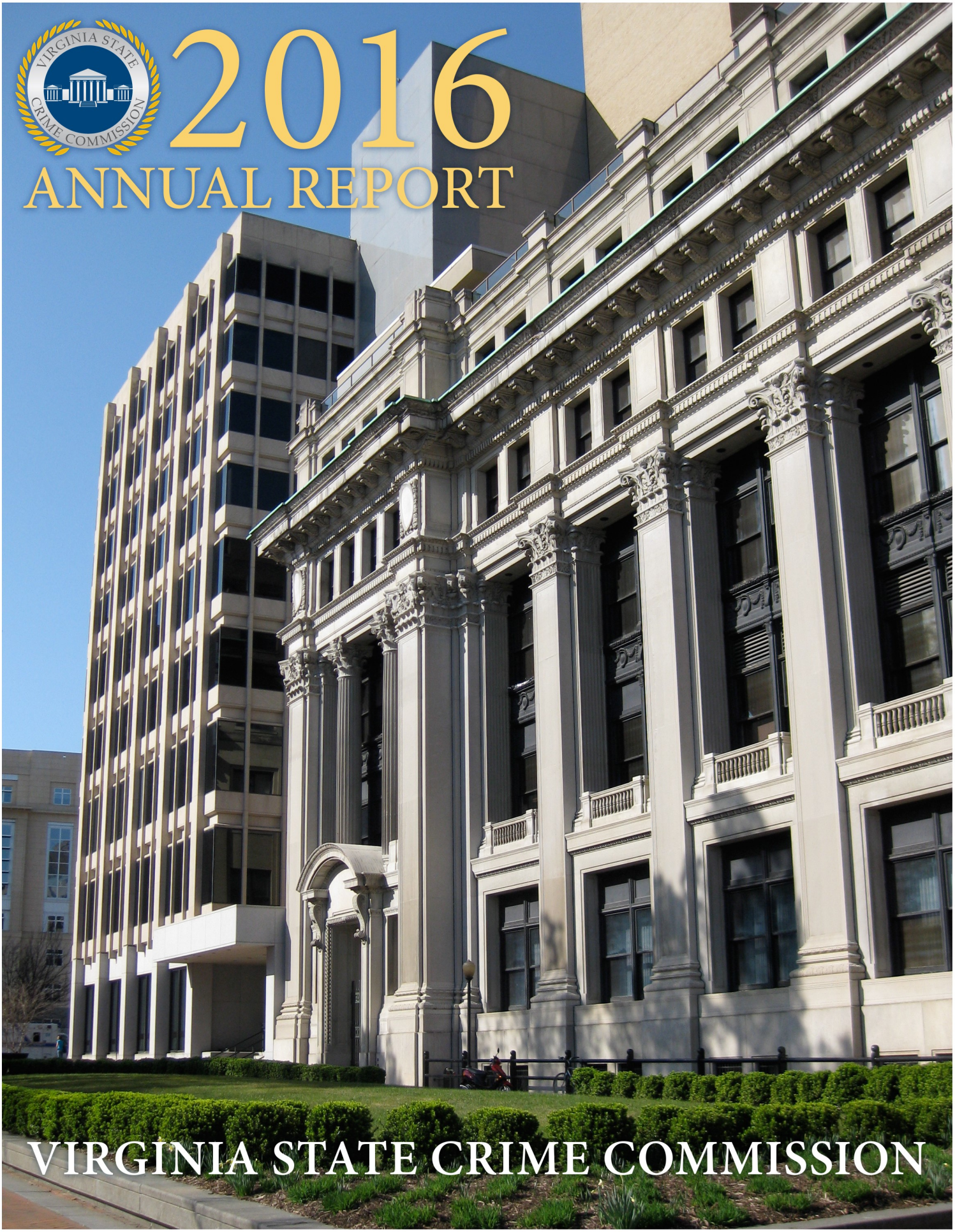
2016 ANNUAL REPORT



VIRGINIA STATE CRIME COMMISSION

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Delegate Robert B. Bell, *Chairman*

Senator Mark D. Obenshain, *Vice-Chairman*

Executive Director
Kristen J. Howard

June 29, 2017

TO: The Honorable Terry McAuliffe, Governor of Virginia
The Honorable Members of the General Assembly of Virginia

Pursuant to the provisions of the Code of Virginia §§ 30-156 through 30-164 establishing the Virginia State Crime Commission and setting forth its purpose, please find attached herewith the Commission's 2016 Annual Report.

Very truly yours,

Robert B. Bell, Chair

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Authority of the Crime Commission

Established in 1966, the Virginia State Crime Commission is a legislative agency authorized by the Code of Virginia § 30-156 *et seq.* to study, report, and make recommendations on all areas of public safety and protection. In doing so, the Commission endeavors to ascertain the causes of crime and ways to reduce and prevent it, to explore and recommend methods of rehabilitation for convicted criminals, to study compensation of persons in law enforcement and related fields, and examine other related matters including apprehension, trial, and punishment of criminal offenders. The Commission makes such recommendations as it deems appropriate with respect to the foregoing matters, and coordinates the proposals and recommendations of all commissions and agencies as to legislation affecting crime, crime control, and public safety. The Commission cooperates with the executive branch of state government, the Attorney General's Office and the judiciary who are in turn encouraged to cooperate with the Commission. The Commission cooperates with governments and governmental agencies of other states and the United States. The Crime Commission is a criminal justice agency as defined in the Code of Virginia § 9.1-101.

The Crime Commission consists of thirteen members that include nine legislative members, three non-legislative citizen members, and the Attorney General, as follows: six members of the House of Delegates to be appointed by the Speaker of the House of Delegates in accordance with the principles of proportional representation contained in the Rules of the House of Delegates; three members of the Senate to be appointed by the Senate Committee on Rules; three non-legislative citizen members to be appointed by the Governor; and the Attorney General or his designee.

Members of the Crime Commission

HOUSE OF DELEGATES APPOINTMENTS

The Honorable Robert B. Bell, Chair
The Honorable Richard L. Anderson
The Honorable C. Todd Gilbert
The Honorable Charniele L. Herring
The Honorable G. Manoli Loupassi
The Honorable Jennifer L. McClellan

SENATE APPOINTMENTS

The Honorable Mark D. Obenshain, Vice-Chair
The Honorable Janet D. Howell
The Honorable Thomas K. Norment, Jr.

ATTORNEY GENERAL

Cynthia E. Hudson, Chief Deputy, Attorney General's Office, Designee for Attorney General Mark R. Herring

GOVERNOR'S APPOINTMENTS

Kristine R. Hall, Policy Director, Virginia Sexual and Domestic Violence Action Alliance
The Honorable Arthur Townsend Jr., Sheriff, Lunenburg County
Chief John Venuti, Associate Vice President of Campus Safety/Chief of Police, Virginia Commonwealth University Police Department

Crime Commission Staff

Kristen J. Howard, Executive Director
G. Stewart Petoe, Director of Legal Affairs

Christina Barnes Arrington, Ph.D., Senior Methodologist
Holly E. Berry, Policy Analyst
Colin L. Drabert, Staff Attorney
David Stock, Staff Attorney

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2016 Executive Summary of Activities

In addition to a number of ongoing studies, the Crime Commission received numerous bill referrals and letter requests in 2016. Staff studied five new issues as a result of bill referrals and letter requests: restitution, search warrants, pretrial services, the use of the term "mental retardation" in capital murder statutes, and *habeas corpus*. The Crime Commission held three meetings to review and discuss study findings: October 3rd, November 10th, and December 5th. At its December meeting, the Crime Commission endorsed legislation on the topics of restitution, the use of the term "mental retardation," search warrants, and cigarette trafficking that were introduced during the 2017 Session of the General Assembly.

Staff examined restitution in relation to revocation of probation or suspended sentences per House Bill 605. In order to address the study mandate, staff collected available literature and research, gathered and analyzed data from numerous local and state entities, completed a review of Virginia restitution statutes, reviewed restitution statutes and practices of other states, and met with numerous stakeholders involved in the restitution process in Virginia. Staff also developed and disseminated a survey to clerks of court for all circuit, general district, juvenile and domestic relations, and combined district courts. As a result of this study, the Crime Commission endorsed several legislative recommendations to improve the overall restitution process in the Commonwealth.

Staff completed a comprehensive legal analysis of search warrants in regard to probation violations that do not involve new criminal offenses as outlined in Senate Bill 247 and House Bill 361. Staff also met with interested parties to determine the extent of the problem. Crime Commission members endorsed the language in the substitute version of SB 247, which was introduced during the 2017 session of the General Assembly.

Staff began their initial research for the two year study relating to pretrial services, per House Bills 774 and 776. A representative from the Department of Criminal Justice Services gave a presentation at the December Commission meeting to provide members with a preliminary overview of pretrial services in Virginia. Staff plans to continue work on this topic during 2017 and provide a detailed presentation in the fall.

Staff received a letter request regarding the use of the term "mental retardation" in capital cases. In an effort to determine the feasibility of changing the term "mental retardation" to "intellectual disability" staff reviewed relevant statutes, including capital murder statutes. Staff also examined the use of the terminology in other states and whether there were any successful challenges to the term's definition. Crime Commission members endorsed legislation for the 2017 Session of the

General Assembly to replace the term "mental retardation" with "intellectual disability" throughout the capital murder statutes.

Staff was also requested by letter to review the writ of *habeas corpus* in Virginia as it relates to the restrictions, statute of limitations, available remedies and relief, and actual innocence. Staff analyzed statutory and case law in Virginia and Texas, collected other literature on *habeas corpus*, examined cases of wrongful convictions, and gathered data from Virginia courts. Additionally, staff consulted with numerous stakeholders, including the Office of the Attorney General, the Mid-Atlantic Innocence Project, the Innocence Project of Texas, and the Office of the Attorney General of Texas.

In addition to the bill referrals and letter requests, staff continued work on a number of ongoing studies: cigarette trafficking, DNA Notification Project, and asset forfeiture coordinator training. The Crime Commission has been involved with the issue of cigarette trafficking since 2012, and continued to monitor the issue in 2016 to address emerging problems - primarily fraudulent business operations. Staff worked closely with numerous stakeholders to develop legislation in an effort to reduce fraudulent purchases of cigarettes and require documentation for the sale and distribution of large quantities of cigarettes.

As a result of the Crime Commission's 2015 study on asset forfeiture, members directed staff to work with law enforcement and prosecutors to help implement training that can be readily accessible to new asset forfeiture coordinators. Staff worked closely with these groups to coordinate and plan a statewide training for March 2017, which was recorded and available online. The Crime Commission remains involved in the Forensic Science Board's DNA Notification Project. As part of this continued project, staff completed a comprehensive case file review and notified the next of kin for certain deceased defendants. Staff also began to reconstruct the entire database to verify the final notification status of each named defendant eligible for notification.

The Crime Commission's Executive Director serves as a member of the Forensic Science Board pursuant to the Code of Virginia § 9.1-1109(A)(7) and also acts as the Chair of the DNA Notification Subcommittee. The Crime Commission's Executive Director is a member of the Virginia Indigent Defense Commission in accordance with the Code of Virginia § 19.2-163.02, as well as their Budget Committee. The Executive Director also serves on the Advisory Committee on Sexual and Domestic Violence pursuant to the Code of Virginia § 9.1-116.2(A).

Detailed study presentations are located on the Crime Commission's website.

Capital Cases: "Mental Retardation" Terminology

Executive Summary

In April 2016, Delegate Dave Albo sent a letter to the Crime Commission requesting that the Commission review the use of the term "mental retardation" in Virginia's capital murder statutes and whether that term could be replaced with the term "intellectual disability." In order to determine the feasibility of changing the term, staff reviewed relevant statutes in Virginia and in other states with capital punishment, as well as case law to determine whether any legal challenges were raised contending that a change in the terminology altered the substantive definition of the condition.

In 2002, the United States Supreme Court ruled in the case of Atkins v. Virginia that the execution of a "mentally retarded" defendant was excessive punishment in violation of the Eighth Amendment. In response to the Atkins decision, the Virginia legislature made a number of modifications to Virginia's capital murder statutes in 2003. Following these 2003 amendments, a defendant asserting a claim of mental retardation is required to show by a preponderance of the evidence that he has a disability, originating before the age of 18, characterized by significantly sub-average intellectual functioning as demonstrated by a standardized IQ test, and significant limitations in adaptive behavior.

In 2012, the terms "mental retardation" and "mental deficiency" were replaced throughout the Code of Virginia with the term "intellectual disability" or some variation of that term. However, these amendments did not apply to the use of the term "mental retardation" in the capital murder statutes.

In the 2014 case of Hall v. Florida, the U.S. Supreme Court held that a Florida death penalty statute which required a defendant to show an IQ score of 70 or below before any additional evidence of intellectual or functional disability would be permitted violated the Eighth Amendment. In Hall, the Court specifically noted that: "[p]revious opinions of this Court have employed the term 'mental retardation.' This opinion uses the term 'intellectual disability' to describe the identical phenomenon."

As part of the study, staff reviewed other states' terminology. In the 30 states, including Virginia, where the death penalty option existed, a total of 16 states changed terminology from "mental retardation" to "intellectual disability" between 2009 and 2016. An additional nine states, including Virginia, continue to use the "mental retardation" terminology. The other five states vary in the use of the terminology.

Staff further examined case law in the 16 states that changed their terminology from "mental retardation" to "intellectual disability." Staff was unable to locate any decisions raising a specific claim that changing the terminology from "mental retardation" to "intellectual disability" altered the definition of the condition.

While Massachusetts law does not allow for the death penalty, staff did locate a decision from that jurisdiction which addressed a challenge to the change in terminology. In the 2015 case of Commonwealth v. St. Louis, a claim was raised alleging that a 2010 amendment to the terminology of the statute prohibiting indecent assault and battery on a "person with intellectual disability" rendered the statute unconstitutionally vague. The Court found that the definition was sufficiently clear and definite and that the "…Legislature's intent was merely to change the nomenclature and not the substance of the statute."

Presently, the definition of "mentally retarded" under Va. Code § 19.2-264.3:1.1 is exactly the same as the definition of "intellectual disability" under Va. Code § 37.2-100. Changing the term "mental retardation" to the term "intellectual disability" should not impact any of Virginia's currently pending capital cases because there would not be a substantive change to the legal definition of the term. A defendant challenging Virginia's capital murder statutes would have to show that the substantive definition of the concept, not the specific terminology used, violated the Constitution.

The Crime Commission reviewed study findings at its October and November meetings and directed staff to draft legislation. As a result of the study, the Crime Commission unanimously endorsed the following recommendation, with the inclusion of the second enactment clause, at its December meeting:

> **Recommendation 1:** The term "mental retardation" should be replaced with the term "intellectual disability" in Virginia's capital murder statutes.
>
> - These changes will apply to Va. Code §§ 8.01-654.2; 18.2-10; 19.2-264.3:1.1; 19.2-264.3:1.2, and 19.2-264.3:3.
> - Should a second enactment clause be included in the legislation, stating that the change in term is not to be construed as a change to Virginia's substantive law?

Legislation for Recommendation 1 was introduced in both chambers during the 2017 Session of the General Assembly. Senator Janet D. Howell introduced Senate Bill 1352 and Delegate Patrick A. Hope introduced House Bill 1882. Both bills passed and were signed by the Governor.

Background

In April 2016, Delegate Dave Albo sent a letter to the Crime Commission requesting that the Commission review the use of the term "mental retardation" in Virginia's capital murder statutes and whether that term could be replaced with the term "intellectual disability." In order to determine the feasibility of changing the term, staff reviewed relevant statutes in Virginia and in other states with capital punishment, as well as case law to determine whether any legal challenges were raised contending that a change in the terminology altered the substantive definition of the condition.

Virginia's Response to Atkins v. Virginia

In 2002, the United States Supreme Court ruled in the case of Atkins v. Virginia that the execution of a "mentally retarded" defendant was excessive punishment in violation of the Eighth Amendment.[1] In its opinion, the Court relied on the definition of "mental retardation" as promulgated by the *American Association of Mental Retardation* and the *American Psychiatric Association.* "Mental retardation" was characterized by "significantly sub-average intellectual functioning…with related limitations in…applicable adaptive skills areas."[2] The Supreme Court ultimately allowed states to craft their own definition of mental retardation to enforce the constitutional restrictions of Atkins.[3]

In response to the Atkins decision, the Virginia legislature made a number of modifications to Virginia's capital murder statutes in 2003:[4]

- Virginia Code § 18.2-10(a) was amended to specify that no one who is "mentally retarded" can be sentenced to death.
- Virginia Code § 19.2-264.3:1.1 was enacted to (i) define "mentally retarded" for purposes of capital murder sentencing, (ii) set forth requirements for the assessments to determine "mental retardation", and (iii) provide the procedure by which a judge or jury determines this fact.
- Virginia Code §§ 19.2-264.3:1.2 and 19.2-264.3:3 were enacted to provide expert assistance to an indigent defendant when the issue of that defendant's mental retardation would be relevant in a capital proceeding.
- Virginia Code § 19.2-264.3:1.2 also required that a defendant seeking to assert a claim of mental retardation provide notice of such claim to the Commonwealth's Attorney. If such notice is provided, the Commonwealth has the right to have a second evaluation performed by a separate expert.
- Virginia Code § 8.01-654.2 was amended to apply to all capital defendants whose death sentences became final in Circuit Court before April 29, 2003. It provides that mental retardation claims may be raised in the Supreme Court of Virginia on either a direct appeal or in a *habeas corpus* petition. If the defendant has completed both his direct appeal and his *habeas corpus* proceeding, "his sole remedy shall lie in federal court."

Following these 2003 amendments, a defendant asserting a claim of mental retardation is required to show by a preponderance of the evidence that he has a disability, originating before the age of 18, characterized by significantly sub-average intellectual functioning as demonstrated by a standardized IQ test, and significant limitations in adaptive behavior.[5]

[1] 536 U.S. 304.
[2] *Id*. at 308 (see footnote 3).
[3] *Id*. at 317 (quoting Ford v. Wainwright, 477 U.S. 399, 405 (1986)).
[4] 2003 Va. Acts ch. 1031, 1040.
[5] Va. Code § 19.2-264.3:1.1 (2016).

Evolution of Terminology Changes

At the time of the 2003 enactments, the term "mental retardation," or some similar variation, was used throughout the Code of Virginia. The term "mental retardation" was used in the former Title 37.1 (Institutions for the Mentally Ill; Mental Health Generally), although the definition used in that title was slightly different. In 2005, Title 37.1 was recodified into Title 37.2 (Behavioral Health and Developmental Services) and the definition of "mental retardation" was amended.[6] Following these 2005 amendments, the definition of "mentally retarded" under Va. Code § 19.2-264.3:1.1 and "mental retardation" under Va. Code § 37.2-100 were identical.

