

**REPORT OF THE
VIRGINIA STATE CRIME COMMISSION**

**Review and Analysis of the Virginia
Prisoner Litigation Reform Act**



**A Bill Referral Study to the
Senate Courts of Justice Committee**

**COMMONWEALTH OF VIRGINIA
RICHMOND
2005**



COMMONWEALTH of VIRGINIA

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January 11, 2005

TO: The Honorable Mark Warner, Governor of Virginia

And

Members of the Virginia General Assembly

The 2004 General Assembly, through a letter from the Senate Courts of Justice Committee requested the Virginia State Crime Commission study the Prisoner Litigation Reform Act.

Enclosed for your review and consideration is the report which has been prepared in response to this request. The Commission received assistance from all affected agencies and gratefully acknowledges their input into this report.

Respectfully submitted,

A handwritten signature in black ink, appearing to read "D. Albo", written over a horizontal line.

David B. Albo
Chairman

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Attachment 1: Senate Bill 49 (2004)

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 review of the Virginia Prisoner Litigation Reform Act pursuant to a Senate Courts of Justice Committee referral of legislation.

II. Executive Summary

During the 2004 Session of the Virginia General Assembly, Senator Henry Marsh introduced Senate Bill 49 which proposed to modify the Virginia Prisoner Litigation Reform Act. Because the Act had only been in effect for a year and a half, the Senate Courts of Justice Committee wanted to determine what impact, if any, the Act was having on prisoner litigation. The bill was continued in the Senate Courts Committee and referred by letter request to the Virginia State Crime Commission to study prior to the 2005 Session of the General Assembly.

Based on an examination of current practices under the Act, the Virginia State Crime Commission recommended not amending the Act as proposed by Senate Bill 49¹.

III. Methodology

The Virginia State Crime Commission obtained from the Attorney General’s Office a list of all civil lawsuits filed by prisoners that had been dismissed from 2003 to August 2, 2004 to determine the extent to which the Act was impacting inmates’ ability to seek relief. The Clerks of Court in the districts where those cases were dismissed were then contacted by staff to determine the nature of the lawsuits and the ultimate reason for dismissal. Additionally, phone interviews were conducted with some of the clerks for further insight into how the Act is applied.

¹ See Attachment 1 for SB 49.

IV. Background

The Virginia Prisoner Litigation Reform Act (VA. Code §8.01-689 et seq.) was passed in 2002.² The Act applies to *pro se* litigants who request *in forma pauperis* status.³ Prisoners who are represented by lawyers, or who can pay filing fees, are not subject to the Act.⁴

When a *pro se* prisoner files a lawsuit for money damages or for injunctive, declaratory or mandamus relief, he must provide a certified copy of his inmate trust account if he is going to request *in forma pauperis* status.⁵ If the inmate has had any deposits in his inmate trust account in the past six months, he must make payments, in equal installments, towards the filing fees and costs.⁶ Failure to make payments as directed results in the lawsuit being dismissed without prejudice.⁷

If a prisoner has had three previous lawsuits dismissed as frivolous or for failure to state a claim, then he is denied *in forma pauperis* status.⁸ There are two exceptions to this rule, whereby a prisoner may still be allowed to proceed *in forma pauperis*:

- if the prisoner can show he is in imminent danger of serious physical injury; or,
- if the court finds it would be a manifest injustice to deny *in forma pauperis* status, then the lawsuit can proceed.⁹

V. Case Analyses

In an effort to determine the efficacy of the Prisoner Litigation Reform Act, and see what impact, if any, it was having on the dismissal of prisoners' lawsuits, the Crime Commission staff reviewed all civil cases that it could identify as having been filed by *pro se* prisoners in state courts that were dismissed in 2003 and up through August 2, 2004.

The Crime Commission staff identified 320 inmate civil cases that were dismissed in 2003 and 294 cases that were dismissed through August in 2004. When inmates filed two or more distinct causes of action in a single filing, they were counted as more than one case. Of the total dismissed inmate cases, the most frequent type of dismissed

² 2002 VA. ACTS CH. 871.

³ VA. CODE §§ 8.01-690, 8.01-691 (MICHIE 2004).

⁴ The Act only applies to lawsuits that are filed in Virginia courts; inmate lawsuits filed in federal courts are not affected by the Act.

⁵ VA. CODE § 8.01-691 (MICHIE 2004).

⁶ VA. CODE § 8.01-691 (MICHIE 2004).

⁷ VA. CODE § 8.01-691 (MICHIE 2004).

⁸ VA. CODE § 8.01-692 (MICHIE 2004).

