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## Compensation Under the Microscope: Virginia

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# COMPENSATION UNDER THE MICROSCOPE:

## VIRGINIA

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How Does State Compensation Work in Virginia  
And Why Does It Work So Well?

### Introduction

In 1993, 18-year-old [Bobbie Morman Jr.](#) was convicted in Norfolk (Virginia) City Circuit Court of several charges arising from a drive-by shooting in which no one was injured. He was sentenced to 48 years in prison. In 2014, the actual shooter confessed to the crime. Morman was paroled in 2016 after serving 22 years in prison. In 2021, Governor Ralph Northam granted Morman an absolute pardon, reflecting his belief that Morman was innocent of the crimes for which he was convicted.

In January 2022, legislation was introduced in the Virginia General Assembly to compensate Morman. Although the Virginia House of Delegates and Virginia Senate were both closely divided by political party, the legislation passed unanimously and was signed by the governor in May 2022. Morman was awarded \$1,247,973 in compensation. Morman's exoneration was slow in coming, but his compensation was paid quickly.

Virginia is the only state with a wrongful conviction compensation statute in which the state legislature, and it alone, determines whether an exoneree meets statutory standards for compensation and whether to appropriate the funds for that compensation. Virginia's is a part-time legislature and there are many reasons to think that time, political division and the vagaries of the political process could conspire to prevent many exonerees from receiving wrongful conviction compensation.

But, that has not generally been the case. Virginia's state compensation system has provided wrongful conviction compensation payments covering nearly 78% of the years lost to wrongful incarceration by Virginia exonerees. That is the second highest percentage in the country, behind Nebraska which has only nine exonerees. What seems to be working in Virginia?

### Virginia's Statute

Enacted in 2004, the Virginia wrongful conviction compensation statute is unique in the United States. The decision to award compensation rests not with a court or an administrative agency, but with the state legislature. Unlike other compensation statutes that create an entitlement to compensation when a person is found eligible, the Virginia statute explicitly says that "[t]he payment and receipt of any compensation for wrongful incarceration shall be contingent upon the General Assembly appropriating funds for that purpose. This article shall not

provide an entitlement to compensation for persons wrongfully incarcerated or require the General Assembly to appropriate funds for the payment of such compensation.” Va. Code § 8.01-195.10(A).

Those who are “wrongfully incarcerated” are eligible for compensation. Va. Code § 8.01-195.10(A). To be “wrongfully incarcerated” requires either that the person’s felony conviction has been vacated pursuant to Virginia statutes that authorize courts to issue writs of actual innocence, or that the person has been granted an absolute pardon by the governor on the grounds that they did not commit the crime in question. *Id.* § 8.01-195.10(B). In addition, to be “wrongfully incarcerated” requires that the person “did not by any act or omission on his part intentionally contribute to his conviction for the felony for which he was incarcerated.” *Id.* A grant of a federal or state writ of habeas corpus alone is not sufficient to meet the definition of “wrongfully incarcerated,” although the legislature retains discretion to compensate such a person released in that manner by passing a private legislative bill.

There is an important difference between Virginia’s eligibility provisions and those in virtually all other states. Compensation in Virginia requires a finding of innocence by *other* branches of government (a court or governor). The body making the compensation decision (in Virginia, the legislature) does not decide innocence. The evidentiary nature of that decision is, to be sure, not well-suited to legislative deliberation. In contrast, in most other states, a court vacates the conviction and the exoneree must then demonstrate innocence to the court or administrative body that decides whether to compensate.

This does not mean that Virginia’s system is less rigorous than those of other states. Instead, it means that the innocence advocacy necessary to lay the foundation for potential compensation must be made to a court or the governor. If there were substantive or procedural barriers that made getting a judicial writ of innocence or gubernatorial pardon difficult or if there were a custom or culture in Virginia of legislative inaction despite receipt of a writ or pardon, legislative compensation would presumably be far less common. As we explain, these potential problems are not significant barriers to compensation in Virginia.

The Commonwealth of Virginia may award those who are wrongfully incarcerated \$55,000 per year of incarceration, adjusted annually by an inflation factor. Va. Code § 8.01-195.11(A). Generally, they are paid a lump sum of 25% of the total award, with the remainder paid by annuity over a ten-year period. *Id.* § 8.01-195.11(B). Exceptions are made for those who have more limited life expectancies, are 60 or older or who suffer from a terminal illness. *Id.*

The General Assembly may pay any unreimbursed fine, fee, court cost, or restitution paid, and reasonable attorney fees and costs incurred to receive a compensation award. Va. Code § 8.01-195.11(C). In addition, any wrongfully incarcerated person is eligible to receive a \$15,000 “transition assistance grant” within 30 days of request to the Executive Secretary of the Supreme Court of Virginia. *Id.* 8.01-195.11(D). The grant amount is deducted from a future legislative award. The exoneree may also receive reimbursement of up to \$10,000 for career or technical training provided by a Virginia community college.