Beginning around 2002, the mental health community and developmental psychologists around the country began to gradually favor the term "disability" over "retardation."[7] In 2007, the *American Association on Mental Retardation*, the oldest and largest interdisciplinary organization of professionals and citizens concerned about intellectual and developmental disabilities, changed its name to the *American Association on Intellectual and Developmental Disabilities.* Further, in 2010, the U.S. Congress passed and the President signed "Rosa's Law," which deleted the phrase "mental retardation" and its variants from certain education, labor and health statutes and replaced the term with "intellectual disability" or some variation thereof.[8]

In 2012, the terms "mental retardation" and "mental deficiency," along with variations thereof, were replaced throughout the Code of Virginia with the term "intellectual disability" or some variation of that term.[9] However, these amendments did not apply to the use of the term "mental retardation" in Virginia's capital murder statutes.

In 2013, the *American Psychiatric Association* released the Diagnostic and Statistical Manual of Mental Disorders, Fifth Edition.[10] In the DSM-5, the term "mental retardation" was replaced with the term "intellectual disability (intellectual developmental disorder)."

In the 2014 case of Hall v. Florida, the U.S. Supreme Court held that Florida's statute defining intellectual disability violated the Eighth Amendment.[11] In its decision, the Court specifically noted that: "Previous opinions of this Court have employed the term 'mental retardation.' This opinion uses the term 'intellectual disability' to describe the identical phenomenon."[12] Aside from using the term "mentally retarded" to describe the historical context of the case, both the majority and dissent used the term "intellectual disability" throughout the entire opinion.

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[6] 2005 Va. Acts ch. 716.
[7] *See* Schalock, R.L., Luckasson, R.A., & Shogren, K.A. (April 2007). The Renaming of Mental Retardation: Understanding the Change to the Term Intellectual Disability. *Intellectual and Developmental Disabilities*, Vol. 45, No. 2, pp. 116-124.
[8] 111 P.L. 256, 124 Stat. 2643.
[9] 2012 Va. Acts ch. 476, 507.
[10] This manual is popularly known as the DSM-5.
[11] 134 S. Ct. 1986.
[12] *Id*. at 1990.

Legal Overview – Other States

Terminology

As part of this study, staff examined the terminology utilized in other states. It should be noted that the 19 states that do not have the death penalty were excluded from the analysis, including: Alaska, Connecticut, Delaware, Hawaii, Illinois, Iowa, Maine, Maryland, Massachusetts, Michigan, Minnesota, New Jersey, New Mexico, New York, North Dakota, Rhode Island, Vermont, West Virginia, and Wisconsin. Additionally, Nebraska was excluded from the analysis because it did not have the death penalty at the time the review was conducted.[13]

For the remaining 30 states, staff examined the terminology used in each state's capital murder statutes or related punitive statutes and the year in which any change to the terminology was effective. A total of 16 states changed terminology from "mental retardation" to "intellectual disability" between 2009 and 2016. An additional nine states, including Virginia, continue to use the "mental retardation" terminology. The other five states vary in the use of the terms or use other terminology. Table 1 illustrates the terminology used in these 30 states and, if applicable, the year terminology changed.

Table 1: Capital Murder Statute Terminology Changes

State	Terminology Amended	Year
Alabama	"Retarded Defendant Act" to "Defendant with Intellectual Disability Act"[14]	2009[15]
Arizona	"Mental retardation" to "Intellectual disability"[16]	2011[17]
Arkansas	"Mental retardation"[18]	N/A
California	"Mentally retarded" to "Intellectual disability"[19]	2012[20]
Colorado	"Mentally retarded"[21]	N/A
Florida	"Mental retardation" to "Intellectual disability"[22]	2013[23]
Georgia	"Mentally retarded"[24]	N/A

[13] Nebraska presents a unique circumstance. On May 27, 2015, the Nebraska Legislature overrode the Governor's veto to enact a bill which repealed capital punishment (2015 Neb. Laws 268) in the state. Subsequently, on November 8, 2016, Nebraska voters approved Referendum 426 which repealed this bill and reinstated capital punishment in Nebraska. *See* http://electionresults.sos.ne.gov/resultsSW.aspx?text=Race&type=SW&map=CTY

[14] Ala. Code § 15-24-1 (2016). *But see* Morrow v. State, 928 So. 2d 315, 317 (Ala. Crim. App. 2004). "The Alabama Legislature has not yet enacted legislation defining mental retardation for purposes of implementing Atkins."

[15] 2009 Ala. Acts 635.

[16] Ariz. Rev. Stat. § 13-753 (LexisNexis 2016).

[17] 2011 Ariz. Sess. Laws 89.

[18] Ark. Code Ann. § 5-4-618 (2016).

[19] Cal. Penal Code § 1376 (West 2016).

[20] 2012 Cal. Stat. 448.

[21] Colo. Rev. Stat. § 18-1.3-1103 (2016).

[22] Fla. R. Crim. P. 3.203 (2016).

[23] In re: Amendments to the Fla. Rules of Crim. Procedure, 132 So. 3d 123 (Fla. 2013).

[24] Ga. Code Ann. § 17-7-131 (2016).

State	Terminology Amended	Year
Idaho	"Mentally retarded"[25]	N/A
Indiana	"Mental retardation" to "Intellectual disability"[26]	2015[27]
Kansas	"Mentally retarded" to "A person with intellectual disability"[28]	2012[29]
Kentucky	"Seriously mentally retarded" to "Serious intellectual disability"[30]	2012[31]
Louisiana	"Mental retardation" to "Intellectual disability"[32]	2014[33]
Mississippi	"Person with mental retardation" to "Person with an intellectual disability" [34]	2010[35]
Missouri	"Mentally retarded" to "Intellectual disability"[36]	2014[37]
Montana	"Mental disease or defect" to "Mental disease or disorder"[38]	2015[39]
Nevada	"Mentally retarded" to "Intellectually disabled"[40]	2013[41]
New Hampshire	Not definitive[42]	N/A
North Carolina	"Mentally retarded" to "Intellectual disability"[43]	2015[44]
Ohio	Not definitive[45]	N/A
Oklahoma	"Mentally retarded"[46]	N/A
Oregon	"Intellectual disability" [47]	2015

[25] Idaho Code Ann. § 19-2515A (2016).
[26] Ind. Code Ann. § 35-36-2-5(e) (LexisNexis 2016).
[27] 2015 Ind. Acts 117.
[28] Kan. Stat. Ann. § 21-6622 (2016).
[29] 2012 Kan. Sess. Laws 91.
[30] Ky. Rev. Stat. Ann. § 532.140 (LexisNexis 2016).
[31] 2012 Ky. Acts 146.
[32] La. Code Crim. Proc. Ann. art. 905.5.1 (2016).
[33] 2014 La. Acts. 811.
[34] *See* Miss. Code Ann. § 99-13-1 (2016). The Mississippi legislature amended the terminology in the insanity proceedings statutes. *But see* Chase v. State, 171 So. 3d 463 (Miss. 2015). In Mississippi, the term "mentally retarded" and subsequently the term "intellectual disability" have been defined by case law for purposes of complying with Atkins.
[35] 2010 Miss. Gen. Laws 476.
[36] Mo. Rev. Stat. § 565.030 (2016).
[37] 2014 Mo. HB 1064.
[38] Mont. Code Ann. § 46-14-312 (2016).
[39] 2015 Mt. Laws 161.
[40] Nev. Rev. Stat. Ann. § 174.098 (LexisNexis 2016).
[41] 2013 Nev. Stat. 186.
[42] *See* N.H. Rev. Stat. Ann. § 630:1 (LexisNexis 2016). New Hampshire has a narrow capital murder statute which does not address mental retardation or intellectual disability. According to the Death Penalty Information Center, the last execution in New Hampshire occurred in 1939. *See* http://www.deathpenaltyinfo.org/new-hampshire-1
[43] N.C. Gen. Stat. § 15A-2005 (2016).
[44] 2015 N.C. Sess. Laws 247.
[45] *See* State v. Waddy, 2016 Ohio App. LEXIS 2716 (Ohio Ct. App. 2016). The Court of Appeals of Ohio continues to use the term "mentally retarded." *But see* Ohio Rev. Code Ann. 2945.371 (LexisNexis 2016). In this statute entitled "Evaluations of defendant's mental condition at relevant time; separate mental retardation evaluation", the Ohio legislature substituted the term "mentally retarded" with the term "intellectual disability" within the body of the statute, but did not amend the title of the statute (2015 Ohio HB 158).
[46] Okla. Stat. tit. 21, § 701.10b (2016).
[47] *See* State v. Agee, 364 P.3d 971 (Or. 2015). Following the Atkins decision, the Oregon legislature did not adopt procedures for determining a defendant's intellectual disability in regard to a capital offense. The issue of a defendant's intellectual disability was not addressed at the appellate level until 2015. In this case, the Supreme Court of Oregon used

State	Terminology Amended	Year
Pennsylvania	"Mental retardation"[48]	N/A
South Carolina	"Mental retardation"[49]	N/A
South Dakota	"Mentally retarded"[50]	N/A
Tennessee	"Mentally retarded" to "Intellectual disability"[51]	2010[52]
Texas	Not definitive[53]	N/A
Utah	"Mentally retarded" to "Intellectually disabled"[54]	2016[55]
Virginia	"Mentally retarded"[56]	N/A
Washington	"Mentally retarded" to "Intellectual disability"[57]	2010[58]
Wyoming	"Mental deficiency" [59]	2008[60]

Challenges to the Term's Definition

Staff reviewed opinions from the 16 states that specifically changed their statutory terminology from "mental retardation" to "intellectual disability." Staff was unable to locate any decisions raising a specific claim that changing the terminology from "mental retardation" to "intellectual disability" altered the definition of the condition. The majority of the decisions addressed whether a particular defendant's condition met the substantive definition of an "intellectual disability."

Staff expanded the search to include jurisdictions without capital punishment which have specifically changed their statutory terminology from "mental retardation" to "intellectual disability." Using this expanded search criteria, staff located a relevant decision in Massachusetts which addressed the issue of whether the definition of the concept changed when the terminology was amended.

In the 2015 case of Commonwealth v. St. Louis, the Supreme Court of Massachusetts addressed a claim of whether the term "intellectual disability" was unconstitutionally vague.[61] In 2010, Massachusetts had amended its statutes to substitute the term "person with an intellectual disability" in place of the term "mentally retarded person." In this

the term "intellectual disability."
[48] Pa. R. Crim. P. 844 (2016).
[49] S.C. Code Ann. § 16-3-20 (2016).
[50] S.D. Codified Laws § 23A-27A-26.1 (2016).
[51] Tenn. Code Ann. § 39-13-203 (2016).
[52] 2010 Tenn. Pub. Acts 734.
[53] *See* In re Allen, 462 S.W.3d 47 (Tex. Crim. App. 2015). The Texas legislature has not adopted a statutory definition of "mental retardation," and thus the Court of Criminal Appeals of Texas developed a definition through case law. In this decision from the Court of Criminal Appeals of Texas, the majority opinion used the term "intellectually disabled" while a concurring opinion used the term "mental retardation."
[54] Utah Code Ann. § 77-15a-101 (LexisNexis 2016).
[55] 2016 Utah Laws 115.
[56] Va. Code § 19.2-264.3:1.1 (2016).
[57] Wash. Rev. Code Ann. § 10.95.030 (LexisNexis 2016).
[58] 2010 Wash. Sess. Laws 94.
[59] *See* Wyo. Stat. Ann. § 7-11-301(a)(iii) (2016). Wyoming uses the term "mental deficiency" to refer to "a defect attributable to intellectual disability, brain damage and cognitive disabilities."
[60] *See* 2008 Wyo. Sess. Laws 70. The phrase "intellectual disability" was substituted for "mental retardation."
[61] 473 Mass. 350.

particular case, the defendant was convicted of indecent assault and battery on a person with an intellectual disability. The defendant contended on appeal that the 2010 amendment rendered that statute unconstitutionally vague. The Court rejected this claim and affirmed the defendant's convictions. The Court found that the definition was sufficiently clear and definite and that the "…Legislature's intent was merely to change the nomenclature and not the substance of the statute."[62]

Feasibility of Changing the Term

Presently, the definition of "mentally retarded" under Va. Code § 19.2-264.3:1.1 is identical to the definition of "intellectual disability" under Va. Code § 37.2-100. Because the term "mentally retarded" has a specific definition in Va. Code § 19.2-264.3:1.1, the term itself could be replaced with "intellectually disabled" without altering the definition.

The term "mental retardation" could be amended to "intellectual disability" in the following Virginia Code sections:

- § 8.01-654.2. Presentation of claim of mental retardation by person sentenced to death before April 29, 2003;
- § 18.2-10. Punishment for conviction of felony; penalty;
- § 19.2-264.3:1.1. Capital cases; determination of mental retardation;
- § 19.2-264.3:1.2. Expert assistance when issue of defendant's mental retardation relevant to capital sentencing; and,
- § 19.2-264.3:3. Limitations on use of statements or disclosure by defendant during evaluations.

As of September 2016, there were seven inmates on death row in Virginia.[63] Only one of those inmate's sentences was finalized prior to April 29, 2003.[64] Changing the term "mental retardation" to the term "intellectual disability" should not impact any of Virginia's currently pending capital cases because there would not be a substantive change to the legal definition of the term. A defendant would still need to show by a preponderance of the evidence that he had a disability, originating before the age of 18, characterized by significantly sub-average intellectual functioning as demonstrated by a standardized IQ test, and significant limitations in adaptive behavior. Further, a second enactment clause could also be included in the legislation to reinforce that changing the terminology is not meant to alter the substantive law.

If Virginia amends the term "mental retardation" to "intellectual disability" in its capital murder statutes, challenges to the definition are possible. If such challenges arise, it would be pertinent to note that the Atkins decision left the definition of "mental retardation" to the states.[65] Approximately 12 years later, the Hall decision changed the

[62] *Id*. at 356.
[63] This figure was provided by the Office of the Attorney General.
[64] William Joseph Burns has a mental retardation claim pending, but he has been found to be incompetent and has not been restored to competence.
[65] 536 U.S. 304, 317 (2002).

terminology, but specifically noted that the definition was not being altered.[66] Furthermore, Virginia's capital murder statutes are consistent with the holding in Hall and the criteria for an "intellectual disability" under the definition in the DSM-5. A defendant challenging Virginia's capital murder statutes would have to show that the substantive definition of the concept, not the specific terminology used, violated the Constitution.[67]

Summary and Conclusion

Currently, the definition of "mentally retarded" under Va. Code § 19.2-264.3:1.1 is identical to the definition of "intellectual disability" under Va. Code § 37.2-100. Amending the term "mental retardation" to the term "intellectual disability" should not impact any of Virginia's currently pending capital cases because there would not be a substantive change to the legal definition of the term. While challenges to Virginia's capital murder statutes are possible, a defendant challenging those statutes would have to show that the substantive definition of the concept, not the specific terminology used, violated the Constitution.

The Crime Commission reviewed study findings at its October and November meetings and directed staff to draft legislation. As a result of the study, the Crime Commission unanimously endorsed the following recommendation, with the inclusion of the second enactment clause, at its December meeting:

> **Recommendation 1:** The term "mental retardation" should be replaced with the term "intellectual disability" in Virginia's capital murder statutes.
>
> - These changes will apply to Va. Code §§ 8.01-654.2; 18.2-10; 19.2-264.3:1.1; 19.2-264.3:1.2, and 19.2-264.3:3.
> - Should a second enactment clause be included in the legislation, stating that the change in term is not to be construed as a change to Virginia's substantive law?

Legislation for Recommendation 1 was introduced in both chambers during the 2017 Session of the General Assembly. Senator Janet D. Howell introduced Senate Bill 1352 and Delegate Patrick A. Hope introduced House Bill 1882. Both bills passed and were signed by the Governor.[68]

[66] 134 S. Ct. 1986, 1990 (2014).
[67] *See* Moore v. Texas, 137 S. Ct. 1039 (2017), in regard to the use of current medical standards in determining whether an offender is intellectually disabled for purposes of the Eighth Amendment.
[68] 2017 Va. Acts ch. 86, 212.

Acknowledgements

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

Office of the Attorney General

Virginia Department of Behavioral Health and Developmental Services

Virginia Indigent Defense Commission

Cigarette Trafficking Update

Executive Summary

The Crime Commission has continued to monitor cigarette trafficking for the past five years. At the conclusion of a comprehensive review conducted in 2012, the Crime Commission recommended a number of statutory changes, including increasing the penalties for cigarette trafficking. These recommendations were enacted during the 2013 Regular Session of the Virginia General Assembly. Crime Commission members instructed staff to continue to monitor the ongoing trafficking situation in Virginia, assess the impact of the proposed statutory changes, and make any recommendations necessary to address the problem.

Cigarette trafficking remains widespread in the Commonwealth. Virginia has the second lowest tax rate in the nation at 30 cents per pack. This tax rate disparity, as well as geographical location, has resulted in Virginia becoming the primary source state for black market cigarettes. Organized criminal enterprises have brought violent activity to the Commonwealth while amassing large profits by purchasing cigarettes cheaply in Virginia and then selling them illegally in other states. Some of the profits from this illegal activity are also sent overseas. The federal government has identified links between cigarette trafficking and the funding of terrorist groups. Virginia's statutes are being used to combat cigarette trafficking, but the sentences imposed are often low when compared with the enormous amounts of money generated by this crime.

Staff regularly reviewed cigarette trafficking cases and trends. Many of these cases involved the establishment and use of fraudulent businesses to purchase large quantities of cigarettes solely for the purpose of trafficking. Business registrations and sales tax exempt certificates are easily obtained online and are immediately available to the applicant. Virginia loses millions of dollars in sales tax every year due to these fraudulent businesses.

As part of the 2016 study on cigarette trafficking, staff communicated regularly with interested parties and convened multiple meetings to discuss this issue and develop recommendations. As in past years, staff requested data on the number of charges and convictions for cigarette-related offenses from the Virginia Criminal Sentencing Commission.

Staff provided an update to Crime Commission members regarding recent data and general trends in cigarette trafficking at the October meeting. As a result of the findings from the continued study, staff presented the following recommendations at the December meeting:

> **Recommendation 1:** A new section (Virginia Code § 58.1-623.2) should be enacted to create a cigarette exemption certificate issued by the Department of Taxation following a vetting process, which includes a background investigation and verification of a physical place of business.

- Creates an expedited process for active valid ABC licensees and OTP licensees.
- Creates a 30 day waiting period to obtain certificate.
- Allows retailers to purchase cigarettes exempt from sales tax.
- The use of a forged or invalid Virginia cigarette exemption certificate would be punishable under existing Virginia Code § 58.1-1017.3.

The Crime Commission unanimously endorsed Recommendation 1.

Recommendation 2: A new section (Virginia Code § 58.1-623.3) should be enacted requiring that a form be completed and maintained for any cigarette purchase of more than 10,000 sticks or 50 cartons, or when the total value of the purchase is over $10,000.

- The form should be developed by the Office of the Attorney General.
- The form must be accompanied by photographic identification.
- The form will be available for inspection and transmitted to the Office of the Attorney General on a regular basis.

The Crime Commission unanimously endorsed Recommendation 2.

Recommendation 3: Reduce the number of tax-paid cigarettes that an individual may possess under Virginia Code § 58.1-1017.1 in relation to the charge of possession with intent to distribute contraband cigarettes.

No motion was made for Recommendation 3.

