General.

E. In any petition filed pursuant to this chapter that is not summarily dismissed, the defendant is entitled to representation by counsel subject to the provisions of Article 3 (§ 19.2-157 et seq.) and Article 4 (§ 19.2-163.1 et seq.) of Chapter 10 of this title. The Court of Appeals may, in its discretion, appoint counsel prior to deciding whether a petition should be summarily dismissed.

§ 19.2-327.12. Determination by Court of Appeals for findings of fact by the circuit court.

If the Court of Appeals determines from the petition, from any hearing on the petition, from a review of the records of the case, or from any response from the Attorney General that a resolution of the case requires further development of the facts, the court may order the circuit court in which the order of conviction was originally entered to conduct a hearing within 90 days after the order has been issued to certify findings of fact with respect to such issues as the Court of Appeals shall direct. The record and certified findings of fact of the circuit court shall be filed in the Court of Appeals within 30 days after the hearing is concluded. The petitioner or his attorney of record, the attorney for the Commonwealth and the Attorney General shall be served a copy of the order stating the specific purpose and evidence for which the hearing has been ordered.

§ 19.2-327.13. Relief under writ.

Upon consideration of the petition, the response by the Commonwealth, previous records of the case, the record of any hearing held under this chapter and, if applicable, any findings certified from the circuit court pursuant to an order issued under this chapter, the Court of Appeals, if it has not already summarily dismissed the petition, shall either dismiss the petition for failure to state a claim or assert grounds upon which relief shall be granted; or the Court shall (i) dismiss the petition for failure to establish previously unknown or unavailable evidence sufficient to justify the issuance of the writ, or (ii) only upon a finding that the petitioner has proven by clear and convincing evidence all of the allegations contained in clauses (iv) through (viii) of subsection A of § 19.2-327.11, and upon a finding that no rational trier of fact could have found proof of guilt beyond a reasonable doubt, grant the writ, and vacate the conviction, or in the event that the Court finds that no rational trier of fact could have found sufficient evidence beyond a reasonable doubt as to one or more elements of the offense for which the petitioner was convicted, but the Court finds that there remains in the original trial record evidence sufficient to find the petitioner guilty beyond a reasonable doubt of a lesser included offense, the court shall modify the order of conviction accordingly and remand the case to the circuit court for resentencing. The burden of proof in a proceeding brought pursuant to this chapter shall be upon the convicted person seeking relief.

§ 19.2-327.14. Claims of relief.

An action under this chapter or the actions of any attorney representing the petitioner under this chapter shall not form the basis for relief in any habeas corpus proceeding. Nothing in this chapter shall create any cause of action for damages against the Commonwealth or any of its political subdivisions.

2. That the Office of the Executive Secretary of the Supreme Court of Virginia shall report to the Chairmen of the Senate and House Courts of Justice Committees on January 1 of each year the number of petitions filed for writs of actual innocence pursuant to Chapter 19.3 of Title 19.2 and the dispositions thereof.

Attachment 3

Appendix 3: Avenues for Introduction of New Evidence

	Time Limit	State Statute	Court Rule	Case Law	State Habeas Statute	Notes
Alabama	NL		Rule 32.2(c) of AL Rules of Criminal Procedure			
Alaska	NL	Alaska Stat. §12.72.020 (b)(2)(a)(i) (2003)				
Arizona	90 days	Ariz. Rev. Stat. Ann. §13-4234(c) (2003)	Rule 32 of AZ Rules of Criminal Procedure			
Arkansas	NL		Rule 37.2(c) of AR Rules of Criminal Procedure	*McArty v. State* , 983 S.W.2d 418		Allows for an Error Coram Nobis for the introduction of new evidence in certain situations
California	NL				Cal. Penal Code §1473 (2003)	State Habeas is the avenue for introducing new evidence post conviction
Colorado	NL		Rule 33(c) of CO Rules of Criminal Procedure			A motion for a new trial based upon newly discovered evidence must be filed as soon after entry of judgment as the facts supporting it become known to the defendant
Connecticut	NL	Conn. Gen. Stat. §§52-470, 270, 582, (2003)		*Summerville v. Warden* , 229 Conn. 397		A substantial claim of actual innocence is cognizable by way of a petition for a writ of Habeas Corpus, even in the absence of proof by the petitioner of an antecedent constitutional violation that affected the result of his criminal trial
Delaware	2 years	Del. Code Ann. Tit. 11, §4504 (2003)	Rules 33 and 61 of DE Criminal Rules Governing the Court of Common Pleas			
Florida	NL		Rule 3.851(b) of FL Rules of Criminal Procedure			Contact said that the 2-year time limit imposed by Rule 3.851(d) can be circumvented in the interest of justice
Georgia	NL	Ga. Code Ann. §5-5-40 (2003)				General 30 day time limit is subject to extension in "extraordinary cases" according to § 5.5.40(a)
Hawaii	NL		Rule 40(1)(iv) of HI Rules of Penal Procedure			
Idaho	2 years		Rule 34 of ID Criminal Rules			
Illinois	NL	725 Ill. Comp. Stat. 5/116-1 (2003)				
Indiana	NL		Rule 1 of IN Procedure for Post-Conviction Remedies			
Iowa	NL	Iowa R. Crim. P. 2.24(2)(b)(8)				
Kansas	NL	Kan. Stat. Ann §22-3501 (2003)				Contact said that courts will sometimes waive 2-year statutory time limit in the interest of justice
Kentucky	NL		Rule 60.02 of KY Rules of Civil Procedure			