A wrongly incarcerated person loses eligibility for any outstanding payments if they are later convicted of a felony. Va. Code § 8.01-195.12(A). With the exception described below, a wrongly incarcerated person may receive payment only if they release all claims against the Commonwealth of Virginia, or any state agency, subdivision or employee, arising from their wrongful conviction. *Id.* 8.01-195.12(B). Nor may a person receive state compensation if they had earlier received a judgment or settlement of claims arising from their wrongful conviction. *Id.*

In 2018, the statute was amended to include an unusual provision that appears to have been intended to benefit the “[Norfolk Four](#).” Section 8.01-195.13 provides that, if the court record clearly demonstrates that the Commonwealth, a state agency or instrumentality, or state officer or employee intentionally fabricated evidence used to obtain a wrongful conviction *and* willfully suppressed or withheld evidence establishing innocence, the state may make an *additional* compensation award in an amount up to that paid under Section 8.01-195.11(A) (the \$55,000 per year plus inflation metric). This additional compensation will not be paid unless two things happen. The first is that the exoneree releases claims against the state agency or state employee. The second is unique - the state agency, instrumentality or subdivision must, in addition to the enhanced compensation paid by the state, *also* agrees “to compensate the person with a sum at least equal to the total compensation provided pursuant to § 8.01-195.11 and this section.”

The Norfolk Four were four U.S. Navy sailors who were wrongly convicted of a 1997 rape and murder; their DNA did not match DNA found on the victim. Another man, whose DNA did match, later admitted committing the crime alone. He said he was pressured by the lead Norfolk detective to implicate the Norfolk Four. That detective was later convicted of extorting criminal defendants. This statutory provision permitted the Norfolk Four to receive both a combined \$4.9 million settlement of civil rights claims against the City of Norfolk as well as Virginia state compensation exceeding the standard cap.

### Virginia By the Numbers

Generally, exonerees can receive state compensation in Virginia only when the legislature determines that they meet the definition of being “wrongfully incarcerated,” approves a compensatory award, and then separately passes a bill appropriating that compensation.

As of January 1, 2023, the National Registry of Exonerations had recorded 65 Virginia exonerees, 60 of whom had been incarcerated and, thus were potentially eligible for state compensation.

As shown in Table 1, of those 60 individuals, 42, or 70%, were the subject of legislative activity in the Virginia General Assembly. Of the 42 filers, 36 were awarded compensation and six were unsuccessful. That award rate of 86% exceeds the national average of 72%.

	# exonerees	# with bills	Passed	Not passed
Before statute	20	12 (60%)	8 (67%)	4
After statute	40	30 (75%)	28 (93%)	2

Total	60	42 (70%)	36 (86%)	6
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TABLE 1

### *Compensation Before the Statute*

Let's first look at the 20 persons exonerated prior to the passage of the 2004 statute. As shown in Table 2, the General Assembly of Virginia awarded compensation to eight of them.<sup>1</sup> They were wrongly incarcerated for an average of 9.5 years. Of those eight people, five were exonerated based on DNA evidence.<sup>2</sup> All but one<sup>3</sup> had received a pardon (called an absolute pardon) on grounds of innocence from the governor.

To be sure, Virginia compensated only 40% of the pre-statute exonerees. However, the General Assembly had nevertheless developed a custom of awarding compensation in some pre-statute cases by enacting private bills. Because the legislature was working in the absence of a legislative standard for compensation, compensation depended on express or implied legislative findings that the exoneree deserved compensation, presumably because there was persuasive evidence of innocence.

A DNA exoneration, of course, is powerful evidence of innocence. A gubernatorial pardon on the grounds of innocence also offers a strong basis for compensation. Legislative findings are much easier to make when another branch of government has already made them. One would expect legislative action to be more likely in cases where the governor or a court found someone to be innocent. Even so, the inherent difficulty with private bills is there must be a proponent of the bill who is able to present a compelling case to a legislature willing to listen. Without a legislative sponsor and a persuasive narrative, private bills either do not get filed or lack the political traction to pass.

Thus, in Virginia, both before and after the statute, it is typically incumbent on advocates for the exonerated, such as the Virginia Innocence Project or private counsel, to present the case for compensation. That effort naturally requires some political savvy – an understanding of which legislators are willing to sponsor the legislation and to persuade their colleagues to vote for it. Success requires presenting a persuasive case for compensation. That case is made easier in cases of DNA exoneration, absolute pardon, a long term of incarceration, substantial press coverage of the case and, as we will see, a court-issued writ of innocence.

With one exception (Cox), the eight who were exonerated before the 2004 statute were enacted presented particularly good cases for compensation because they shared a number of these characteristics. Let's next see if it can be determined why the remaining 12 exonerees were not compensated.

Bills on behalf of four the 12 – Steven Lawton, Beverly Monroe, Christopher Prince, and Earl Washington – were introduced in the state legislature but were not passed. Of the four, only Washington was a DNA exoneree. Lawton, Prince and Washington each received an absolute

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<sup>1</sup> Marvin Anderson, Jeffrey Cox, Yvonne Crittle, Edward Honaker, Julius Ruffin, Walter Snyder, David Vasquez and Troy Webb.

<sup>2</sup> Anderson, Honaker, Ruffin, Vasquez and Webb.