Recommendation 4: Amend two definitions under Virginia Code § 58.1-1000:

- Amend "authorized holder" to disqualify anyone as an authorized holder who has been convicted of a criminal offense under Chapter 10 of Title 58.1.
- Amend "retail dealer" to include the requirement that the retail dealer possess a valid cigarette exemption certificate.

The Crime Commission unanimously endorsed Recommendation 4.

Legislation combining Recommendations 1, 2, and 4 was introduced in both chambers as an omnibus bill during the Regular Session of the 2017 General Assembly. Delegate Richard L. Anderson introduced House Bill 1913 and Senators Janet D. Howell and Thomas K. Norment, Jr., introduced Senate Bill 1390. Both bills were passed and signed by the Governor.

The bills require the Department of Taxation to begin developing guidelines for the issuance of the cigarette exemption certificates. Effective July 1, 2017, purchases of certain quantities of cigarettes will require completion of a form and presentation of photo identification. Effective January 1, 2018, a cigarette exemption certificate will be

required for tax exempt purchases of cigarettes. Additionally, as of that date: i) qualifications for specific authorized holders will change; ii) criminal sanctions for fraudulent use of the cigarette exemption certificate will take effect; and iii) a valid cigarette exemption certificate will need to be presented for the purchase of certain quantities of cigarettes, along with the form and photo identification.

Background

During the 2012 Regular Session of the Virginia General Assembly, Senate Joint Resolution 21 was enacted, which directed the Crime Commission to conduct a comprehensive study on cigarette trafficking. At the conclusion of the study, the Crime Commission recommended a number of statutory changes, including increasing the penalties for cigarette trafficking. These recommendations were enacted during the 2013 Regular Session of the Virginia General Assembly. Crime Commission members instructed staff to continue to monitor the ongoing trafficking situation in Virginia, assess the impact of the proposed statutory changes, and make any recommendations necessary to address the problem.

Cigarettes remain a significant source of tax revenue for Virginia. As seen in Table 1, Virginia has received around $160 million per year over the past three fiscal years (FY14-FY16) from cigarette tax revenue.

Table 1: Total Cigarette Tax Stamp Revenue Collected, FY06-FY16

Fiscal Year	Cigarette Tax Revenue (Gross $ in Millions)
2006	$172.1*
2007	$172.1
2008	$168.3
2009	$167.5
2010	$158.6
2011	$155.8
2012	$174.0
2013	$169.5
2014	$161.6
2015	$159.6
2016	$158.9

Source: Virginia Department of Taxation.
* Rate increased from $0.20 to $.30 per 20 cigarettes effective 7/1/05.

Despite legislative and investigative efforts, cigarette trafficking has continued throughout the Commonwealth. There are a number of broad categories of cigarette trafficking crimes: purchasing tax paid cartons with the intent to distribute ("smurfing"); fraudulent retail operations for purchasing in bulk; retailers selling cigarettes "off the books;" tax avoidance by wholesalers; tax avoidance by manufacturers; international smuggling; importing counterfeit cigarettes; and forged tax stamps. All of these trafficking schemes, regardless of the methods employed, rely upon tax avoidance.

The main reason that traffickers are drawn to Virginia is the low cigarette tax rate. Virginia has the second lowest cigarette tax rate in the nation at 30 cents per pack, while the mid-Atlantic and New England states have some of the highest cigarette tax rates in the country.[1] New York, for example, has a tax rate of $4.35 per pack. City and county taxes also can be added to the state excise tax, creating an even higher tax rate. In Chicago, Illinois, this results in the highest combined tax in the nation, $6.16 per pack.[2] Moreover, almost half of the states have increased cigarette taxes over the last several years, and many were significant increases.[3]

The 2017 state excise tax rate for a carton of cigarettes (10 packs) varies significantly by state:[4]

- Virginia: $3.00
- New Jersey: $27.00
- Massachusetts: $35.10
- Rhode Island: $37.50
- New York: $43.50
- New York City: $58.50
- Chicago: $61.60

As an illustration of the profit that can be made from cigarette trafficking, a single car can transport up to 10 cases of cigarettes (50 cartons per case), resulting in a profit ranging from $15,000 to $25,000. A van can be used to transport up to 50 cases of cigarettes, producing a profit of $80,000 to $100,000, depending on the state where the cigarettes are trafficked.

In addition to the lower cigarette tax rate, geography also plays a role in making Virginia an attractive location for traffickers. Virginia's location along the Interstate 95 corridor provides easy access to those mid-Atlantic and New England states with high cigarette tax rates.

[1] *See* State Cigarette Excise Tax Rates & Rankings (2017). *Campaign for Tobacco-Free Kids.* Retrieved from https://www.tobaccofreekids.org/research/factsheets/pdf/0097.pdf
[2] *Id.*
[3] *Id.*
[4] *See* State Excise Tax Rates On Cigarettes (2017). *Federation of Tax Administrators.* Retrieved from https://www.taxadmin.org/assets/docs/Research/Rates/cigarette.pdf

According to some law enforcement agents, cigarette trafficking has a higher profit margin than illegally trafficked drugs or guns.[5] The lure of these profits has brought organized crime and gangs, along with the violent criminal activity that often accompanies such groups, to Virginia. Some jurisdictions have reported that cigarette trafficking has been connected to an increase in attendant crimes, such as credit card fraud, money laundering, burglaries, robberies, homicides and murder-for-hire schemes. Using Virginia as a base for their operations, criminal organizations purchase low-cost cigarettes here and resell them illegally in other states for the aforementioned high profits. This criminal activity negatively impacts all legitimate manufacturers, wholesalers, and retailers, and it also deprives governments of needed tax revenue.

Current Law

Based upon the Crime Commission's endorsement, the General Assembly has enacted numerous criminal and civil penalties for cigarette trafficking over the past four years. The penalties for trafficking tax-paid cigarettes have increased and felony threshold amounts have been lowered.[6] Similarly, the penalties for trafficking unstamped cigarettes, i.e., cigarettes for which the state excise tax has not been paid, have increased, and the qualifying threshold for this offense has been lowered.[7] Legislation has made it illegal to purchase cigarettes using a forged business license or a forged or otherwise invalid sales and use tax exemption certificate.[8] The definition of "authorized holder" has been modified to exclude anyone convicted of a cigarette trafficking offense in any locality, state, or the United States.[9] A list of ineligible "authorized holders" is maintained by the Attorney General's Office and is available online on their website.[10]

Cigarette trafficking has been added to the list of crimes that may be investigated by multi-jurisdictional grand juries.[11] Trafficking stamped cigarettes has been added to the qualifying offenses for Virginia's RICO statute.[12] The Virginia Code section which permits law enforcement officers to seize and forfeit all "fixtures, equipment, materials, and personal property" used in connection with the sale or possession of counterfeit cigarettes has been expanded to include non-counterfeit, trafficked cigarettes.[13] There have also been changes to the penalties for trafficking counterfeit cigarettes. The knowing distribution or possession with the intent to distribute counterfeit cigarettes is now a criminal offense; prior to this change, the distribution of counterfeit cigarettes only carried a civil penalty.[14]

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[5] "Illegally trafficked cigarettes now have a higher profit margin than cocaine, heroin, marijuana, or guns." – Virginia State Police Agent (2012); "We've had people trading our undercover agents kilos of cocaine for cigarettes. That's how lucrative it is." – ATF Agent (2016).
[6] Va. Code § 58.1-1017.1 (2016).
[7] Va. Code § 58.1-1017 (2016).
[8] Va. Code § 58.1-1017.3 (2016).
[9] Va. Code § 58.1-1000 (2016).
[10] *See* http://www.oag.state.va.us/programs-initiatives/tobacco-enforcement#cigarette-trafficking
[11] Va. Code § 19.2-215.1(cc) (2016).
[12] Va. Code § 18.2-513 (2016).
[13] Va. Code § 19.2-386.21 (2016).
[14] Va. Code § 18.2-246.14 (2016).

Changes to the law have not just involved increasing penalties and broadening the scope of prohibited activities. The Virginia Department of Taxation, the Office of the Attorney General of Virginia, local tax administrators, and the Virginia Department of Alcoholic Beverage Control now all have access to records involving the purchase and sale of cigarettes, thereby enhancing their investigative and administrative capabilities.[15] Both the Virginia Department of Taxation and the Office of the Attorney General of Virginia have been authorized, though not mandated, to accept the electronic receipt of reporting forms from tobacco manufacturers and wholesalers.[16] The Virginia Department of Taxation has also been authorized to accept electronic payments for tax stamps.[17]

Cigarette Trafficking Charge and Conviction Data

Staff requested updated data from the Virginia Criminal Sentencing Commission as to the number of charges and convictions related to illegal cigarette trafficking in general district and circuit courts.

Table 2 on the next page shows that the most common charge in general district court falls under Virginia Code § 58.1-1017.1, which captures possession with intent to distribute tax-paid, contraband cigarettes ("smurfing"). It is also noteworthy that a significant number of charges were set forth under the new threshold amount for this Code section effective FY16 (>5,000 but < 40,000; or, > or equal to 40,000). As seen in Table 3, convictions for Virginia Code § 58.1-1017.1 steadily decreased with a small number of convictions attained for the new threshold amounts effective in FY16. Data indicates that there were few convictions under any of the other code sections that capture cigarette trafficking related activities. The low number of charges and subsequent convictions indicate that these crimes may not be serving as a deterrent to cigarette traffickers.

[15] Va. Code § 58.1-1007 (2016).
[16] Va. Code §§ 3.2-4209(A) and 58.1-1008.1 (2016).
[17] Va. Code § 58.1-1009(A) (2016).

Table 2: General District Court Charges for Common Cigarette-Related Offenses, FY14-FY16*

Va. Code Section	Description	FY14	FY15	FY16
§ 58.1-1017(B)	Cigarettes without stamp, sale, purchase, possess, < 3000 pks (FY13); <500 pks (FY14 onward)	3	1	5
§ 58.1-1017(B)	Cigarettes without stamp, sale, purchase, possess, <500 pks, subseq.	0	0	0
§ 58.1-1017(C)	Cigarettes without stamp, sale, purchase, possess, >= 3000 pks (FY13); >= 500 pks (FY14 onward)	14	4	6
§ 58.1-1017(C)	Cigarettes without stamp, sale, purchase, possess, >= 500 pks, subseq.	0	1	0
§ 58.1-1017.1	Possession with intent to distribute tax-paid, contraband cigarettes	109	45	85
§ 58.1-1017.1	Possession with intent to distribute tax-paid, contraband cigarettes, subseq.	8	4	7
§ 58.1-1017.1	Intent/distribute >=100,000 tax-paid cigarettes	14	5	3
§ 58.1-1017.1	Intent/distribute >=100,000 tax-paid cigarettes, subseq.	0	0	0
§ 58.1-1017.1	Intent/distribute >5,000 & <40,000 tax-paid cigarettes	---	---	57
§ 58.1-1017.1	Intent/distribute >5,000 & <40,000 tax-paid cigarettes, subseq.	---	---	4
§ 58.1-1017.1	Intent/distribute >=40,000 tax-paid cigarettes	---	---	27
§ 58.1-1017.1	Intent/distribute >=40,000 tax-paid cigarettes, subseq.	---	---	3

Source: Supreme Court of Virginia - General District Court Case Management System (CMS).* Fiscal year in which charge was filed.

Table 3: General District Court Convictions for Common Cigarette-Related Offenses, FY14-FY16*

Va. Code Section	Description	FY14	FY15	FY16
§ 58.1-1017(B)	Cigarettes without stamp, sale, purchase, possess, < 3000 pks (FY13); <500 pks (FY14 onward)	6	2	4
§ 58.1-1017(B)	Cigarettes without stamp, sale, purchase, possess, <500 pks, subseq.	0	0	0
§ 58.1-1017(C)	Cigarettes without stamp, sale, purchase, possess, >= 3000 pks (FY13); >= 500 pks (FY14 onward)	0	0	0
§ 58.1-1017(C)	Cigarettes without stamp, sale, purchase, possess, >= 500 pks, subseq.	0	0	0
§ 58.1-1017.1	Possession with intent to distribute tax-paid, contraband cigarettes	82	46	28
§ 58.1-1017.1	Possession with intent to distribute tax-paid, contraband cigarettes, subseq.	0	0	0
§ 58.1-1017.1	Intent/distribute >=100,000 tax-paid cigarettes	0	0	0
§ 58.1-1017.1	Intent/distribute >=100,000 tax-paid cigarettes, subseq.	0	0	0
§ 58.1-1017.1	Intent/distribute >5,000 & <40,000 tax-paid cigarettes	---	---	23
§ 58.1-1017.1	Intent/distribute >5,000 & <40,000 tax-paid cigarettes, subseq.	---	---	0
§ 58.1-1017.1	Intent/distribute >=40,000 tax-paid cigarettes	---	---	0
§ 58.1-1017.1	Intent/distribute >=40,000 tax-paid cigarettes, subseq.	---	---	0

Source: Supreme Court of Virginia - General District Court Case Management System (CMS). * Fiscal year in which charge was concluded.

Similar to general district court data, as illustrated in Table 4 on the next page, the most frequently charged offense in circuit court was also for possession with intent to distribute tax-paid, contraband cigarettes. There were also several charges set forth per the new threshold amounts of this Code section. Table 5 indicates that convictions for the same Code section fluctuated between FY14 to FY16 with a handful of additional convictions for the new threshold amounts effective FY16. The data also show that there were almost no convictions under other Code sections related to cigarette trafficking. The relatively low number of charges and convictions in circuit court may be due to a number of factors, including the length of time required to investigate these complex trafficking cases. During this investigation period no data for such cases is reflected in Virginia's court management systems.

Table 4: Circuit Court Charges for Common Cigarette-Related Offenses, FY14-FY16*

Va. Code Section	Description	FY14	FY15	FY16
§ 58.1-1017(B)	Cigarettes without stamp, sale, purchase, possess, < 3000 pks (FY13); <500 pks (FY14 onward)	0	0	0
§ 58.1-1017(B)	Cigarettes without stamp, sale, purchase, possess, <500 pks, subseq.	0	0	0
§ 58.1-1017(C)	Cigarettes without stamp, sale, purchase, possess, >= 3000 pks (FY13); >= 500 pks (FY14 onward)	0	1	2
§ 58.1-1017(C)	Cigarettes without stamp, sale, purchase, possess, >= 500 pks, subseq.	5	0	1
§ 58.1-1017.1	Possession with intent to distribute tax-paid, contraband cigarettes	7†	4†	17†
§ 58.1-1017.1	Possession with intent to distribute tax-paid, contraband cigarettes, subseq.	3	6	2
§ 58.1-1017.1	Intent/distribute >=100,000 tax-paid cigarettes	4	0	5
§ 58.1-1017.1	Intent/distribute >=100,000 tax-paid cigarettes, subseq.	0	4	0
§ 58.1-1017.1	Intent/distribute >5,000 & <40,000 tax-paid cigarettes	---	---	7
§ 58.1-1017.1	Intent/distribute >5,000 & <40,000 tax-paid cigarettes, subseq.	---	---	1
§ 58.1-1017.1	Intent/distribute >=40,000 tax-paid cigarettes	---	---	6
§ 58.1-1017.1	Intent/distribute >=40,000 tax-paid cigarettes, subseq.	---	---	1

Source: Supreme Court of Virginia - Circuit Court Case Management System (CMS). * Fiscal year in which charge was filed. † At least one of the charges was the result of an appeal from General District Court. Note: The CMS does not include cases from Alexandria or Fairfax. Virginia Beach rejoined the system in October 2014 after leaving the system in FY09.

Table 5: Circuit Court Convictions for Common Cigarette-Related Offenses, FY14-FY16*

Va. Code Section	Description	FY14	FY15	FY16
§ 58.1-1017(B)	Cigarettes without stamp, sale, purchase, possess, < 3000 pks (FY13); <500 pks (FY14 onward)	3	0	5
§ 58.1-1017(B)	Cigarettes without stamp, sale, purchase, possess, <500 pks, subseq.	0	0	0
§ 58.1-1017(C)	Cigarettes without stamp, sale, purchase, possess, >= 3000 pks (FY13); >= 500 pks (FY14 onward)	2	1	4
§ 58.1-1017(C)	Cigarettes without stamp, sale, purchase, possess, >= 500 pks, subseq.	0	0	1
§ 58.1-1017.1	Possession with intent to distribute tax-paid, contraband cig.	5†	10†	6
§ 58.1-1017.1	Possession with intent to distribute tax-paid, contraband cig., subseq.	2	0	6†
§ 58.1-1017.1	Intent/distribute >=100,000 tax-paid cigarettes	1	4	6
§ 58.1-1017.1	Intent/distribute >=100,000 tax-paid cigarettes, subseq.	0	1	0
§ 58.1-1017.1	Intent/distribute >5,000 & <40,000 tax-paid cigarettes	---	---	3
§ 58.1-1017.1	Intent/distribute >5,000 & <40,000 tax-paid cigarettes, subseq.	---	---	0
§ 58.1-1017.1	Intent/distribute >=40,000 tax-paid cigarettes	---	---	3
§ 58.1-1017.1	Intent/distribute >=40,000 tax-paid cigarettes, subseq.	---	---	1

Source: Supreme Court of Virginia - Circuit Court Case Management System (CMS). * Fiscal year in which charge was concluded. † At least one of the convictions was the result of an appeal from General District Court. Note: The CMS does not include cases from Alexandria or Fairfax. Virginia Beach rejoined the system in October 2014 after leaving the system in FY09.

In sum, the total number of charges and convictions relating to cigarette trafficking continues to be noticeably low overall. As noted in previous Crime Commission reports, this might be due to a number of reasons. First, cigarette trafficking operations can be complicated and require longer amounts of time to investigate. Second, local law enforcement may instead devote time and resources to different types of investigations. Finally, because cigarette trafficking involves activities in multiple states, charges may be filed in other states or at the federal level. However, thus far, the lowered threshold amounts for intent to distribute under Virginia Code § 58.1-1017.1 appear to have a positive impact on the number of charges and convictions seen in general district and circuit courts. Trends will continue to be monitored by Commission staff.