Appendix 3: Avenues for Introduction of New Evidence

	Time Limit	State Statute	Court Rule	Case Law	State Habeas Statute	Notes
Louisiana	NL	La. Code Crim. Proc. Ann. Art. 853 (2003)				
Maine	2 years		Rule 33 of ME Rules of Criminal Procedure			
Maryland	1 year		Rule 4-331 of MD Rules, Criminal Causes			Contact said trial judges will refuse to follow statute occasionally
Massachusetts	NL		Rule 30 of MA Criminal Procedure			
Michigan	NL	Mich. Comp. Laws. Ann. §770.2 (2003)				
Minnesota	NL	Minn. Stat. Ann. §590.01 (2003)				
Mississippi	NL	Miss. Code Ann. §99-39-5(2) (2003)				
Missouri	25 days		Rule 29.11 of MO Supreme Court Rules, Rules of Criminal Procedure			*But See* Mo. Rev. Stat. §§ 547.020, 547.030 where time limit is 34 days; however, contact said that the Court Rule limit governs
Montana	NL	Mont. Code Ann. §46-21-102 (2003)				
Nebraska	3 years	Neb. Rev. Stat. §29-2103 (2003)				
Nevada	2 years	Nev. Rev. Stat. Ann.176.515 (2003)				
New Hampshire	NL	N.H. Rev. Stat. Ann. §526.4 (2003)				Contact said that courts will sometimes waive statutory 3-year limit in the interest of justice
New Jersey	NL		Rule 3:22-12 of N.J. Rules Governing Criminal Practice	*State v. McQuaid,* 147 N.J. 464		Structured telephone interviews led to disparate findings, dicta in case law does mention exceptions in the interest of justice
New Mexico	NL		Rule 5-802 of N.M. Rules of Criminal Procedure for the District Courts			Almost all of the post-conviction relief is routed through the State Habeas Rule which does not require a constitutional claim to be brought
New York	NL	N.Y.C.P.L.R 440.10 (2003)				
North Carolina	NL	N.C. Gen. Stat. §15a-1415 (2003)				
North Dakota	NL	N.D. Cent. Code §29-32.1-03 (2003)				
Ohio	NL		Rule 33 of OH Rules of Criminal Procedure			

Appendix 3: Avenues for Introduction of New Evidence

	Time Limit	State Statute	Court Rule	Case Law	State Habeas Statute	Notes
Oklahoma	NL	Okla. Stat. Ann. Tit. 22, §1080 (2003)				
Oregon	2 years	Or. Rev. Stat. §138.530 and §138.535 (2003)				Per §136.535, a motion for new trial must be filed within 5 days of filing of judgment. Under §138.530 the petitioner needs constitutional error to get relief, but with newly discovered evidence Oregon courts often find ineffectiveness of counsel; that allows an avenue for the new evidence to be before the court within 2 years of judgment
Pennsylvania	NL	42 Pa. Cons. Stat. §9541 (2003)				
Rhode Island	NL	R.I. Gen. Laws §10-9.1 (2003)				
South Carolina	NL	S.C. Code Ann. §17-27-10 (2003)				
South Dakota	NL	S. D. Codified Laws §21-27-1		*Jenner v. Dooley*, 590 N.W. 2d 463		Case stands for the enlargement of State Habeas so that newly discovered evidence can be introduced after conviction
Tennessee	NL		Rule 14 of TN Rules of Appellate Procedure			
Texas	NL				Tex. Crim. Proc. Code Ann. §40.001 (2003)	Although there is generally a time limit for writs of Habeas Corpus, Actual Innocence is enumerated as an exception
Utah	NL	Utah Code Ann. §78-35-107 (2003)				
Virginia	**21 day**	**Va. Code Ann. §19.2-327.01 (2003)**				**Senate Bill 1143 (2003) effective July 1, 2004, extends the time limit to 90 days**
Vermont	2 years		Rule 33 of VT Rules of Criminal Procedure			
Washington	NL	Wash. Rev. Code §10-73-100 (2003)	Rule 16.4 of WA Rules of Appellate Procedure			
West Virginia	NL		Rule 33 of WV Rules of Criminal Procedure			
Wisconsin	NL	Wis. Stat. Ann. §974.06 (2003)				
Wyoming	2 years		Rule 33 of WY Rules of Criminal Procedure			
Totals:		23 Statute	18 Court Rule	4 Case law	2 Habeas Alone	3 Statute and Court Rule
* NL = No Time Limit						