⁹ VA. CODE § 8.01-692 (MICHIE 2004).

lawsuit was a petition for habeas corpus relief. Forty percent (or 128 cases) of the dismissed cases in 2003 and 36% (or 105 cases) of the dismissed cases through August 2004 were for habeas corpus relief. The next most common type of lawsuit was prisoners demanding to be transferred from the local jail to the Department of Corrections. Twenty-eight percent (or 91 cases) in 2003 and forty-one percent (or 120 cases) through August 2004 were suits demanding transfer from the local jail. Another common type of dismissed lawsuit involved disputes over the computation of either “good time credits” or the total amount of time to be served:

- 16 cases in 2003; and,
- 9 cases in 2004.

The case files were also analyzed by staff to determine the specific reasons why each of these cases was dismissed. The analysis revealed that the majority of the cases were dismissed on the actual merits of the case, as opposed to a dismissal based on a procedural fault or for failure to pay court costs as instructed. A dismissal based on the merits accounted for 74% of the cases in 2003 and 82% of the cases in 2004. Other reasons for case dismissal were:

- the lawsuit was filed outside of the statute of limitations;
- the lawsuit was dismissed on a demurrer (failure to state a claim on which relief can be based); and,
- the inmate had failed to properly exhaust the prison grievance process first.

It appeared that only two cases were dismissed for failure to pay filing fees in 2003, and only one case was dismissed for this reason in 2004. However, it did not appear that any cases were dismissed because the prisoner was denied *in forma pauperis* status as a result of previous frivolous lawsuits.

The Crime Commission staff also analyzed the case files to see if any lawsuits could be identified where a prisoner had alleged some sort of threat to his physical safety, yet had had his lawsuit dismissed pursuant to the Virginia Prisoner Litigation Reform Act. No such lawsuits were found, and very few lawsuits appeared to allege physical mistreatment.¹⁰ Additionally, in 2003, no dismissed lawsuits were identified that alleged excessive force by guards, or physical injury or harassment by other inmates. One of the dismissed 2003 lawsuits did allege sexual harassment by guards; however, it was dismissed on the pleadings, not pursuant to the Act or for failure to pay court fees. As of August 2, 2004, no dismissed lawsuits were identified that alleged excessive force by guards, sexual harassment by guards, or harassment by guards or inmates.

¹⁰ It should be emphasized that only lawsuits filed in Virginia state courts were examined. The Virginia Prisoner Litigation Reform Act only applies to actions in Virginia courts; therefore, actions filed in federal court would have no bearing on this analysis.

VI. Conclusion

The Virginia Prisoner Litigation Reform Act is a very new law, having only gone into effect on July 1 of 2002. As currently drafted, there are safeguards within the Act that allow prisoners to proceed with their lawsuits if they are in imminent danger or if it would be a manifest injustice to not allow the case to proceed.

A review of the Attorney General's case files found that it does not appear that the Act is preventing *pro se* prisoners from gaining *in forma pauperis* status and proceeding on with their lawsuits. Nor does it appear that the Virginia Prisoner Litigation Reform Act is hindering the ability of inmates to pursue their legal rights in court. Additionally, clerks that were interviewed anecdotally stated prisoners were routinely granted *in forma pauperis* status by judges, but were not required to follow payment plans.

VII. Recommendation

The Virginia State Crime Commission recommended not amending the Act as proposed by Senate Bill 49.

VIII. Acknowledgements

City of Alexandria

Edward Semonian Jr., Clerk, Circuit Court

City of Charlottesville

Paul C. Garrett, Clerk, Circuit Court

City of Chesapeake

Faye W. Mitchell, Clerk, Circuit Court

City of Colonial Heights

Stacy L. Stafford, Clerk, Circuit Court

City of Danville

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City of Hampton

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City of Harrisonburg

L. Wayne Harper, Clerk, Circuit Court

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City of Lynchburg

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County of Rockbridge

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Attachment 1
Senate Bill 49 (2004)

2005 SESSION

INTRODUCED

040796756

SENATE BILL NO. 49

Offered January 14, 2004

Prefiled December 19, 2003

A BILL to amend and reenact § 8.01-690 of the Code of Virginia, relating to the Prisoner Litigation Reform Act; exception.

Patron—Marsh

Referred to Committee for Courts of Justice

Be it enacted by the General Assembly of Virginia:

1. That § 8.01-690 of the Code of Virginia is amended and reenacted as follows:

§ 8.01-690. Applicability provisions.

The provisions of this chapter shall apply to all pro se civil actions, except cases claiming actual physical or sexual assault, rape or sexual abuse, for money damages brought under the laws of this Commonwealth, or for injunctive, declaratory or mandamus relief, brought by prisoners incarcerated in any state or local correctional facility, or operated pursuant to the Corrections Private Management Act (§ 53.1-261 et seq.).

INTRODUCED

SB49