Recent Cases

In May 2016, Qiuyue Chen, Fu Chen, and Ihab Abou El Ela were arrested by the Henrico County Police Department for operating a multimillion-dollar cigarette trafficking ring. The defendants trafficked approximately 10,000 cartons of cigarettes per week to New York in the luggage compartments of charter buses. They set up phony businesses in order to purchase millions of dollars of cigarettes from area Sam's Clubs. They also utilized fake storefronts to launder money. Henrico police conducted a two-year investigation into the operation, including the use of confidential informants, GPS tracking devices, and undercover surveillance with the assistance of other law enforcement agencies and the U.S. Department of Homeland Security. All three suspects were charged with money laundering, racketeering, and possession with the intent to distribute. Four guns, nine vehicles, cash, and gold bars were also seized.[18]

In January 2017, Qiuyue Chen pleaded no contest to multiple felony charges as part of a deal with prosecutors. That same month, Ihab Abou El Ela pleaded no contest to one felony charge as part of a deal with prosecutors. Qiuyue Chen's husband, Fu Chen, pleaded no contest to three felony charges in February 2017. On May 10, 2017, Qiuyue Chen was sentenced to four years in prison and fined $50,000 in civil penalties, while Fu Chen was sentenced to 18 months of home incarceration and fined $25,000 in civil penalties. Ihab Abou El Ela is scheduled to be sentenced on June 30, 2017.[19]

In June 2016, Laila Alayat pleaded guilty in federal court to using shell businesses to purchase $9.5 million worth of Virginia cigarettes which were then transported to New Jersey for illegal resale. Alayat and others purchased cigarettes from wholesale stores using cash and "structured" purchases of less than $10,000 so as to avoid the requirement to fill out federal forms. There were 1,735 cash transactions between March 2014 and August 2015 at Sam's Club wholesale stores, totaling $6.3 million. Three of the six shell businesses, which were created online, were in Richmond and the other three were in Woodbridge. At least five of the businesses never paid any Virginia sales taxes. Alayat has dual citizenship in the U.S. and Jordan and was arrested in February 2016 while attempting to flee to Jordan.[20] Alayat faced up to 15 years in prison for conspiracy to traffic contraband cigarettes and witness tampering. She was sentenced to 16 months in federal prison.[21]

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[18] Monfort, A. (2016, May 16). Married couple and lover arrested in Henrico's largest cigarette bust. Retrieved from http://www.nbc12.com/story/31912896/married-couple-and-lover-arrested-in-henricos-largest-cigarette-bust

[19] Gorman, S. (2017, May 10). Couple sentenced for massive cigarette trafficking operation based in Wyndham home. *Richmond Times-Dispatch*. Retrieved from http://www.richmond.com/news/local/crime/couple-sentenced-for-massive-cigarette-trafficking-operation-based-in-wyndham/article_15bdbdd3-e3b2-53a5-9a52-70f713e30ecb.html

[20] Green, F. (2016, June 16). Cigarette trafficking figure pleads guilty. *Richmond Times-Dispatch*. Retrieved from http://www.richmond.com/news/cigarette-trafficking-figure-pleads-guilty/article_2a60d996-0324-58d9-a3fb-8dbf7477cef5.html

[21] Green, F. (2016, December 1). Cigarette trafficker sentenced in federal court in Richmond to 16 months. *Richmond Times-Dispatch*. Retrieved from http://www.richmond.com/news/local/chesterfield/cigarette-trafficker-sentenced-in-federal-court-in-richmond-to-months/article_73b9da96-dd52-5b66-b84e-5b7683c53433.html

In August 2016, Juan Encarnacion pleaded guilty in Shenandoah County Circuit Court to one count each of money laundering and possessing untaxed cigarettes. He purchased more than 3,000 packs of cigarettes between December 2012 and October 2013 to sell in New York. Encarnacion was indicted on 20 felonies, including racketeering, money laundering, and possession charges. He received a six year suspended prison sentence and two years of supervised probation. As a condition of his sentence, he was barred from entering Virginia except to meet with his probation officer. He was also ordered to pay $10,000 in restitution to the Virginia Department of Taxation.[22]

Fraudulent Business Operations

Cigarette traffickers use fraudulent retail operations to more efficiently purchase cartons of cigarettes in bulk. Many retailers have contracts with cigarette manufacturers to sell no more than five cartons to one individual per day. In order to avoid the purchasing limits placed on individual purchasers, many cigarette traffickers have created fraudulent retail establishments solely for the purpose of purchasing large quantities of cigarettes from wholesalers. Traffickers encounter little difficulty creating such fraudulent businesses. While there is a list of ineligible "authorized holders," there is not an extensive vetting process for business licenses and sales and use tax certificate applications. Such documents are easily obtained online and available without a waiting period. These fraudulent businesses cost Virginia millions of dollars in lost sales tax every year.

In one specific example of lost tax revenue, a retailer was open for two months and purchased $290,000 worth of cigarettes from Sam's Club. The Virginia Department of Taxation never received sales tax for any of those purchases. The loss was estimated to be $15,370. Hypothetically, if ten fictitious retailers were to operate like this for one year, Virginia would lose an estimated $922,200 in tax revenue. The Commonwealth stands to lose a significant amount of sales tax revenue as long as fraudulent businesses continue to operate.

The Virginia Department of Taxation reported that it conducted 275 retail inspections in FY16. During the past two years, the Department issued 145 civil penalty assessments for cigarette tax non-compliance and collected $104,680 in penalties. No warning letters were issued by the Department to retailers in the past three years. The Department of Taxation explained that warning letters are issued to people selling untaxed cigarettes, and the absence of warning letters indicates that this activity is less of a problem than it had been in recent years. The Department of Taxation advised that wholesalers are doing a better job of putting tax stamps on the cigarette packs and reputable retailers often do not have unstamped cigarettes on the shelf, thus giving the Department no reason to issue warning letters.

[22] Clark, K. (2016, August 11). New York Man Banned From Virginia After Valley Cigarette Smuggling Case. Retrieved from http://www.dnronline.com/update/new-new-york-man-banned-from-virginia-after-valley-cigarette/article_9c988d64-5fbe-11e6-8857-9b9ed18dc31f.html

In 2015, the Tobacco Enforcement Unit in the Office of the Attorney General advised that they performed 1,724 retail inspections and seized 4,735 packs of cigarettes. As of September 29, 2016, the unit had conducted 1,368 inspections and seized 509 packs of cigarettes. During the course of their investigations, the unit identified a number of fictitious businesses involved in trafficking. In 2015, investigators discovered 147 fraudulent businesses connected to cigarette trafficking. The unit had linked 88 such fraudulent businesses to cigarette trafficking as of September 29, 2016.

Summary and Conclusion

As part of the 2016 study on cigarette trafficking, staff communicated more with interested parties including cigarette manufacturers, wholesalers, retailers, Office of the Attorney General, Department of Taxation, Department of Alcoholic Beverage Control, Northern Virginia Cigarette Tax Board, law enforcement, prosecutors, cigar industry, technology providers, and other interested groups. Staff also convened two large open forums, one on October 11, 2016, and the other on November 28, 2016, bringing all interested parties together to discuss ongoing concerns and develop recommendations.

Staff provided an update to Crime Commission members regarding recent data and general trends in cigarette trafficking at the October meeting. As a result of the continued study, staff presented the following recommendations at the December meeting:

Recommendation 1: A new section (Virginia Code § 58.1-623.2) should be enacted to create a cigarette exemption certificate issued by the Department of Taxation following a vetting process, which includes a background investigation and verification of a physical place of business.

- Creates an expedited process for active valid ABC licensees and OTP licensees.
- Creates a 30 day waiting period to obtain certificate.
- Allows retailers to purchase cigarettes exempt from sales tax.
- The use of a forged or invalid Virginia cigarette exemption certificate would be punishable under existing Virginia Code § 58.1-1017.3.

The Crime Commission unanimously endorsed Recommendation 1.

Recommendation 2: A new section (Virginia Code § 58.1-623.3) should be enacted requiring that a form be completed and maintained for any cigarette purchase of more than 10,000 sticks or 50 cartons, or when the total value of the purchase is over $10,000.

- The form should be developed by the Office of the Attorney General.
- The form must be accompanied by photographic identification.
- The form will be available for inspection and transmitted to the Office of the Attorney General on a regular basis.

The Crime Commission unanimously endorsed Recommendation 2.

Recommendation 3: Reduce the number of tax-paid cigarettes that an individual may possess under Virginia Code § 58.1-1017.1 in relation to the charge of possession with intent to distribute contraband cigarettes.

No motion was made for Recommendation 3.

Recommendation 4: Amend two definitions under Virginia Code § 58.1-1000:

- Amend "authorized holder" to disqualify anyone as an authorized holder who has been convicted of a criminal offense under Chapter 10 of Title 58.1.
- Amend "retail dealer" to include the requirement that the retail dealer possess a valid cigarette exemption certificate.

The Crime Commission unanimously endorsed Recommendation 4.

Legislation combining Recommendations 1, 2, and 4 was introduced in both chambers as an omnibus bill during the Regular Session of the 2017 General Assembly. Delegate Richard L. Anderson introduced House Bill 1913 and Senators Janet D. Howell and Thomas K. Norment, Jr., introduced Senate Bill 1390. Both bills were passed and signed by the Governor.

The bills require the Department of Taxation to begin developing guidelines for the issuance of the cigarette exemption certificates. Effective July 1, 2017, purchases of certain quantities of cigarettes will require completion of a form and presentation of photo identification. Effective January 1, 2018, a cigarette exemption certificate will be required for tax exempt purchases of cigarettes. Additionally, as of that date: i) qualifications for specific authorized holders will change; ii) criminal sanctions for fraudulent use of the cigarette exemption certificate will take effect; and iii) a valid cigarette exemption certificate will need to be presented for the purchase of certain quantities of cigarettes, along with the form and photo identification.

Acknowledgements

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Henrico County Police Department

Northern Virginia Cigarette Tax Board (NVCTB)

R. J. Reynolds Tobacco Company (RJR)

Virginia Association of Chiefs of Police (VACP)

Virginia Department of Alcoholic Beverage Control

Virginia Department of Taxation

Virginia Fire Chiefs Association

Virginia Fire Prevention Association

Virginia Manufacturers Association

Virginia Office of the Attorney General (OAG)

Virginia Petroleum Convenience and Grocery Association

Virginia Retail Merchants Association

Virginia Sheriffs' Association

Virginia Wholesalers and Distributors Association and North Carolina Wholesalers Association

7/Eleven

Habeas Corpus: Restrictions, Deadlines and Relief

Executive Summary

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Background

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

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

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

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

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

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

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

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

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

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

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

Habeas Corpus

Habeas Corpus **Generally**

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

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

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

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

Virginia Law - *Habeas Corpus*

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

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

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

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

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

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

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

[17] Va. Code § 8.01-654 (2016).

[18] 1995 Va. Acts ch. 503.

[19] 1998 Va. Acts ch. 577.

[20] 2005 Va. Acts ch. 836.

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

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

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

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

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

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

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

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

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

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

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

Data on Writs of *Habeas Corpus* in Virginia

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

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

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

Source: Supreme Court of Virginia.

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

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

CY	Total Filings*
2013	420
2014	317
2015	327

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

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

Other Means of Relief

Federal *Habeas Corpus*

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

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

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

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

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

Writ of Actual Innocence Based on Nonbiological Evidence

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

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

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

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

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

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

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

Data on Writs of Actual Innocence for Nonbiological Evidence

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

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

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

Source: Supreme Court of Virginia

Fleming v. Commonwealth

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

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

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

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

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

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

Gubernatorial Pardon

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

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

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

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

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

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

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

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

Texas Law – *Habeas Corpus*

Habeas Corpus Generally

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

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

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

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

Procedure after Felony Conviction without the Death Penalty[76]

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

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

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

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

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

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

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

Procedure Related to Certain Scientific Evidence[94]

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Ex parte Robbins

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

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

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

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

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

Summary and Conclusion

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

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

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

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

Acknowledgements

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

Innocence Project

Innocence Project of Texas

Mid-Atlantic Innocence Project

Office of the Attorney General

Office of the Attorney General of Texas

Restitution: Collection Practices and Extension of Probation

Executive Summary

During the Regular Session of the 2016 General Assembly, Delegate Robert B. Bell introduced House Bill 605 (HB 605). The bill as introduced required an automatic extension of probation if a defendant failed to pay restitution or complete community service as ordered by the court. A substitute version of HB 605 was introduced and enacted into law. The substitute version extended the statute of limitations for the issuance of process against a defendant for failure to pay restitution from one year to three years.

The House Courts of Justice Committee sent a letter requesting that the Crime Commission review the subject matter of HB 605 as introduced, including an analysis of the automatic extension of probation for failure to pay restitution. The Executive Committee of the Crime Commission authorized a broad review of the topic of restitution, including an examination of current methods for payment and collection, as well as extension of probation.

In order to address the study mandate, staff collected available literature and research, gathered and analyzed data from numerous local and state entities, completed a review of Virginia restitution statutes, reviewed restitution statutes and practices of other states, and met with numerous stakeholders involved in the restitution process in Virginia. Staff also developed and disseminated a survey to clerks of court for all circuit, general district, juvenile and domestic relations, and combined district courts. The response rate was high; 95% (306 of 321) of courts responded. Finally, staff surveyed other states' Departments of Corrections' Deputy Directors to gain insight into how restitution was handled across the nation and received a 63% (31 of 49) response rate.

According to *Black's Law Dictionary*, restitution involves the return or restoration of a specific thing to its owner, or compensation for a wrong or loss caused to another. Restitution can be ordered for a variety of legal reasons, the most common being tort (a civil remedy involving a monetary dispute), contract (a civil remedy involving a dispute over the terms of or a breach of a contract), or criminal (a quasi-civil remedy for the damages or loss caused by a crime). Staff focused the study on criminal restitution.

An enormous amount of restitution goes uncollected in Virginia. As of November 8, 2016, the total outstanding restitution owed to victims was $406,697,471 for all courts across the Commonwealth. Data was not readily available to determine the total number of orders issued, the number of defendants ordered to pay, or the number of victims owed restitution.

The criminal restitution process begins at sentencing when the court determines the amount of restitution owed and the terms of payment. Restitution is to be paid to the clerk and disbursed by the clerk as directed by the court. If the defendant is unable to pay restitution in full within 30 days of sentencing, he must enter into a deferred payment or installment plan. The payment of restitution may be ordered as a condition of the defendant's suspended sentence, probation, or both.

Virginia law differentiates between non-delinquent and delinquent restitution. Non-delinquent restitution includes sums which the defendant has paid or is paying in compliance with the terms of a deferred payment or installment plan. Delinquent restitution includes sums which the defendant has failed to pay as required by a court order. Such delinquent restitution can include sums which have not been paid in full by a date specified by the court or sums which have not been paid in accordance with the terms of a deferred payment or installment plan. If a defendant fails to pay restitution within 41 days of the due date ordered by the court, the restitution is considered to be delinquent and is forwarded to collections. It is the duty of the Commonwealth's Attorney to institute proceedings for the collection of delinquent restitution. The Commonwealth's Attorney can undertake collections through his own office, or may contract with a private attorney or collections agency, a local governing body, a county or city Treasurer, or the Department of Taxation to engage in collections on his behalf.

Separate and apart from the collections process, the court may impose various sanctions upon a defendant for failure to pay restitution. The court may revoke the defendant's suspended sentence or probation, hold the defendant in contempt of court, or suspend the defendant's driving privilege.

The court also has the authority to increase or decrease the length of a defendant's probation or to modify or revoke any condition of probation. Virginia law does not allow for an automatic extension of probation. The court may modify the defendant's probation only after a hearing following reasonable notice to the defendant and the attorney for the Commonwealth. If the period of probation exceeds the period of the suspended sentence, then the terms of probation become unenforceable after the period of the suspended sentence expires.

Staff found that the restitution process is fragmented and inconsistent in Virginia, which in turn leads to inequitable treatment of victims and defendants across the Commonwealth. Staff identified four specific categories of need within the restitution process, including:

- Uniformity within the restitution process;
- Collection of restitution;
- Monitoring of restitution compliance; and,
- Disbursement of restitution.

In response to these needs, staff identified many legislative and administrative changes that could be made to improve the overall functionality and efficiency of the restitution process. The Crime Commission reviewed the findings and recommendations of the study at its November meeting. Staff presented the following recommendations and policy options at the December meeting:

Recommendation 1: Virginia Code § 19.2-305.1 should be amended to require the Office of the Executive Secretary of the Supreme Court to develop a form order for restitution to be entered at the time of sentencing.

The Crime Commission unanimously endorsed Recommendation 1.

Recommendation 2: Virginia Code § 19.2-305.1 should be amended to require that the form order developed by the Office of the Executive Secretary of the Supreme Court should be completed in part by the Commonwealth's Attorney, or his designee, prior to sentencing and should be entered by the court at the time of sentencing.

- If the Commonwealth's Attorney is not involved in the prosecution, then the court or clerk shall complete the form.
- A copy of this form order should be provided to the defendant, without the victim's contact information, at sentencing.
- A copy of this form order should be provided to the victim(s), free of charge, upon request of the victim(s).
- This form will provide vital information for clerks to collect and distribute restitution.

The Crime Commission unanimously endorsed Recommendation 2.

Recommendation 3: Virginia Code § 19.2-305.2 should be amended to clarify that the docketing of a criminal restitution order as a civil judgment does not prohibit criminal or contempt enforcement of that restitution order.

The Crime Commission unanimously endorsed Recommendation 3.

Recommendation 4: Virginia Code § 19.2-305.1 should be amended to allow for both the defendant and the Commonwealth's Attorney to seek modification of the terms of payment of restitution in the event that a defendant's ability to pay changes.

- The Commonwealth's Attorney should notify the victim of any proceedings to modify the restitution order.

The Crime Commission unanimously endorsed Recommendation 4.

Recommendation 5: Virginia Code § 19.2-305.1 should be amended to specify that the court shall not order the defendant to pay restitution directly to the victim or through the defendant's counsel.

The Crime Commission made no motion on Recommendation 5.

Recommendation 6: Virginia Code §§ 19.2-305.1, 19.2-305.2, and 19.2-354 should be amended to allow the court discretion to order a defendant who is unable to pay restitution the option to perform community service at the rate of the state minimum wage in lieu of restitution, provided that such community service is with the consent of the victim, the victim's estate, or the victim's agent, and the Commonwealth's Attorney.

Recommendation 6 was defeated by a majority vote of the Crime Commission.

Recommendation 7: The Department of Taxation Court Debt Collections Office should explore the possibility of accepting payments for delinquent restitution and upgrading current software to allow for a more streamlined approach to the collection of restitution. Additionally, the Office of the Executive Secretary of the Supreme Court, Department of Taxation, Department of Motor Vehicles, Department of Corrections, and Department of Criminal Justice Services should develop recommendations for enhancing the collection of restitution and to report findings and recommendations to the Chairman of the Crime Commission by November 1, 2017. The Commonwealth's Attorneys' Services Council and the Indigent Defense Commission will also be included in this group.

- May require legislation if funding is provided for new software.
- May require an amendment to Virginia Code § 19.2-349 to encompass all Commonwealth's Attorneys and collection agents.

The Crime Commission unanimously voted to send a letter request to the Office of the Executive Secretary of the Supreme Court that a restitution work group be formed for Recommendation 7.

Recommendation 8: Virginia Code §§ 19.2-303, 19.2-304, 19.2-305, 19.2-305.1, and 19.2-306 should be amended to specify who is responsible for monitoring compliance with the payment of restitution. Such amendments should include:

- If restitution is ordered, the defendant should be placed on indefinite supervised probation until all restitution is paid in full;

- The Department of Corrections or the local probation office should be responsible for monitoring compliance with the restitution order;
- For misdemeanor cases, as an alternative to probation, the court may instead schedule a review hearing to determine compliance with the restitution order;
- If supervision services are not available in the locality, then the court shall schedule a review hearing to determine compliance with the restitution order;
- The court should be required to conduct a hearing upon notice from the probation officer that the defendant is not in compliance with restitution payments;
- The court should verify with the clerk of court that all restitution has been paid before releasing the defendant from supervised probation; and,
- A provision allowing the court to release the defendant from supervised probation, upon the defendant's motion and under special circumstances, after consideration of the amount owed and paid, payment history, and the defendant's future ability to pay. The Commonwealth's Attorney should notify the victim of any request by the defendant for release from supervision.