Attachment 4

Appendix 4: Ultimate Relief Granted

	New Trial	Vacate Judgment	New Sentence
	43 of 50 States = 86%	27 of 50 States = 54%	23 of 50 States = 46%
Alabama	X	X	X
Alaska	X		
Arizona	X	X	X
Arkansas	X	X	X
California	X	X	
Colorado	X	X	X
Connecticut	X		
Delaware	X		
Florida	X	X	X
Georgia	X		
Hawaii	X	X	X
Idaho	X		
Illinois	X	X	
Indiana	X	X	X
Iowa	X	X	X
Kansas	X		
Kentucky	X		
Louisiana	X		
Maine	X		
Maryland	X	X	X
Massachusetts			
Michigan			
Minnesota	X	X	X
Mississippi	X	X	X
Missouri			

Appendix 4: Ultimate Relief Granted

	New Trial	Vacate Judgment	New Sentence
Montana	X	X	
Nebraska	X		
Nevada	X		
New Hampshire	X		
New Jersey	X	X	X
New Mexico		X	X
New York	X	X	X
North Carolina	X	X	X
North Dakota			
Ohio	X		
Oklahoma	X	X	X
Oregon	X	X	X
Pennsylvania	X	X	X
Rhode Island	X	X	X
South Carolina	X		
South Dakota			
Tennessee	X	X	X
Texas			
Utah	X	X	X
Vermont	X		
VIRGINIA	X		
Washington	X	X	X
West Virginia	X	X	
Wisconsin	X	X	X
Wyoming	X		

*In cases where "appropriate relief" is the remedy, all three boxes were checked

Attachment 5

Appendix 5: Procedure for Introducing New Evidence

	Court Where Petition is Filed	Allow for Summary Dismissal	Summary Dismissal Appealable
	47 of 50 States = 94%	44 of 50 States = 88%	39 of 44 States with S.D. = 89%
Alabama	Trial	Y	Y
Alaska	Trial	N	Y
Arizona	Trial	Y	Y
Arkansas	Trial	Y	Y
California	Trial	Y	Y
Colorado	Trial	Y	Y
Connecticut	Trial	U	U
Delaware	Trial	Y	Y
Florida	Trial	Y	Y
Georgia	Trial	Y	Y
Hawaii	Trial	Y	Y
Idaho	Trial	Y	Y
Illinois	Trial	Y	Y
Indiana	Trial	Y	Y
Iowa	Trial	Y	Y
Kansas	Supreme	Y	N
Kentucky	Trial	Y	Y
Louisiana	Trial	Y	N
Maine	Trial	Y	Y
Maryland	Trial	U	U
Massachusetts	Trial	Y	U
Michigan	Trial	Y	U
Minnesota	Trial	Y	Y
Mississippi	Supreme	Y	N
Missouri	Trial	U	U

Appendix 5: Procedure for Introducing New Evidence

	Court Where Petition is Filed	Allow for Summary Dismissal	Summary Dismissal Appealable
Montana	Trial	Y	Y
Nebraska	Trial	Y	U
Nevada	Trial	U	U
New Hampshire	Trial	Y	Y
New Jersey	Trial	N	Y
New Mexico	Trial	Y	Y
New York	Trial	Y	Y
North Carolina	Trial	Y	Y
North Dakota	Trial	Y	Y
Ohio	Trial	Y	Y
Oklahoma	Trial	Y	Y
Oregon	Trial	Y	Y
Pennsylvania	Trial	Y	Y
Rhode Island	Trial	Y	Y
South Carolina	Trial	Y	Y
South Dakota	Trial	Y	Y
Tennessee	U	Y	Y
Texas	Trial	Y	Y
Utah	Trial	Y	Y
Vermont	Trial	Y	N
VIRGINIA	**Trial**	**Y**	**Y**
Washington	Trial or Appellate	Y	Y
West Virginia	Trial	Y	Y
Wisconsin	Trial	Y	Y
Wyoming	Trial	Y	Y