The Crime Commission unanimously endorsed Recommendation 8.

Recommendation 9: The General Assembly should authorize funding for the Office of the Executive Secretary of the Supreme Court to allow for circuit courts to accept online payments. The amount of funding required is $150,000.

The Crime Commission endorsed Recommendation 9 by a majority vote.

Recommendation 10: The General Assembly should provide additional resources to the Department of Corrections to support the monitoring of restitution and the extension of probation.

The Crime Commission made no motion on Recommendation 10.

Recommendation 11: The Office of the Executive Secretary for the Supreme Court, in coordination with other stakeholders involved in the restitution process, should develop best practice guidelines for managing the restitution process. The guidelines should address such practices as:

- Developing a local plan for the collection, monitoring and disbursement of restitution;
- Addressing repeat offenders;
- Handling joint and several restitution orders;

- Determining how payments are applied when the defendant owes fines, costs and restitution;
- Addressing issues surrounding micro-checks for restitution;
- Issues involving collections when the victim is a large corporation or insurance company;
- How to handle unclaimed restitution;
- Options for locating the victim for disbursement;
- Availability of payment options, including credit and debit cards and online payment;
- Feasibility of developing a uniform payment schedule for restitution, similar to the child/spousal support model; and,
- Defining when a case is closed for purposes of collection and monitoring.

If the Court later determines that some of these items would be better addressed by legislation they will notify Crime Commission staff.

The Crime Commission unanimously voted to send a letter request for Recommendation 11.

Recommendation 12: The Office of the Executive Secretary for the Supreme Court should provide training to clerks and judges on the best practice guidelines for managing the restitution process.

The Crime Commission unanimously voted to send a letter request for Recommendation 12.

Recommendation 13: The Department of Criminal Justice Services should convene representatives from the Virginia Victim Assistance Network, the Criminal Injuries Compensation Fund, Commonwealth's Attorneys' Offices, and any other interested stakeholders, to develop an informational brochure for victims to explain restitution and the victim's role in the restitution process.

The Crime Commission unanimously voted to send a letter request for Recommendation 13.

Recommendation 14: The Office of the Executive Secretary of the Supreme Court should enhance their Financial Accounting System (FAS) to allow clerks the ability to generate a payment notice, as is the practice with fines and costs, along with any other capabilities that would enhance the management of restitution.

The Crime Commission unanimously voted to send a letter request for Recommendation 14.

Policy Option 1: Virginia Code § 19.2-358 could be amended to remove the court's authority to impose up to a $500 fine for a defendant's failure to pay a fine, costs, forfeiture, restitution or penalty.

The Crime Commission unanimously endorsed Policy Option 1.

Policy Option 2: Virginia Code § 19.2-349 could be amended to require the court to notify the Commonwealth's Attorney if a defendant who owes restitution has not made any payments within 90 days after his account was sent to collections. Virginia Code § 19.2-349 could be amended to require the clerk to send a list every 90 days to the Commonwealth's Attorney of all defendants who owe restitution, including the amount ordered and balance due.

The Crime Commission unanimously endorsed Policy Option 2.

Legislation was introduced in both chambers during the Regular Session of the 2017 General Assembly for Recommendations 1, 2, 3, 4, and 8, and Policy Options 1 and 2. Due to the unanticipated budget shortfall, the budget amendment for Recommendation 9 was not included in the final state budget.

Delegate Robert B. Bell introduced House Bill 1855, which was an omnibus bill encompassing Recommendations 1, 2, and 3, and Policy Options 1 and 2. Delegate Robert B. Bell also introduced House Bill 1856 that dealt with the supervised probation requirements of Recommendation 8. Delegate Charniele L. Herring introduced House Bill 2083 in regard to the modification of the terms of payment of restitution pursuant to Recommendation 4.

Companion bills to all of the House of Delegates legislation were introduced in the Senate. Senator Mark D. Obenshain introduced Senate Bills 1284 and 1285, which were identical to House Bills 1855 and 1856, respectively. Senator Jennifer L. McClellan introduced Senate Bill 1478, which was identical to House Bill 2083.

House Bill 2083 was left in the House Courts of Justice Committee. Senate Bill 1478 failed to report from the Senate Courts of Justice Committee.

The General Assembly passed House Bills 1855 and 1856 and Senate Bills 1284 and 1285. The Governor returned all four bills to the General Assembly with recommended amendments. The House of Delegates voted to reject the Governor's amendments to House Bill 1856. The Senate voted to reject the Governor's amendments to Senate Bill 1285. The Governor ultimately vetoed both House Bill 1856 and Senate Bill 1285. The General Assembly accepted the Governor's amendments to House Bill 1855 and Senate Bill 1284. Both of those bills were passed and signed by the Governor.

Background

During the Regular Session of the 2016 General Assembly, Delegate Robert B. Bell introduced House Bill 605 (HB 605). The bill as introduced required an automatic extension of probation if a defendant failed to pay restitution or complete community service as ordered by the court. A substitute version of HB 605 was introduced and enacted into law.[1] The substitute version extended the statute of limitations for the issuance of process against a defendant for failure to pay restitution from one year to three years.

The House Courts of Justice Committee sent a letter requesting that the Crime Commission review the subject matter of HB 605 as introduced, including an analysis of the automatic extension of probation for failure to pay restitution. The Executive Committee of the Crime Commission authorized a broad review of the topic of restitution, including an examination of current methods for payment and collection, as well as extension of probation.

In order to address the study mandate, staff collected available literature and research, gathered and analyzed data from numerous local and state entities, completed a review of Virginia restitution statutes, reviewed restitution statutes and practices of other states, and met with numerous stakeholders involved in the restitution process in Virginia. Staff also developed and disseminated a survey to clerks of court for all circuit, general district, juvenile and domestic relations, and combined district courts. The response rate was high; 95% (306 of 321) of courts responded.[2] Finally, staff surveyed other states' Departments of Corrections' Deputy Directors to gain insight into how restitution was handled across the nation and received a 63% (31 of 49) response rate.

According to *Black's Law Dictionary*, restitution involves the return or restoration of a specific thing to its owner, or compensation for a wrong or loss caused to another.[3] Restitution can be ordered for a variety of legal reasons, the most common being for a tort (a civil remedy involving a monetary dispute), contract (a civil remedy involving a dispute over the terms of or a breach of a contract), or criminal (a quasi-civil remedy for the damages or loss caused by a crime). Staff focused the study on criminal restitution.[4]

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[1] 2016 Va. Acts ch. 718.

[2] The breakdown of response rate by court was as follows: 98% (118 of 120) of circuit courts; 91% (71 of 78) of general district only courts; 96% (74 of 77) of juvenile and domestic relations only courts; and, 93% (43 of 46) of combined district courts.

[3] *Restitution, Black's Law Dictionary* (9th Ed. 2009).

[4] Note that many of the Virginia Code sections which reference restitution also include provisions relating to fines, costs, forfeitures or other monetary penalties. Staff distinguished criminal restitution from these other monetary obligations for purposes of this study.

Restitution Process

Overview of Process

In Virginia, the criminal restitution process begins at sentencing when the court determines the amount of restitution owed and the terms of payment.[5] At or before the time of sentencing, the court shall receive and consider any plan submitted by the defendant for repaying restitution.[6] The restitution plan shall include the defendant's home address, place of employment and address, social security number and bank information.[7] If the court finds the restitution plan to be reasonable and practicable under the circumstances, then it may consider probation or an appropriate suspension of the sentence.[8] The defendant shall make restitution while on probation, work release or following his release from confinement based upon the restitution plan he submitted or a reasonable and practical plan devised by the court.[9]

When suspending the imposition or execution of a sentence, the court may "require the defendant to make at least partial restitution to the aggrieved party or parties for damages or loss caused by the offense" as a condition of the suspended sentence.[10] The court may also order the payment of restitution as a condition of the defendant's probation.[11]

For any person convicted of a violation of any provision in Title 18.2 on or after July 1, 1995, the court shall order such person to "make at least partial restitution for any property damage or loss caused by the crime or for any medical expenses or expenses directly related to funeral or burial incurred by the victim or his estate as a result of the crime."[12] If a crime resulted in property damage or loss, no person shall be placed on probation or have his sentence suspended unless such person shall make at least partial restitution for such property damage or loss.[13]

If a defendant who has not previously been convicted of a felony enters a plea of not guilty to a misdemeanor property offense under Articles 5, 6, 7 and 8 of Chapter 5 of Title 18.2, and the court finds facts sufficient to justify a finding of guilt, the court may defer further proceedings, place the defendant on probation and may order restitution for losses caused.[14]

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[5] Va. Code § 19.2-305.1(D) (2016).
[6] Va. Code § 19.2-305.1(C) (2016).
[7] *Id.*
[8] *Id.*
[9] *Id.*
[10] Va. Code § 19.2-303 (2016).
[11] Va. Code § 19.2-305(B) (2016).
[12] Va. Code § 19.2-305.1(B) (2016).
[13] Va. Code § 19.2-305.1(A) (2016).
[14] Va. Code § 19.2-303.2 (2016).

The Virginia Code mandates that the court order restitution for specified offenses, including:

- A juvenile adjudicated delinquent of a violation of Virginia Code §§ 18.2-51, 18.2-51.1, 18.2-52, 18.2-53, 18.2-55, 18.2-56, 18.2-57, 18.2-57.2, 18.2-121, 18.2-127, 18.2-128, 18.2-137, 18.2-138, 18.2-146, or 18.2-147; or for any violation of a local ordinance adopted pursuant to Virginia Code § 15.2-1812.2;[15]
- Removal of an electronic or radio transmitting device from certain animals;[16]
- Fraudulent conversion or removal of leased personal property;[17]
- Killing or injuring police animals;[18]
- Damaging or destroying a research farm product;[19]
- Identity theft;[20]
- Property damaged, destroyed, or otherwise rendered unusable as a result of methamphetamine production;[21]
- Damage to the Capitol, state property in Capitol Square or property assigned to Capitol Police;[22]
- A defendant convicted of an offense under Virginia Code §§ 18.2-374.1, 18.2-374.1:1, or 18.2-374.3;[23] and,
- Larceny of timber.[24]

The court shall specify the amount of restitution and terms of payment in the judgment order.[25] Pursuant to statute, restitution is to be paid to the clerk and disbursed by the clerk as directed by the court.[26] The methods of repayment can vary by court.[27]

When ordering restitution pursuant to Virginia Code §§ 19.2-305 or 19.2-305.1, the court may order interest at the statutory rate, which shall accrue from the date of loss or damage unless another date is specified.[28] The statutory rate of interest is six percent annually.[29]

When a defendant is ordered to pay restitution and cannot do so within 30 days of sentencing, the court shall require the defendant to enter into a deferred payment

[15] Va. Code § 16.1-278.8(B) (2016).
[16] Va. Code § 18.2-97.1 (2016).
[17] Va. Code § 18.2-118(D) (2016).
[18] Va. Code § 18.2-144.1 (2016).
[19] Va. Code § 18.2-145.1(B) (2016).
[20] Va. Code § 18.2-186.3(E) 2016).
[21] Va. Code § 18.2-248(C1) (2016).
[22] Va. Code § 19.2-305.1(B2) (2016).
[23] Va. Code § 19.2-305.1(E1) (2016).
[24] Va. Code § 55-334.1(A) (2016).
[25] *Id.*
[26] *Id*.
[27] *See* Va. Code § 19.2-353.3 (2016). District court clerks shall accept personal checks and credit or debit cards in lieu of money for all fees, fines, restitution, forfeitures and penalties. Circuit court clerks shall accept personal checks and may, in their discretion, accept credit or debit cards.
[28] Va. Code § 19.2-305.4 (2016).
[29] Va. Code § 6.2-302(A) (2016).

or installment plan.[30] The court may authorize the clerk to establish and approve the conditions of all deferred or installment payments and such conditions shall be posted in the clerk's office and on the court's website if available.[31] As a condition of such deferred or installment payments, the defendant shall promptly notify the court of any change of mailing address.[32] When the court authorizes a deferred payment or installment plan for the defendant, the clerk shall provide notice to that defendant that he could be fined and imprisoned under Virginia Code § 19.2-358, or that his driver's license could be suspended under Virginia Code § 46.2-395, for failure to maintain payments as ordered.[33]

Failure to Pay Restitution

The court may impose various sanctions upon a defendant for failure to pay restitution. The court may revoke the defendant's suspended sentence or probation,[34] hold the defendant in contempt of court,[35] or suspend the defendant's driving privilege.[36]

Revocation Proceedings

If a court has suspended the imposition or execution of a sentence, the court may revoke that suspended sentence for any cause it deems sufficient that occurred during the period of suspension set by the court or during the probation period.[37] If a probation or suspension period was not set by the court, then the court may revoke the suspension for any cause it deems sufficient which occurred during the maximum period for which the defendant could have been sentenced to imprisonment.[38]

The defendant's unreasonable failure to abide by a restitution plan shall result in the revocation of probation or the imposition of the suspended sentence.[39] The court shall conduct a hearing relating to the revocation of probation or the imposition of a suspended sentence before taking such action.[40]

The court may not conduct a hearing to revoke the suspended sentence unless the court issues process to notify the defendant or compel his appearance before the court.[41] If the violation is for failure to pay restitution, process shall be issued within three years of the expiration of the period of probation or of the period of the

[30] Va. Code § 19.2-354(A) (2016).
[31] *Id*.
[32] *Id*.
[33] Va. Code § 19.2-354(D) (2016).
[34] Va. Code § 19.2-306 (2016).
[35] Va. Code § 19.2-358 (2016).
[36] Va. Code § 46.2-395 (2016).
[37] Va. Code § 19.2-306(A) (2016).
[38] *Id*.
[39] Va. Code § 19.2-305.1(E) (2016).
[40] *See* Va. Code §§ 19.2-304, 19.2-305.1(E) and 19.2-306 (2016).
[41] Va. Code § 19.2-306(B) (2016).

suspension of the sentence.[42] If no period of probation or suspension was set by the court, such process shall be issued for restitution violations within three years after the expiration of the maximum period for which the defendant could have been sentenced to imprisonment.[43] The defendant may waive notice and service of process, and if so waived, the court may proceed to determine if the defendant violated the terms of the suspended sentence.[44]

If the court finds good cause to believe that the defendant has failed to pay restitution as ordered, then the court shall impose punishment against the defendant for violation of the terms of the suspended sentence.[45] If the court originally suspended the imposition of the sentence, the court shall revoke the suspension and may impose whatever sentence could have been originally imposed.[46] If the court originally suspended the execution of the sentence, then the court shall revoke the suspension and the original sentence shall be in full force and effect.[47] The court may suspend all or some of this sentence and may place the defendant on probation under terms and conditions.[48] If the court finds no cause to revoke or suspend a sentence or probation, then any further hearing to do so based solely on the allegation for which the original hearing was held is barred.[49]

Contempt Proceedings[50]

If a defendant defaults in the payment or any installment payment of restitution, the court may, on its own motion or the motion of the Commonwealth's Attorney, order the defendant to show cause why he should not be jailed or fined for nonpayment.[51] A show cause is not required prior to issuing a capias if the court had previously entered an order to appear on a date certain in the event of nonpayment.[52]

Upon a finding of nonpayment, the court may find the defendant in contempt and may impose a sentence of confinement of not more than 60 days or a fine not to exceed $500.[53] The defendant may present evidence to show that his default was not attributable to an intentional refusal to obey the court or to make a good faith effort to obtain the funds.[54]

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[42] *Id*. Note that the three year statute of limitations for failure to pay restitution became effective July 1, 2016, as a result of the enactment of HB 605 during the Regular Session of the 2016 General Assembly.
[43] *Id*.
[44] *Id*.
[45] Va. Code § 19.2-306(C) (2016).
[46] *Id*.
[47] *Id*.
[48] *Id*.
[49] Va. Code § 19.2-306(D) (2016).
[50] *See* Porter v. Commonwealth, 65 Va. App. 467, 778 S.E.2d 549 (Va. Ct. App. 2015). If restitution was ordered as part of a defendant's suspended sentence or probation, the failure to pay restitution can be enforced through either Va. Code §§ 19.2-306 or 19.2-358, as the two are not mutually exclusive. A significant difference between the two statutes is that there is no statute of limitations for the enforcement of a violation of Va. Code § 19.2-358.
[51] Va. Code § 19.2-358(A) (2016).
[52] *Id*.
[53] Va. Code § 19.2-358(B) (2016).
[54] *Id*.

If it appears to the court that the defendant's default was excusable, the court may allow additional time for payment, reduce the amount due or the installment due, or may remit the unpaid portion in whole or in part.[55] If the court sentences the defendant to confinement, the court may provide in its order that payment of the amount in default will entitle the defendant to release from confinement.[56] Additionally, after entering the order for contempt for nonpayment, the court may at any time reduce the sentence for good cause shown, including payment of the amount owed.[57]

Suspension of Driving Privilege[58]

Any person who drives a motor vehicle on the highways in Virginia is deemed to have consented, as a condition of such driving, to pay all lawful monetary obligations assessed against him, including restitution, for violation of the laws of the Commonwealth.[59] If a person fails or refuses to pay, or if he fails to make deferred or installment payments as ordered, the court shall suspend his privilege to drive a motor vehicle on the highways of Virginia.[60] The person's license shall remain suspended until all monetary obligations are paid in full.[61] However, if the person pays a reinstatement fee to DMV and enters into a deferred payment or installment payment agreement that is acceptable to the court, his driver's license shall be restored.[62] If a person does not have a Virginia driver's license, or is a nonresident, the court may order as part of the conviction that the person not drive a vehicle in Virginia "…for a period to coincide with the nonpayment of the amounts due."[63]

Restitution Payment Status

Virginia law differentiates between two types of restitution in the criminal context: non-delinquent and delinquent. Non-delinquent restitution includes sums which the defendant has paid or is paying in compliance with the terms of a deferred payment or installment plan. Delinquent restitution includes sums which the defendant has failed to pay as required by a court order. Such delinquent restitution can include sums which have not been paid in full by a date specified by the court or sums which have not been paid in accordance with the terms of a deferred payment or installment plan.

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[55] Va. Code § 19.2-358(C) (2016).
[56] Va. Code § 19.2-358(B) (2016).
[57] *Id*.
[58] *See* Driven Deeper Into Debt: Unrealistic Repayment Options Hurt Low-Income Court Debtors (2016). *Legal Aid Justice Center*. Retrieved from: https://www.justice4all.org/wp-content/uploads/2016/05/Driven-Deeper-Into-Debt-Payment-Plan-Analysis-Final.pdf. This report claims that 1 in 6 Virginia drivers has a suspended driver's license due to failure to pay fines and court costs. Crime Commission staff attempted to obtain data from the Virginia Department of Motor Vehicles in regard to the number of driver's licenses suspended solely for failure to pay restitution, however that data was not readily available.
[59] Va. Code § 46.2-395(A) (2016).
[60] Va. Code § 46.2-395(B) (2016).
[61] *Id*.
[62] *Id*.
[63] *Id*.

Non-Delinquent Restitution

Staff requested data for non-delinquent restitution. Table 1 shows the total non-delinquent restitution assessed and paid in fiscal years 15 and 16. The total amount accounts for principle only as interest and fees are not included. While Table 1 must be interpreted with caution, it can be said that *at least* 9 to 10% of restitution assessed in the past two fiscal years was paid within that same fiscal year. The collection percentage is likely higher than this due to the "joint and several" amounts being double-counted in the data. However, due to programming issues, it is unable to be determined exactly how much of the "joint and several" amount is overstated in the total assessed.

Table 1: Total Non-Delinquent Restitution Assessed and Paid, FY15-FY16

Fiscal Year	Total Assessed*	Total Paid**	Collection %
FY15	$42,957,547	$3,742,926	9%
FY16	$39,524,666	$3,791,320	10%

Source: Office of the Executive Secretary-Supreme Court of Virginia, Department of Judicial Services. **Total Assessed* is overstated due to joint and several orders. ** *Total Paid* is the principle amount assessed and paid on during that fiscal year, not amounts paid regardless of when assessed. As such, collection percentages must be interpreted with extreme caution.

Table 2 on the next page provides the breakdown of the total amount of restitution assessed and paid in FY16 broken down by type of court. Not surprisingly, circuit courts have the least amount paid within the same fiscal year (around 6%) as compared to the general district and juvenile and domestic relations (J&DR) courts, which have a 36% and 41% collection percentage respectively.

Table 2: Total Non-Delinquent Restitution Assessed and Paid by Type of Court, FY16

Type of Court	Total Assessed*	Total Paid**
Circuit Courts	$34,940,874	$2,068,994
General District Courts	$3,292,694	$1,186,963
J&DR Courts	$1,291,098	$535,362
TOTAL	**$39,524,666**	**$3,791,320**

Source: Office of the Executive Secretary-Supreme Court of Virginia, Department of Judicial Services.
* *Total Assessed* is overstated due to joint and several orders. ** *Total Paid* is the principle amount assessed and paid on during that fiscal year, not amounts paid regardless of when assessed. As such, collection percentages must be interpreted with caution.

Delinquent Restitution

The clerk of every circuit and district court must submit a monthly report of all fines, costs, forfeitures and penalties, including restitution, that is delinquent more than 30 days, to the judge of his court, the Department of Taxation, the State Compensation Board and the Commonwealth's Attorney.[64] The Executive Secretary of the Supreme Court shall submit this report on behalf of any clerks who participate in the Supreme Court's automated information system.[65]

If a defendant fails to pay restitution within 41 days of the due date ordered by the court, the restitution is considered to be delinquent and is forwarded to collections. The Commonwealth's Attorney has the duty to institute proceedings for collection of all fines, forfeitures, penalties and restitution.[66] The Commonwealth's Attorney and the clerk may agree to a process to commence collection 30 days after judgment if the defendant has not entered into an installment payment agreement.[67]

The Commonwealth's Attorney shall determine whether it would be impractical or uneconomical for his office to engage in such collection.[68] If the Commonwealth's Attorney does not undertake such collection, he shall contract with one of the following to engage in such collection activities:

- a private attorney or private collection agency;
- a local governing body;
- the county or city Treasurer; or,
- the Department of Taxation.[69]

[64] Va. Code § 19.2-349(A) (2016).
[65] *Id.*
[66] Va. Code § 19.2-349(B) (2016).
[67] *Id.*
[68] *Id.*
[69] *Id.*

If the Commonwealth's Attorney does engage in such collection, he shall abide by the procedures established by the Department of Taxation and the Compensation Board.[70] If the Commonwealth's Attorney contracts with another party for such collection, then such a contract shall be in accordance with such terms and conditions as may be established by guidelines promulgated by the Office of the Attorney General, the Executive Secretary of the Supreme Court, the Department of Taxation and the Compensation Board.[71]

Various means exist under Virginia law to collect upon unpaid debts. Such methods include: garnishment of wages,[72] liens on property,[73] levy of property,[74] withholding of the individual's state tax refund,[75] and withholding of the individual's lottery winnings.[76] Treasurers have also been granted certain authority under the Virginia Code in regard to assessing liens and conducting distress seizure of personal property.[77] Additionally, defendants serving a term of incarceration on work release, non-consecutive days, or electronic monitoring are required to remain compliant with restitution payments as a condition of participation in these programs.[78]

The fee to any private attorney or collection agency is paid on a contingency fee basis out of the amount of proceeds collected.[79] However, no private attorney or collection agency shall be paid a fee for amounts collected by the Department of Taxation under the Setoff Debt Collection Act (§ 58.1-520 et seq.).[80] A local Treasurer engaging in collections may also collect an administrative fee.[81] Only Treasurers who were collecting on a contingency fee basis as of January 1, 2015, may contract to continue receiving compensation on such a contingency basis.[82]

When restitution becomes delinquent and is sent to collections, then the amount owed shall be increased by a 17% rate.[83] The party collecting the restitution is limited to collecting a portion of this increased rate as compensation for collection of the delinquent restitution.[84] For example, assume that a defendant owed $100 in restitution and that sum became delinquent. When that amount is referred to collections, the 17% increased rate would make a total of $117 subject to collection.

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[70] *Id*.
[71] *Id*.
[72] Va. Code §§ 8.01-511 through 8.01-525 (2016).
[73] Va. Code §§ 8.01-501 through 8.01-505 (2016).
[74] Va. Code §§ 8.01-487 through 8.01-500 (2016).
[75] Va. Code §§ 58.1-520 through 58.1-535 (2016).
[76] Va. Code § 58.1-4026 (2016).
[77] Va. Code §§ 58.1-3940 through 58.1-3962 (2016).
[78] Va. Code § 19.2-354(B) (2016). *See also* Va. Code § 53.1-131 (2016).
[79] *Id*.
[80] *Id*.
[81] *Id*.
[82] *See* Master Guidelines Governing Collection of Unpaid Delinquent Court-Ordered Fines and Costs Pursuant to Virginia Code § 19.2-349 (2015). *State Compensation Board*. Retrieved from: http://www.scb.virginia.gov/docs/guidelinesfinesandfees.pdf
[83] *Id*.
[84] *Id*.

Because the collection is for delinquent restitution, a collecting agent would be limited to receiving compensation for a portion of the $17 increase, but not for a portion of the $100 in restitution owed to the victim.

The Executive Secretary of the Supreme Court of Virginia may, at the direction of the Committee on District Courts or at the request of a circuit court clerk, enter into an agreement with the DMV to authorize the DMV to receive payment of any delinquent fines, costs, forfeitures, and penalties, including any court-ordered restitution of a sum certain, on behalf of a district or circuit court.[85] However, the DMV is not authorized to establish an installment payment plan or to receive partial payment of the full amount imposed by the court.[86] The DMV may impose a processing fee for this transaction.[87]

As seen in Table 3, the large majority, 74% (238 of 321), of delinquent restitution was referred to the Department of Taxation for collection, followed by the Commonwealth's Attorneys, private attorneys, and Treasurer's Offices.

Table 3: Collection Agents for Delinquent Restitution, FY16

Collection Agent	Total Courts	% of Total
Department of Taxation	238	**74%**
Commonwealth's Attorneys	35	**11%**
Private Attorneys	29	**9%**
Treasurer's Offices	19	**6%**
TOTAL	**321**	**100%**

Source: State Compensation Board.

Staff requested data for delinquent restitution from the State Compensation Board. Unlike the data for non-delinquent restitution, the "Total Collected" column in Table 4 includes amounts collected on restitution assessed in *any* given fiscal year. Because of this, the "Collection %" column must also be interpreted with caution. A further note of caution is that any comparison between the data provided for delinquent restitution and non-delinquent restitution must be discouraged due to the "joint and several" over counting issue referenced earlier. Additionally, the "Total Collected" column in Table 4 and "Total Paid" column in Table 1 are defined differently between the two sources of data.

[85] Va. Code § 19.2-349.1 (2016).
[86] *Id.*
[87] *Id.*

Table 4: Total Delinquent Restitution Assessed and Collected, FY15-FY16*

Fiscal Year	Total Assessed	Total Collected	Collection %
2015	$28,613,642	$5,306,040	19%
2016	$33,993,646	$5,852,399	17%

Source: State Compensation Board. * FY16 data accurate as of September 16, 2016.
Note: Assessments of restitution in a fiscal year are limited to assessments made in that fiscal year, however collections of restitution in a fiscal year may contain amounts collected for prior year assessments. As such, collection percentages must be interpreted with extreme caution.

Table 5 illustrates the total delinquent restitution assessed and collected by type of court. Again, not surprisingly, circuit courts collect at a lower percentage due to the high assessment amounts as compared to what is typically assessed in district courts. Yet, circuit courts comprised 87% ($5,087,233 of $5,858,399) of what was collected overall in FY16.

Table 5: Total Delinquent Restitution Assessed and Collected by Type of Court, FY16*

Type of Court	Total Courts	Total Assessed	Total Paid	Collection %
Circuit Courts	120	$31,035,690	$5,087,233	16%
General District Courts	78	$1,186,342	$274,926	23%
J&DR Courts	77	$859,298	$256,387	30%
Combined District Courts	46	$912,317	$233,852	26%
TOTAL	**321**	**$33,993,646**	**$5,852,399**	**17%**

Source: State Compensation Board. * FY16 data accurate as of September 16, 2016.
Note: Assessments of restitution in a fiscal year are limited to assessments made in that fiscal year, however collections of restitution in a fiscal year may contain amounts collected for prior year assessments. As such, collection percentages must be interpreted with extreme caution.

Finally, Table 6 on the next page shows the total delinquent restitution assessed and collected by type of collection agent. Although the Department of Taxation collected at a lower percentage, that agency also handles the vast majority of courts and their efforts comprised 55% ($3,254,033 of $5,852,399) of what was collected overall in FY16.

Table 6: Total Delinquent Restitution Assessed and Collected by Collection Agency, FY16*

Collection Agent	Total Courts	Total Assessed	Total Collected	Collection %
Department of Taxation	238	$22,913,673	$3,254,099	14%
Commonwealth's Attorneys	35	$2,937,314	$775,325	26%
Private Attorneys	29	$4,292,672	$1,234,024	29%
Treasurer's Offices	19	$3,849,987	$588,951	15%
TOTAL	**321**	**$33,993,646**	**$5,852,399**	**17%**

Source: State Compensation Board. * FY16 data accurate as of September 16, 2016.
Note: Assessments of restitution in a fiscal year are limited to assessments made in that fiscal year, however collections of restitution in a fiscal year may contain amounts collected for prior year assessments. As such, collection percentages must be interpreted with extreme caution.

Criminal Injuries Compensation Fund[88]

If restitution is ordered and the victim cannot be located or identified, the clerk of court shall forward any such restitution payments to the Criminal Injuries Compensation Fund (CICF) for the benefit of crime victims.[89] Prior to forwarding such payments, the clerk shall record the name of the victim(s), the last known address of the victim(s), and amount of restitution owed.[90] The administrator of the CICF shall reserve a sufficient amount in the fund to make prompt payment to the victim upon request of the victim.[91] The CICF shall be reimbursed through the restitution collected for payments it made on behalf of a victim.[92]

The total amount of unclaimed restitution received by CICF is illustrated in Table 7:

Table 7: Total Unclaimed Restitution Received by CICF, CY14-CY16*

	CY14	CY15	CY16
Total Unclaimed Restitution	$706,759	$670,623	$634,853

Source: CICF Case Management System. *CY16 is through November 3, 2016.

[88] As of January 1, 2017, this fund is referred to as the Virginia Victims Fund (officially Criminal Injuries Compensation Fund).
[89] Va. Code § 19.2-305.1(F) (2016).
[90] *Id.*
[91] *Id.*
[92] Va. Code § 19.2-305.1(G) (2016).

Table 8 illustrates the other sources of monies receivable by CICF, including CICF collections from offenders, restitution received by the courts and forwarded to CICF, and the Department of Taxation's Setoff Debt Collection Program.

Table 8: Total CICF Collections, CY14-CY16*

Source of Monies Received	CY14	CY15	CY16
CICF Collections *Monies received directly from offenders*	$126,080	$119,667	$104,318
Restitution *Monies received by courts and forwarded to CICF*	$237,948	$235,968	$215,087
State Taxation Setoff Debt Collection Program	$132,152	$151,074	$147,888
TOTAL	**$496,180**	**$506,709**	**$467,293**

Source: CICF Case Management System. *CY16 data is through November 3, 2016.

Restitution as a Civil Judgment

A restitution order from the court may be docketed as a civil judgment pursuant to the provisions of Virginia Code § 8.01-446 based upon a written request of the victim.[93] The judgment may be enforced by the victim in the same manner as a judgment in a civil action.[94]

A restitution order docketed pursuant to Virginia Code § 19.2-305.2 has the same force and effect as a specific judgment for money.[95] The docketed order shall state that "…it is an order of restitution in a specific amount in favor of a named party, against a named party, with that party's address, if known, and it shall further state the time from which the judgment bears interest."[96]

Based on survey findings to clerks, docketing restitution orders in criminal cases as civil judgments was primarily a circuit court phenomenon. Specifically, 43% (50 of 116) responding circuit court clerks indicated that this was a common practice in their court. Of the courts that docket restitution orders, survey findings indicated that most of these orders appeared to be docketed at the time of criminal sentencing on the original charge.

[93] Va. Code § 19.2-305.2(B) (2016).
[94] *Id.*
[95] Va. Code § 8.01-446 (2016).
[96] *Id.*

Other States

Staff reviewed other states in order to identify whether they had identified unique methods to handle the collection of restitution. Staff identified a variety of practices in other states, including:

- Designate a statewide agency or a centralized approach to handle all aspects of restitution;[97]
- Suspend any recreational licenses or other state privileges for failure to comply;[98]
- Prohibit expungement of records if any restitution remains unpaid;[99]
- Statutorily require substantial garnishment of inmate wages;[100]
- Thoroughly investigate financial disclosures;[101]
- Transfer restitution owed to victim's estate;[102]
- Create a restitution lien against the defendant's property;[103]
- Docket all restitution orders as civil judgments;[104]
- Automatically generate bills and reminder letters to defendants;[105]
- Use kiosk machines across the state for payments;[106] and,
- Statutorily require a determination of the defendant's ability to pay when establishing the terms of payment.[107]

Extension of Probation and Completion of Sentence

Extension of Probation

As introduced during the Regular Session of the 2016 General Assembly, House Bill 605 deemed that failure to pay restitution or complete community service would result in the automatic extension of probation until all payments were made and community service was performed. The question that arose regarding this legislation was whether probation can be automatically extended in this manner. Virginia law does not allow for such an automatic extension of probation.

In Cook v. Commonwealth, the Virginia Supreme Court found that "fundamental fairness requires a judicial hearing of a summary nature for the probation period to be extended, since increasing the period of probation has the effect of extending the

[97] Vt. Stat. Ann. tit. 13, § 5362 (2016).
[98] Vt. Stat. Ann. tit. 13, § 7043 (m)(2)(D) (2016).
[99] *See* Iowa Code § 907.9(4)(b) (2017). *See also* Kan. Stat. Ann. § 38-2312(e)(2) (2017).
[100] Cal. Penal Code § 2085.5 (c) and (d) (Deering 2016). *See also* https://victimsofcrime.org/docs/restitution-toolkit/f1_ca-restitution-guide.pdf?sfvrsn=2
[101] Cal. Penal Code § 1202.4 (f)(11) and (h) and § 1203(j) (Deering 2016).
[102] Mich. Comp. Laws Serv. § 780.766 (7) (LexisNexis 2016).
[103] *See* Ariz. Rev. Stat. § 13-806 (LexisNexis 2017). *See also* Fla. Stat. Ann. § 960.292 (LexisNexis 2017).
[104] Minn. Stat. § 611A.04 (2017).
[105] *See* Arizona Code of Judicial Administration § 5-205(D)(1). *See also* https://www.azcourts.gov/courtservices/Consolidated-Collections-Unit/FARE
[106] *See* http://courts.delaware.gov/aoc/oscce/locations.aspx
[107] Cal. Penal Code § 1202.42 (a) (Deering 2016).

restraints on the probationer's liberty...."[108] Similarly, Virginia Code § 19.2-304 requires that the court conduct a hearing and provide reasonable notice to the defendant and the attorney for the Commonwealth prior to increasing or decreasing the length of probation or modifying or revoking any condition of probation. Both Virginia case law and statutory law require that the court provide notice and conduct a hearing prior to extending a defendant's term of probation.

Probation may also be extended if the defendant is found to have violated the terms of his suspended sentence or probation following notice and a hearing.[109] If the court finds good cause to believe that the defendant violated the terms of his suspended sentence, the court shall revoke the suspended sentence and may again suspend all or part of the sentence and place the defendant on probation.[110] When extending a defendant's probation, it is important to note that if the period of probation exceeds the period of the suspended sentence, then the terms of probation become unenforceable after the period of the suspended sentence expires.[111]

Completion of Sentence

Another question that arose from the original version of House Bill 605 was what punishment is available if the defendant has served the entire sentence originally imposed. If a court imposed and suspended the execution of a sentence, then the court is limited to revoking and imposing the term of the original sentence which remains in effect.[112] When the defendant has served the entire sentence originally imposed, the court cannot impose any additional punishment for violation of the terms of the suspended sentence or probation under Virginia Code § 19.2-306. If a sentence exceeds the maximum punishment allowable under law, then the excessive portion of the sentence is invalid.[113]

While the court may not impose any additional sentence under Virginia Code § 19.2-306 once the defendant has served his entire sentence, the court may still punish the defendant for contempt for failure to pay restitution as ordered pursuant to the provisions of Virginia Code §19.2-358. The failure to pay restitution can be enforced through either Virginia Code § 19.2-306 or 19.2-358, as the two are not mutually exclusive.[114] Furthermore, there is no statute of limitations for a violation of Virginia Code § 19.2-358.[115]

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[108] 211 Va. 290, 292-293, 176 S.E.2d 815, 817-818 (Va. 1970).
[109] Va. Code § 19.2-306 (2016).
[110] Va. Code § 19.2-306(C) (2016).
[111] *See* Hartless v. Commonwealth, 29 Va. App. 172, 510 S.E.2d 738 (Va. Ct. App. 1999).
[112] Va. Code § 19.2-306(C) (2016).
[113] Deagle v. Commonwealth, 214 Va. 304, 305, 199 S.E.2d 509, 510-511 (Va. 1973).
[114] Porter v. Commonwealth, 65 Va. App. 467, 778 S.E.2d 549 (Va. Ct. App. 2015).
[115] *Id.*

Other States

Staff reviewed the laws of other states to determine whether those sovereignties allowed for an extension of probation if a defendant failed to pay restitution. Staff identified 24 other states that allow for some form of extension of probation. Those 24 states include: Arizona,[116] Arkansas,[117] California,[118] Colorado,[119] Delaware,[120] Idaho,[121] Illinois,[122] Iowa,[123] Kansas,[124] Kentucky,[125] Louisiana,[126] Maryland,[127] Minnesota,[128] Montana,[129] New Mexico,[130] North Carolina,[131] North, Dakota,[132] Oklahoma,[133] Oregon,[134] Texas,[135] Utah,[136] Washington,[137] Wisconsin,[138] and Wyoming.[139]

Key Findings

An enormous amount of restitution goes uncollected in Virginia. As of November 8, 2016, the total outstanding restitution owed to victims was $406,697,471 for all courts across the Commonwealth.[140] The breakdown of this amount by type of court was as follows:

- $391,292,962 owed in circuit courts;
- $7,607,724 owed in general district courts; and,
- $7,796,785 owed in juvenile and domestic relations courts.