Attachment 6

Appendix 6: Legal Representation

	Allow for Court Appointed Counsel	Appointed After Filing	Prosecutor/DA Represents the State
	40 of 50 States = 80%	27 of 40 States w/appointed counsel = 68%	38 of 50 States = 76%
Alabama	Y	Y	P/DA
Alaska	Y	Y	P/DA
Arizona	Y	Y	P/DA
Arkansas	Y	N	P/DA
California	Y	Y	P/DA
Colorado	Y	Y	P/DA
Connecticut	Y	U	U
Delaware	Y	U	P/DA
Florida	Y	Y	P/DA
Georgia	N	U	U
Hawaii	Y	Y	P/DA
Idaho	Y	Y	P/DA
Illinois	Y	Y	P/DA
Indiana	Y	N	P/DA
Iowa	Y	N	P/DA
Kansas	Y	U	P/DA
Kentucky	N	U	P/DA
Louisiana	Y	Y	P/DA
Maine	Y	U	AG
Maryland	Y	U	P/DA
Massachusetts	Y	N	U
Michigan	U	U	AG and P/DA*
Minnesota	U	U	P/DA
Mississippi	Y	Y	AG
Missouri	U	U	U

Appendix 6: Legal Representation

	Allow for Court Appointed Counsel	Appointed After Filing	Prosecutor/DA Represents the State
Montana	Y	U	P/DA
Nebraska	Y	Y	P/DA
Nevada	Y	Y	P/DA
New Hampshire	Y	Y	P/DA
New Jersey	Y	Y	P/DA
New Mexico	Y	Y	P/DA
New York	U	U	P/DA
North Carolina	Y	Y	P/DA
North Dakota	Y	Y	P/DA
Ohio	N	U	P/DA
Oklahoma	N	U	P/DA
Oregon	Y	Y	AG
Pennsylvania	Y	Y	P/DA
Rhode Island	Y	Y	P/DA
South Carolina	Y	Y	AG
South Dakota	Y	Y	U
Tennessee	N	U	U
Texas	U	U	U
Utah	Y	Y	AG
Vermont	Y	U	AG and P/DA*
VIRGINIA	**Y**	**N**	**P/DA**
Washington	Y	U	P/DA
West Virginia	Y	Y	P/DA
Wisconsin	Y	Y	P/DA
Wyoming	Y	Y	P/DA

Attachment 7

Appendix 7: Legal Test Criteria and Burden of Proof

	Evidence Discovered Since Trial	Could not have been discovered by Due Diligence	Must be Material	Likely to produce a different verdict at a new trial	Must not be merely cumulative, corroborative, or collateral	Burden of Proof (Preponderance of the Evidence [P of E] or Clear and Convincing [C & C])
	35 of 50 States = 70%	32 of 50 States = 64%	24 of 50 States = 48%	29 of 50 States = 58%	25 of 50 States = 50%	17 of 19 (89%) that clearly define burden require P of E while 2 of 19 (11%) require C & C
Alabama	X	X		X	X	P of E
Alaska	X	X			X	C & C
Arizona	X	X	X	X	X	P of E
Arkansas						U
California	X	X		X		P of E
Colorado	X	X	X			U
Connecticut	X	X		X	X	U
Delaware	X	X		X	X	U
Florida	X	X				U
Georgia	X	X	X		X	U
Hawaii	X	X	X	X	X	U
Idaho	X	X	X	X	X	P of E
Illinois	X		X	X	X	U
Indiana	X	X	X	X	X	P of E
Iowa	X	X	X	X	X	P of E
Kansas				X		U
Kentucky				X		U
Louisiana						U
Maine	X	X	X	X	X	P of E
Maryland	X	X				U
Massachusetts	X					U
Michigan	X	X		X	X	U
Minnesota						U
Mississippi	X	X				U
Missouri						U
Montana		X				P of E

Appendix 7: Legal Test Criteria and Burden of Proof

	Evidence Discovered Since Trial	Could not have been discovered by Due Diligence	Must be Material	Likely to produce a different verdict at a new trial	Must not be merely cumulative, corroborative, or collateral	Burden of Proof (Preponderance of the Evidence [P of E] or Clear and Convincing [C & C])
Nebraska	X	X	X	X		U
Nevada	X	X	X	X	X	U
New Hampshire	X	X	X	X	X	U
New Jersey						P of E
New Mexico						U
New York	X	X		X		P of E
North Carolina	X	X	X	X	X	P of E
North Dakota	X			X		U
Ohio	X	X	X			C & C
Oklahoma			X			U
Oregon						P of E
Pennsylvania	X			X		P of E
Rhode Island			X		X	P of E
South Carolina	X	X	X	X	X	U
South Dakota						U
Tennessee						U
Texas						U
Utah	X	X	X	X	X	P of E
Vermont	X	X	X	X	X	U
VIRGINIA	**X**	**X**	**X**	**X**	**X**	**P of E**
Washington	X	X	X	X	X	P of E
West Virginia	X	X	X	X	X	U
Wisconsin	X	X	X	X	X	U
Wyoming	X	X	X	X	X	U