Data was not readily available to determine the total number of orders issued, number of defendants ordered to pay, or the number of victims owed restitution.

[116] Ariz. Rev. Stat. § 13-902 (LexisNexis 2016).
[117] Ark. Code Ann. § 5-4-205(f) (2016).
[118] Cal. Penal Code §§ 1203 through 1203.3 (Deering 2016).
[119] Colo. Rev. Stat. § 16-18.5-105(3)(d)(III) (2016).
[120] Del. Code Ann. tit. 11, §§ 4104, 4105, 4204, and 4333 (2016).
[121] Idaho Code Ann. § 20-222 (2017).
[122] 730 Ill. Comp. Stat. Ann. 5/5-6-2(e) (LexisNexis 2016).
[123] Iowa Code § 910.4(1)(b) (2016).
[124] Kan. Stat. Ann. § 21-6608(c)(7) (2017).
[125] Ky. Rev. Stat. Ann. §§ 532.033(8) (2017) and 533.020(4) (2017).
[126] La. Code Crim. Proc. Ann. art. 894.4 (2016).
[127] Md. Code Ann. Crim. Proc. § 6-222 (b) and (c) (LexisNexis 2016).
[128] Minn. Stat. § 609.135 Subd. 1a. and Subd. 2(g) (2017).
[129] Mont. Code Ann. § 46-18-203(7)(a)(iii) and (iv) (2017).
[130] N.M. Stat. Ann. § 31-17-1(H) (LexisNexis 2016).
[131] N.C. Gen. Stat. §§ 15A-1342(a) and 15A-1344(d) and (f) (2016).
[132] N.D. Cent. Code § 12.1-32-07(1) (2016).
[133] Okla. Stat. Ann. tit. 22, §§ 991b and 991f(B) (2017).
[134] Or. Rev. Stat. §§ 137.010(4), 137.540(9), and 161.685(5) (2016).
[135] Tex. Code Crim. Proc. Ann. art. 42A.751 through 42A.753 (2017).
[136] Utah Code Ann. § 77-18-1(10)(a)(ii)(A) (LexisNexis 2016).
[137] Wash. Rev. Code Ann. § 9.94A.753(4) (LexisNexis 2016).
[138] Wis. Stat. § 973.09(4)(c) (2016).
[139] Wyo. Stat. Ann. § 7-9-109 (2017).
[140] The figure accounts for principle amount owed for all non-delinquent and delinquent restitution. The figure is a "snapshot" of what was owed on the stated date as the total amount owed fluctuates daily based on payments ordered and payments disbursed to victims.

Study findings indicated that the restitution process is fragmented and inconsistent in Virginia, which in turn leads to inequitable treatment of victims and defendants across the Commonwealth. Staff identified four categories of need within the restitution process, including:

- Uniformity within the restitution process;
- Collection of restitution;
- Monitoring of restitution compliance; and,
- Disbursement of restitution.

Uniformity

Courts within the same jurisdiction can engage in different practices when ordering, collecting, monitoring, and enforcing restitution. The vast majority of courts receive and distribute non-delinquent restitution payments; however, there is wider variation in the number of courts that establish payment plans and monitor compliance with such payment plans.

Payment plans vary widely by court in terms of how such plans are established, structured, and enforced.[141] A new rule from the Supreme Court of Virginia took effect on February 1, 2017, in order to address this issue.[142]

No statewide standardized form order exists for courts to utilize when ordering restitution, and thus the amount due, the terms of payment, and the defendant's obligations can be unclear. Only 40% (120 of 302) of responding courts indicated that a standardized order was used when ordering restitution in criminal cases.

Additionally, many stakeholders lack the resources necessary to perform their duties in regard to the collection, monitoring and distribution of restitution. For example, a significant number of clerks' offices are very small with 26% (52 of 201) of district courts having three or fewer full-time employees.[143] Based on survey findings, only 10% (32 of 305) of responding clerks indicated that their office had a position dedicated solely to the receipt, distribution, or monitoring of restitution. While it would be optimal to have one person in each locality dedicated to overseeing restitution, a lack of resources creates an impediment to such a practice. Additional training needs to be provided to clerks and judges regarding the restitution process.

Finally, additional resources need to be made available to both victims and defendants. There is no standardized informational resource available to victims to

[141] *See* Driven Deeper Into Debt: Unrealistic Repayment Options Hurt Low-Income Court Debtors, pgs. 10-16 (2016). *Legal Aid Justice Center*. Retrieved from: https://www.justice4all.org/wp-content/uploads/2016/05/Driven-Deeper-Into-Debt-Payment-Plan-Analysis-Final.pdf

[142] Rule 1:24 of the Rules of the Supreme Court of Virginia (2017). Note that many of the provisions of this Rule were codified or preempted by the passage of House Bill 2386 during the Regular Session of the 2017 General Assembly (2017 Va. Acts ch. 802).

[143] Source: Office of the Executive Secretary-Supreme Court of Virginia. It is also important to note that, according to OES, 88% of district court clerks make below $47,476, which would have made overtime available to full-time salaried clerks pursuant to new rules under the Fair Labor Standards Act effective December 1, 2016. Those rules were delayed as a result of an injunction issued by a federal district court in Texas in November 2016.

explain restitution and their role in the process. Likewise, defendants need to be clearly advised of the amount of restitution which they owe and with clear instructions on how to pay such restitution in accordance with the court order. For example, reports suggest that communication with the defendant at the beginning of the collections process about how much they owe and the terms of payment, along with follow-up procedures such as providing informational letters on a regular basis to the defendant, are amongst the best practices for collecting court ordered monetary obligations.[144]

Collection

The process for the collection of restitution varies amongst courts, even though the Virginia Code requires that the clerk of court collect all non-delinquent restitution.[145] Payment options available to defendants, including payments online or with a credit or debit card, are limited and can vary amongst the courts. Most circuit courts do not have the ability to accept online payments due to lack of funding for a statewide system similar to the online payment system used for general district courts. Many courts still do not allow a defendant to pay restitution with a credit or debit card. In addition to these issues, innovative bill collection strategies are not being utilized for the collection of restitution.

According to one study, the average recovery rate achieved by collection agencies across a wide array of industries in 2011 was 16.5% with a median of 12.8%.[146] As suggested by Tables 1 and 4, data showed that efforts to collect restitution in Virginia have proven to be more successful after the restitution becomes delinquent and is forwarded to collections.

Monitoring

The Virginia Code provision regarding delinquent restitution specifies that the attorney for the Commonwealth is "…to cause proper proceedings to be instituted for the collection and satisfaction of all...restitution."[147] Confusion exists in practice because this provision does not explicitly specify who is responsible for monitoring a defendant's compliance with restitution payments. Because the Code is unclear as to who bears this responsibility, numerous stakeholders advised that the victim is often left to notify the court or Commonwealth's Attorney when the victims are not receiving restitution payments.

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[144] *See* Current Practices in Collecting Fines and Fees in State Courts: A Handbook of Collection Issues and Solutions, Second Edition, pgs. 23-26 (2009). *National Center for State Courts*. Retrieved from: http://www.flccoc.org/collections/NCSC/NCSCCurrentPracticesInCollections.pdf

[145] Va. Code § 19.2-305.1(D) (2016).

[146] 2012 Agency Benchmarking Survey, pg. 19. *Association of Credit and Collection Professionals International*. Retrieved from: https://www.acainternational.org/assets/industry-research-statistics/2012-benchmarking-survey.pdf. This survey measured performance in the collection of various delinquent debts, including bank and finance, commercial, credit card and retail, government, health care—both hospital and non-hospital, property management, student loans, telecommunications and utilities, and other miscellaneous debts.

[147] Va. Code § 19.2-349(B) (2016).

Additionally, there is difficulty in monitoring and tracking restitution that was ordered as joint and several and restitution that was docketed as a civil judgment. Confusion also exists in practice over whether the docketing of a restitution order as a civil judgment prohibits the court from using its criminal or contempt powers to sanction a defendant for failure to pay that restitution. Finally, literature exists suggesting that defendants should remain on some type of probation to better ensure compliance with restitution payments.[148]

Disbursement

When a defendant pays restitution, clerks often experience difficulty forwarding the payment to the victim. Such difficulties are attributable to various reasons, including: the clerk never received contact information for the victim, the clerk received contact information but the victim relocated, or the clerk forwarded the payment via check to the victim but the check was never cashed. When these difficulties arise, clerks often lack the time and resources to identify a current address for the victim.

Additionally, some localities order the defendant to pay restitution directly to the victim, which creates monitoring issues and the potential for unwanted contact between the victim and the defendant. On a final note, the Virginia Code allows for community service in lieu of fines and costs,[149] but no such option exists for defendants who are unable to pay restitution.

Summary and Conclusion

During the Regular Session of the 2016 General Assembly, Delegate Robert B. Bell introduced HB 605. The bill as introduced required an automatic extension of probation if a defendant failed to pay restitution or complete community service as ordered by the court. A substitute version of HB 605 was introduced and enacted into law.[150] The substitute version extended the statute of limitations for the issuance of process against a defendant for failure to pay restitution from one year to three years.

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[148] *See* Commonwealth Court Collections Review (2013). *Auditor of Public Accounts*. Retrieved from: https://www.justice4all.org/wp-content/uploads/2014/12/APA-Report-CourtsAccountsReceivableSR2012.pdf; *see also* Making restitution real: Five case studies on improving restitution collection (2011). *National Center for Victims of Crime*. Retrieved from: http://www.victimsofcrime.org/docs/restitution-toolkit/e4_making-restitution-real.pdf; *see also* Restitution in Pennsylvania: Task Force final report (2013). *Pennsylvania Office of the Victim Advocate*. Retrieved from: http://victimsofcrime.org/docs/default-source/restitution-toolkit/restitution-taskforce_final-report-2013.pdf?sfvrsn=2; *see also* Ruback, R.B., Gladfelter, A.S., & Lantz, B. (2014). Paying restitution: Experimental analysis of the effects of information and rationale. *Criminology & Public Policy*, 13(3), 405-436; *see also* Spridgeon, D.C. (2016). Best practices for collecting fines and costs. *Institute for Court Management*. Retrieved from: http://www.ncsc.org/~/media/Files/PDF/Education%20and%20Careers/CEDP%20Papers/2016/Best%20Practices%20for%20Collecting%20Fines%20and%20Costs.ashx

[149] Va. Code § 19.2-354(C) (2016).

[150] 2016 Va. Acts ch. 718.

The House Courts of Justice Committee sent a letter requesting that the Crime Commission review the subject matter of HB 605 as introduced, including an analysis of the automatic extension of probation for failure to pay restitution. The Executive Committee of the Crime Commission authorized a broad review of the topic of restitution, including an examination of current methods for payment and collection, as well as extension of probation.

In order to address the study mandate, staff collected available literature and research, gathered and analyzed data from numerous local and state entities, completed a review of Virginia restitution statutes, reviewed restitution statutes and practices of other states, and met with numerous stakeholders involved in the restitution process in Virginia. Staff also developed and disseminated a survey to clerks of court for all circuit, general district, juvenile and domestic relations, and combined district courts. The response rate was high; 95% (306 of 321) of courts responded. Finally, staff surveyed other states' Departments of Corrections' Deputy Directors to gain insight into how restitution was handled across the nation and received a 63% (31 of 49) response rate.

Study findings indicated that the restitution process is fragmented and inconsistent in Virginia, which in turn leads to inequitable treatment of victims and defendants across the Commonwealth. Staff identified four categories of need within the restitution process, including:

- Uniformity within the restitution process;
- Collection of restitution;
- Monitoring of restitution compliance; and,
- Disbursement of restitution.

Staff identified many legislative and administrative changes that can be made to improve the overall functionality and efficiency of the restitution process. The Crime Commission reviewed the findings and recommendations of the study at its November meeting. Staff presented the following recommendations and policy options at the December meeting:

> **Recommendation 1:** Virginia Code § 19.2-305.1 should be amended to require the Office of the Executive Secretary of the Supreme Court to develop a form order for restitution to be entered at the time of sentencing.
>
> *The Crime Commission unanimously endorsed Recommendation 1.*

Recommendation 2: Virginia Code § 19.2-305.1 should be amended to require that the form order developed by the Office of the Executive Secretary of the Supreme Court should be completed in part by the Commonwealth's Attorney, or his designee, prior to sentencing and should be entered by the court at the time of sentencing.

- If the Commonwealth's Attorney is not involved in the prosecution, then the court or clerk shall complete the form.
- A copy of this form order should be provided to the defendant, without the victim's contact information, at sentencing.
- A copy of this form order should be provided to the victim(s), free of charge, upon request of the victim(s).
- This form will provide vital information for clerks to collect and distribute restitution.

The Crime Commission unanimously endorsed Recommendation 2.

Recommendation 3: Virginia Code § 19.2-305.2 should be amended to clarify that the docketing of a criminal restitution order as a civil judgment does not prohibit criminal or contempt enforcement of that restitution order.

The Crime Commission unanimously endorsed Recommendation 3.

Recommendation 4: Virginia Code § 19.2-305.1 should be amended to allow for both the defendant and the Commonwealth's Attorney to seek modification of the terms of payment of restitution in the event that a defendant's ability to pay changes.

- The Commonwealth's Attorney should notify the victim of any proceedings to modify the restitution order.

The Crime Commission unanimously endorsed Recommendation 4.

Recommendation 5: Virginia Code § 19.2-305.1 should be amended to specify that the court shall not order the defendant to pay restitution directly to the victim or through the defendant's counsel.

The Crime Commission made no motion on Recommendation 5.

Recommendation 6: Virginia Code §§ 19.2-305.1, 19.2-305.2, and 19.2-354 should be amended to allow the court discretion to order a defendant who is unable to pay restitution the option to perform community service at the rate of the state minimum wage in lieu of restitution, provided that such community service is with the consent of the victim, the victim's estate, or the victim's agent, and the Commonwealth's Attorney.

Recommendation 6 was defeated by a majority vote of the Crime Commission.

Recommendation 7: The Department of Taxation Court Debt Collections Office should explore the possibility of accepting payments for delinquent restitution and upgrading current software to allow for a more streamlined approach to the collection of restitution. Additionally, the Office of the Executive Secretary of the Supreme Court, Department of Taxation, Department of Motor Vehicles, Department of Corrections, and Department of Criminal Justice Services should develop recommendations for enhancing the collection of restitution and to report findings and recommendations to the Chairman of the Crime Commission by November 1, 2017. The Commonwealth's Attorneys' Services Council and the Indigent Defense Commission will also be included in this group.

- May require legislation if funding is provided for new software.
- May require an amendment to Virginia Code § 19.2-349 to encompass all Commonwealth's Attorneys and collection agents.

The Crime Commission unanimously voted to send a letter request to the Office of the Executive Secretary of the Supreme Court that a restitution work group be formed for Recommendation 7.

Recommendation 8: Virginia Code §§ 19.2-303, 19.2-304, 19.2-305, 19.2-305.1, and 19.2-306 should be amended to specify who is responsible for monitoring compliance with the payment of restitution. Such amendments should include:

- If restitution is ordered, the defendant should be placed on indefinite supervised probation until all restitution is paid in full;
- The Department of Corrections or the local probation office should be responsible for monitoring compliance with the restitution order;
- For misdemeanor cases, as an alternative to probation, the court may instead schedule a review hearing to determine compliance with the restitution order;

- If supervision services are not available in the locality, then the court shall schedule a review hearing to determine compliance with the restitution order;
- The court should be required to conduct a hearing upon notice from the probation officer that the defendant is not in compliance with restitution payments;
- The court should verify with the clerk of court that all restitution has been paid before releasing the defendant from supervised probation; and,
- A provision allowing the court to release the defendant from supervised probation, upon the defendant's motion and under special circumstances, after consideration of the amount owed and paid, payment history, and the defendant's future ability to pay. The Commonwealth's Attorney should notify the victim of any request by the defendant for release from supervision.

The Crime Commission unanimously endorsed Recommendation 8.

Recommendation 9: The General Assembly should authorize funding for the Office of the Executive Secretary of the Supreme Court to allow for circuit courts to accept online payments. The amount of funding required is $150,000.

The Crime Commission endorsed Recommendation 9 by a majority vote.

Recommendation 10: The General Assembly should provide additional resources to the Department of Corrections to support the monitoring of restitution and the extension of probation.

The Crime Commission made no motion on Recommendation 10.

Recommendation 11: The Office of the Executive Secretary for the Supreme Court, in coordination with other stakeholders involved in the restitution process, should develop best practice guidelines for managing the restitution process. The guidelines should address such practices as:

- Developing a local plan for the collection, monitoring and disbursement of restitution;
- Addressing repeat offenders;
- Handling joint and several restitution orders;
- Determining how payments are applied when the defendant owes fines, costs and restitution;
- Addressing issues surrounding micro-checks for restitution;
- Issues involving collections when the victim is a large corporation or insurance company;

- How to handle unclaimed restitution;
- Options for locating the victim for disbursement;
- Availability of payment options, including credit and debit cards and online payment;
- Feasibility of developing a uniform payment schedule for restitution, similar to the child/spousal support model; and,
- Defining when a case is closed for purposes of collection and monitoring.

If the Court later determines that some of these items would be better addressed by legislation they will notify Crime Commission staff.

The Crime Commission unanimously voted to send a letter request for Recommendation 11.

Recommendation 12: The Office of the Executive Secretary for the Supreme Court should provide training to clerks and judges on the best practice guidelines for managing the restitution process.

The Crime Commission unanimously voted to send a letter request for Recommendation 12.

Recommendation 13: The Department of Criminal Justice Services should convene representatives from the Virginia Victim Assistance Network, the Criminal Injuries Compensation Fund, Commonwealth's Attorneys' Offices, and any other interested stakeholders, to develop an informational brochure for victims to explain restitution and the victim's role in the restitution process.

The Crime Commission unanimously voted to send a letter request for Recommendation 13.

Recommendation 14: The Office of the Executive Secretary of the Supreme Court should enhance their Financial Accounting System (FAS) to allow clerks the ability to generate a payment notice, as is the practice with fines and costs, along with any other capabilities that would enhance the management of restitution.

The Crime Commission unanimously voted to send a letter request for Recommendation 14.

Policy Option 1: Virginia Code § 19.2-358 could be amended to remove the court's authority to impose up to a $500 fine for a defendant's failure to pay a fine, costs, forfeiture, restitution or penalty.

The Crime Commission unanimously endorsed Policy Option 1.

Policy Option 2: Virginia Code § 19.2-349 could be amended to require the court to notify the Commonwealth's Attorney if a defendant who owes restitution has not made any payments within 90 days after his account was sent to collections. Virginia Code § 19.2-349 could be amended to require the clerk to send a list every 90 days to the Commonwealth's Attorney of all defendants who owe restitution, including the amount ordered and balance due.

The Crime Commission unanimously endorsed Policy Option 2.

Legislation was introduced in both chambers during the 2017 Session of the General Assembly for Recommendations 1, 2, 3, 4, and 8, and Policy Options 1 and 2. Due to the unanticipated budget shortfall, the budget amendment for Recommendation 9 was not included in the final state budget.

Delegate Robert B. Bell introduced House Bill 1855, which was an omnibus bill encompassing Recommendations 1, 2, and 3, and Policy Options 1 and 2. Delegate Robert B. Bell also introduced House Bill 1856 that dealt with the supervised probation requirements of Recommendation 8. Delegate Charniele L. Herring introduced House Bill 2083 in regard to the modification of the terms of payment of restitution pursuant to Recommendation 4.

Companion bills to all of the House of Delegates legislation were introduced in the Senate. Senator Mark D. Obenshain introduced Senate Bills 1284 and 1285, which were identical to House Bills 1855 and 1856, respectively. Senator Jennifer L. McClellan introduced Senate Bill 1478, which was identical to House Bill 2083.[151]

House Bill 2083 was left in the House Courts of Justice Committee. Senate Bill 1478 failed to report from the Senate Courts of Justice Committee.

The General Assembly passed House Bills 1855 and 1856 and Senate Bills 1284 and 1285. The Governor returned all four bills to the General Assembly with recommended amendments. The House of Delegates voted to reject the Governor's amendments to House Bill 1856. The Senate voted to reject the Governor's amendments to Senate Bill 1285. The Governor ultimately vetoed both House Bill 1856[152] and Senate Bill 1285.[153] The General Assembly accepted the Governor's

[151] Senator Jennifer McClellan was elected to the Senate of Virginia in January of 2017.
[152] For an explanation of the veto, see https://lis.virginia.gov/cgi-bin/legp604.exe?171+amd+HB1856AG
[153] For an explanation of the veto, see https://lis.virginia.gov/cgi-bin/legp604.exe?171+amd+SB1285AG

amendments to House Bill 1855 and Senate Bill 1284. Both of those bills were passed and signed by the Governor.[154]

Acknowledgements

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

Auditor of Public Accounts (APA)

City/County Treasurers

Circuit Court Clerks

Commonwealth's Attorneys

Commonwealth's Attorneys' Services Council

Criminal Injuries Compensation Fund (Virginia Victims Fund)

District Court Clerks

Local Probation/Community Corrections

National Center for Victims of Crime

Office of the Executive Secretary of the Supreme Court

Office of the Secretary of Public Safety and Homeland Security

RevQ, A Columbia Ultimate Company

State Compensation Board

Virginia Community Criminal Justice Association

Virginia Court Clerks Association

Virginia Criminal Sentencing Commission

Virginia Department of Criminal Justice Services

Virginia Department of Corrections

Virginia Department of Juvenile Justice

Virginia Department of Motor Vehicles

Virginia Department of Social Services

Virginia Department of Taxation - Court Debt Collections Office

Virginia Department of Taxation - Setoff Debt Collection Program

Virginia Victim Assistance Network

Virginia Victim-Witness Assistance Programs

[154] 2017 Va. Acts ch. 786, 814.

Search Warrants

Executive Summary

During the Regular Session of the 2016 General Assembly, Delegate G. Manoli Loupassi introduced House Bill 361 (HB 361) and Senators Richard H. Black and Jill Holtzman Vogel introduced Senate Bill 247 (SB 247). Both bills were identical as introduced and sought to add the authority to issue a search warrant for "*any person to be arrested or any person who is unlawfully restrained"* to Virginia Code §§ 19.2-53, 19.2-54 and 19.2-56. Senate Bill 247 was amended in the Senate Courts of Justice Committee and later passed the Senate. Specifically, the phrase "*any person to be arrested"* was amended to "*any person to be arrested for whom a warrant or process for arrest has been issued"* and the phrase "*any person who is unlawfully restrained"* was deleted from the bill.

The bills were intended to address an ambiguity under current law in regard to whether a search warrant can be issued for a person who is on probation (or parole) and who violates the terms of his probation. More specifically, it is unclear whether a violation of the terms of probation constitutes a new "crime," so as to authorize the issuance of a search warrant for a probationer who is believed to be in the residence of a third party. Both HB 361 and SB 247 (as amended) were left in the House Courts of Justice Committee and a letter was sent to the Crime Commission requesting a review of the subject matter.

In the absence of exigent circumstances or consent, law enforcement may not enter the home of a third party to execute an arrest warrant, even if they believe the subject of the arrest warrant will be found inside that location. The proper course of conduct is to obtain a search warrant, allowing entry into the residence to search for the person who is the subject of the arrest warrant.

In Virginia, probation officers have arrest authority, but not arrest power. A probation officer can authorize a warrantless arrest for a probationer, but the probation officer cannot physically detain the subject. A warrantless arrest for a violation of the rules of probation can be for status offenses that are punishable only because the offender is on probation.

If probable cause exists, a criminal search warrant may be issued for the search and seizure of:

- Weapons or other objects used in the commission of crime;
- Articles or things the sale or possession of which is unlawful;
- Stolen property or the fruits of any crime; and,
- Any object, thing, or person, including without limitation, documents, books, papers, records or body fluids constituting evidence of the commission of crime.

The Virginia Code does not explicitly authorize the issuance of a search warrant for a person who is wanted for arrest. Thus, an ambiguity exists under current law as to whether a search warrant can be issued for a person wanted for arrest who is believed to be located inside the residence of another individual.

Staff found that if the Virginia Code is amended as provided for in the substitute version of SB 247, the issuance of a search warrant would be explicitly authorized for all cases involving a person wanted on an arrest warrant, a *capias*, or for a warrantless arrest for a violation of the rules of probation. Staff also found that the phrase *"any person who is unlawfully restrained*" is unnecessary because existing law authorizes the issuance of a search warrant in such a circumstance.

The Crime Commission reviewed study findings at its October meeting. As a result of the study effort, the Crime Commission unanimously endorsed the following recommendation at its October and December meetings:

> **Recommendation 1:** Endorse the substitute version of Senate Bill 247 which adds the phrase "*any person to be arrested for whom a warrant or process for arrest has been issued"* to Virginia Code §§ 19.2-53, 19.2-54 and 19.2-56, and deletes the phrase "*any person who is unlawfully restrained*" from the original version of the bill.

Legislation for Recommendation 1 was introduced in both chambers during the 2017 Session of the General Assembly. Delegate Charniele L. Herring introduced House Bill 2084 and Senator Richard H. Black introduced Senate Bill 1260. Both bills were passed and signed by the Governor.

Background

During the Regular Session of the 2016 General Assembly, Delegate G. Manoli Loupassi introduced House Bill 361 (HB 361) and Senators Richard H. Black and Jill Holtzman Vogel introduced Senate Bill 247 (SB 247). Both bills were identical as introduced and sought to add the authority to issue a search warrant for "*any person to be arrested or any person who is unlawfully restrained"* to Virginia Code §§ 19.2-53, 19.2-54 and 19.2-56. Senate Bill 247 was amended in the Senate Courts of Justice Committee and later passed the Senate. Specifically, the phrase "*any person to be arrested"* was amended to "*any person to be arrested for whom a warrant or process for arrest has been issued"* and the phrase "*any person who is unlawfully restrained"* was deleted from the bill.

As introduced, both HB 361 and SB 247 added the authority to issue a search warrant for "*any person to be arrested or any person who is unlawfully restrained"* to the Virginia

criminal search warrant statutes.[1] This language was nearly identical to the terminology used in the Federal Rules of Criminal Procedure.[2]

The bills were intended to address an ambiguity under current law in regard to whether a search warrant can be issued for a person who is on probation (or parole) and who violates the terms of his probation. More specifically, it is unclear whether a violation of the terms of probation constitutes a new "crime," so as to authorize the issuance of a search warrant for a probationer who is believed to be in the residence of a third party. Both HB 361 and SB 247 (as amended) were left in the House Courts of Justice Committee and a letter was sent to the Crime Commission requesting a review of the subject matter. The issue presented is best illustrated by the following scenario:

> *Imagine that a defendant steals a computer and takes it back to his home. Police could clearly obtain a search warrant under Va. Code § 19.2-53 to search his home for the computer. Now, assume that police have charged him with grand larceny for stealing the computer and he hides in his neighbor's home. Under the Steagald decision,[3] police must obtain a search warrant to enter his neighbor's home to arrest him on the felony warrant. Virginia Code § 19.2-53 does not explicitly authorize the issuance of a search warrant for the defendant in this circumstance. However, magistrates in Virginia are issuing search warrants in these instances on the theory that the defendant's physical body itself constitutes "evidence of the commission of [a] crime"[4] because he was present for and allegedly committed the offense.*
>
> *Now, fast forward in time and imagine that the defendant was convicted of grand larceny and is on supervised probation. His probation officer receives information that he is using drugs and calls him to the probation office for a drug screen. The defendant refuses to take the drug screen and walks out of the office. His probation officer authorizes a warrantless arrest for his refusal to take the drug screen in violation of the rules of probation. Once again, the defendant hides in his neighbor's home and police attempt to obtain a search warrant to enter his neighbor's home and arrest him for this violation of probation. Whether a magistrate can issue a search warrant in this scenario is unclear under existing law.*
>
> *Virginia Code § 19.2-53 does not explicitly authorize a search warrant for a person in this circumstance. The defendant's physical body may no longer constitute "evidence of the commission of [a] crime"[5] because he has been convicted of the underlying grand larceny offense. Furthermore, refusing the drug test is not a new "crime" under the Virginia Code. The refusal of the drug test is a status offense that is punishable only because*

[1] The bill proposed amendments to Va. Code §§ 19.2-53, 19.2-54 and 19.2-56.
[2] Fed. R. Crim. P. 41(c)(4).
[3] Steagald v. United States, 451 U.S. 204 (1981).
[4] *See* Va. Code § 19.2-53(A)(4) (2016).
[5] *Id*.

the defendant is on probation. Such a refusal could constitute a violation of a court order, but some judges are uncomfortable with magistrates deciding what actions constitute a violation of the court's order.

As demonstrated by the given scenario, existing Virginia law is unclear as to whether a search warrant can be issued for an individual who is subject to arrest for a violation of probation and who is believed to be hiding in the residence of a third party. Staff undertook a thorough legal analysis to clarify the issue presented by the bills.

Legal Analysis

U.S. Supreme Court Decisions

In Payton v. New York, the U.S. Supreme Court held that in the absence of exigent circumstances, the Fourth Amendment prohibits law enforcement from making a warrantless entry into a person's home for the purpose of executing a routine felony arrest.[6] In order to enter a person's residence to execute a routine felony arrest, law enforcement must first obtain an arrest warrant for that person. The Payton decision did not address entering the residence of a third party to execute an arrest of an individual.

In Steagald v. United States, the U.S. Supreme Court held that in the absence of exigent circumstances or consent, law enforcement may not enter the home of a third party to execute an arrest warrant, even if they believe the subject of the arrest warrant will be found there.[7] Warrantless entry into the residence is a violation of the homeowner's Fourth Amendment rights. The proper course of conduct is to obtain a search warrant authorizing entry into the third party's residence to search for the person who is the subject of the arrest warrant.

Warrantless Arrests in Virginia

Under Virginia law, if a probation officer desires to have a probationer arrested for violating the terms of his probation, he can either: 1) request that a judge issue a *capias* for violation of a court order, or 2) authorize a warrantless arrest of the probationer.[8] In Virginia, a probation officer can authorize a warrantless arrest for a probationer, but the probation officer cannot physically detain the probationer. These warrantless arrest documents issued by the probation officer are commonly referred to as a "PB 15." The probation officer issues the PB 15 documents and then provides the documents to law enforcement to execute the arrest of the probationer.

[6] 445 U.S. 573 (1980).
[7] 451 U.S. 204 (1981).
[8] Va. Code §§ 53.1-149 and 53.1-162 (2016).

A warrantless arrest on a PB 15 is for a violation of the rules of probation. The violation can be for a status offense, which is an action that is not a "crime" in and of itself, but which is punishable because the offender is on probation, such as:

- Failure to report an arrest;
- Failure to maintain or report changes in employment;
- Failure to report to probation as instructed;
- Failure to allow probation to visit home or work place;
- Failure to follow instructions;
- Use of alcohol or controlled substances;
- Possession or transport of a firearm; or,
- Change of residence or leaving the Commonwealth without permission.[9]

While HB 361 and SB 247 were introduced to address search warrants in relation to warrantless arrests for probation violations, the more commonly recognized statute regarding warrantless arrests is Va. Code § 19.2-81. Under this Code section, law enforcement officers in Virginia may arrest without a warrant for any crime committed in their presence, any felony not committed in their presence when based on reasonable grounds or probable cause, and certain misdemeanors not committed in their presence.[10] Unlike the status offenses for which a warrantless arrest for a probation violation may be issued, warrantless arrests under Va. Code § 19.2-81 all involve activities that are defined criminal violations.

Search Warrants in Virginia

If probable cause exists, a criminal search warrant may be issued pursuant to Va. Code § 19.2-53 for the search of and seizure therefrom of the following things as specified in the warrant:

- Weapons or other objects used in the commission of crime;
- Articles or things the sale or possession of which is unlawful;
- Stolen property or the fruits of any crime; and,
- Any object, thing, or person, including without limitation, documents, books, papers, records or body fluids constituting evidence of the commission of crime.

When applying for a search warrant, Va. Code § 19.2-54 requires the filing of "an affidavit of some person reasonably describing the place, thing, or person to be searched, the things or persons to be searched for thereunder, alleging briefly material facts, constituting the probable cause for the issuance of such warrant and alleging substantially the offense in relation to which such warrant is to be made and that the object, thing, or person searched for constitutes evidence of the commission of such offense."

[9] *See* Sentencing Revocation Report (2016). *Virginia Criminal Sentencing Commission*. Retrieved from: http://www.vcsc.virginia.gov/worksheets_2014/SRR_worksheet.pdf

[10] Misdemeanors not committed in the officer's presence include driving under the influence, shoplifting, carrying a weapon on school property, assault and battery, brandishing a firearm, or destruction of commercial property. *See also* Va. Code § 19.2-81.3 (2016) for misdemeanor domestic assault and battery and protective order violations.

While the Virginia Code does not explicitly authorize a search warrant for "a person to be arrested," Virginia magistrates have been encouraged to issue search warrants for a premise when there is probable cause to believe that "a person to be arrested" is within that location.[11] A search warrant may be issued in this circumstance under the theory that the defendant's physical body itself constitutes "*evidence of the commission of [a] crime*"[12] because he was present for and allegedly committed the offense. In the case of a probation violation, no "*crime*" may have been committed because the violation may have been for a status offense. Hence, if no "*crime*" was committed, then the theory that the defendant's physical body itself constitutes "*evidence of the commission of [a] crime*"[13] is not applicable to violations of probation which are status offenses.

These considerations create a lack of clarity within Virginia's existing criminal search warrant statutes as to whether a search warrant may be issued for a person who is subject to arrest. While the original intent of HB 361 and SB 247 focused on search warrants for arrests on probation violations, the proposed amendments would provide clarity within the search warrant statutes on whether a search warrant may be issued for any person who is subject to arrest.

Summary and Conclusion

During the Regular Session of the 2016 General Assembly, Delegate G. Manoli Loupassi introduced HB 361 and Senators Richard H. Black and Jill Holtzman Vogel introduced SB 247. Both bills were identical as introduced and sought to add the authority to issue a search warrant for "*any person to be arrested or any person who is unlawfully restrained"* to Virginia Code §§ 19.2-53, 19.2-54 and 19.2-56. Senate Bill 247 was amended in the Senate Courts of Justice Committee and later passed the Senate. Specifically, the phrase "*any person to be arrested"* was amended to "*any person to be arrested for whom a warrant or process for arrest has been issued"* and the phrase "*any person who is unlawfully restrained"* was deleted from the bill.

The bills were intended to address an ambiguity under current law in regard to whether a search warrant can be issued for a person who is on probation (or parole) and who violates the terms of his probation. More specifically, it is unclear whether a violation of the terms of probation constitutes a new "crime," so as to authorize the issuance of a search warrant for a probationer who is believed to be in the residence of a third party. Both HB 361 and SB 247 (as amended) were left in the House Courts of Justice Committee and a letter was sent to the Crime Commission requesting a review of the subject matter.

If Va. Code §§ 19.2-53, 19.2-54 and 19.2-56 were amended as provided for in the original versions of HB 361 and SB 247, the issuance of a search warrant for a person would be clearly authorized for all cases when an arrest of that person was authorized.

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[11] *See* Virginia Magistrate Manual, pgs. 5-20 (2016). *Office of the Executive Secretary of the Supreme Court of Virginia*. Retrieved from: http://cdm16064.contentdm.oclc.org/cdm/ref/collection/p266901coll6/id/9966

[12] *See* Va. Code § 19.2-53(A)(4) (2016).

[13] *Id*.

The original language applied to "*any person to be arrested.*" This terminology would encompass a search warrant for any individual to be arrested based on issued process[14] or any person subject to a warrantless arrest for a criminal violation.[15]

If Va. Code §§ 19.2-53, 19.2-54 and 19.2-56 were amended as provided for in the substitute version of SB 247, the issuance of a search warrant for a person would be clearly authorized in all cases when an arrest of that person was authorized by warrant, *capias* or PB 15. The substitute language in SB 247 applied to "*any person to be arrested for whom a warrant or process for arrest has been issued.*" This substitute version would limit the issuance of a search warrant for a person to instances when process for arrest had been issued.[16]

Both HB 361 and SB 247 originally included language relating to the issuance of a search warrant for "*any person who is unlawfully restrained.*" Including this phrase in the search warrant statutes is unnecessary. If a person is unlawfully restrained, he is likely the victim of an abduction. In such circumstance, a search warrant can already be issued under the existing statute to search for the person who is "evidence of the commission of [the] crime."[17]

The Crime Commission reviewed study findings at its October meeting. As a result of the study effort, the Crime Commission unanimously endorsed the following recommendation at its October and December meetings:

> **Recommendation 1:** Endorse the substitute version of Senate Bill 247 which adds the phrase "*any person to be arrested for whom a warrant or process for arrest has been issued"* to Virginia Code §§ 19.2-53, 19.2-54 and 19.2-56, and deletes the phrase "*any person who is unlawfully restrained*" from the original version of the bill.

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Acknowledgements

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

Virginia Department of Corrections (Probation & Parole Districts 9 and 32)

Virginia Department of Magistrate Services

[14] Such process for arrest may include a criminal warrant, capias or PB 15.
[15] *See* Va. Code § 19.2-81 (2016).
[16] Such process for arrest may include a criminal warrant, capias or PB 15.
[17] Va. Code § 19.2-53(A)(4) (2016).
[18] 2017 Va. Acts. ch. 233, 242.