<sup>3</sup> Jeffrey Cox was neither a DNA exoneree, nor a recipient of an absolute pardon.

pardon from the governor. Thus, it would seem that three of these four, and particularly Washington, would have solid claims to pre-statute compensation.

When Lawton's compensation bill was introduced, he was in prison following convictions on other crimes, and had a substantial prison sentence ahead of him. It is entirely possible that the General Assembly would not have wished to compensate someone in jail on other crimes.

It is less clear why the legislation was not passed with respect to Prince and Washington. Prince's wrongful incarceration, however, was relatively short – 1.2 years. After the House of Delegates' Claims Committee took no action on the bill, Prince filed a civil rights case and received a settlement. In contrast, Washington, who was incarcerated for 7.1 years, filed a civil rights case before his compensation bill was introduced. It is possible that the legislature chose not to act while that litigation was pending. The two civil rights settlements for Prince and Washington amounted to an average of \$250,000 per lost year, over five times greater than the average legislative award.

Although Prince and Washington were ultimately compensated, they do present a cautionary tale for legislative compensation. When the compensation is entirely driven by the legislature, potentially deserving exonerees can be overlooked. They can simply fail to appear on a busy legislature's radar screen or they can be effectively tabled or rejected for reasons that are not necessarily transparent or sound. When compensation awards are considered by courts or administrative agencies, claims are far less likely to be overlooked or ignored, and, typically, decisionmakers make definitive and appealable decisions. Procedural regularity is not necessarily part of the legislative process.

Beverly Monroe, in contrast, was not a DNA exoneree or a recipient of a pardon. Nor did she file a civil rights case. Her incarceration was lengthy – 9.4 years. Factually, the case was complex, involving whether the death of Monroe's boyfriend was a murder or suicide. Monroe's release from custody followed a strongly contested habeas proceeding that turned on the prosecution's failure to disclose *Brady* material, including medical records that concluded the death was a suicide. Ultimately, the U.S. Court of Appeals for the Fourth Circuit affirmed the grant of habeas corpus, holding the *Brady* material undermined the Commonwealth's claims of premeditation and malice. *Monroe v. Angelone*, 323 F.3d 286 (4<sup>th</sup> Cir. 2003). Although the legislative record offers no reason for the compensation bill's tabling, it is possible that the Commonwealth's strong opposition to habeas relief and lingering doubts about Monroe's innocence offer an explanation.

Let's examine the characteristics of the eight<sup>4</sup> pre-statute exonerees for whom no compensation bill was introduced. These eight exonerees, on average, served much less time in prison – only 2.2 years. None were exonerated based on DNA analysis. Only one, Russell Gray, received a pardon from the governor. Two months after that pardon, Gray was arrested for

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<sup>4</sup> William Douglas Carter, Ricky Cullipher, Russell Leroy Gray, Brian McCray, Bruce McLaughlin, Dell Talley, John Tingle and Curtis White.

murder and later convicted. It is easy to explain why a bill was not introduced to compensate him.

The convictions of four (Carter, McCray, McLaughlin and White) were vacated on various grounds and they were acquitted after retrial. Acquittal is not always tantamount to innocence. Perhaps no legislative sponsor came forward because a lack of a judicial or gubernatorial finding of innocence.

The convictions of the three others (Cullipher, Talley and Tingle) were vacated and dismissed, and they were not retried. Cullipher’s conviction was vacated on ineffective assistance of defense counsel grounds. Talley’s was vacated on grounds that an exculpatory report was disclosed, but written in a code that his defense lawyer failed to decode. Tingle’s conviction was set aside when the key witness withdrew her positive identification. Of the three, Tingle’s was the closest to a suggestion of innocence, but he was incarcerated for less than a half-year. Generally, this group lacked the characteristics (findings of innocence, lengthy incarceration, DNA exoneration) that were present for most compensated exonerees.

Four of these eight exonerees filed civil lawsuits. Two were against their attorneys for malpractice and they settled for undisclosed amounts. Talley’s civil rights case against government entities was also settled for an undisclosed amount. The jury awarded Carter damages of \$1 in his civil rights case against a police officer, an award that was upheld on appeal.

Virginia’s treatment of these 20 pre-statute exonerees was not entirely consistent. There is a basis to question why the legislature passed a private bill compensating one exoneree without a pardon or DNA exoneration, while not compensating others with seemingly more compelling cases of innocence and long-term incarceration. However, prior to the statute, Virginia generally compensated long-serving exonerees with strong cases of innocence.

Before statute	# With bills	# DNA	# absolute pardons	Avg lost years
passed	8	5	7	9.5
failed	4	1	3	6
Unfiled	[8]	0	1	2.2

TABLE 2

Before we look next at what happened in Virginia after the statute was enacted in 2004, it is important to note that the Virginia General Assembly passed legislation in 2002 and 2004 that authorized people to petition the Virginia Supreme Court to issue writs of actual innocence based on biological evidence and for the Virginia Court of Appeals to issue such writs based on non-biological evidence. Va. Code § 19.2-327.2–.6, 19.2-327.10–.14. This gave potential exonerees



another route for a declaration of innocence, in addition to that offered by a gubernatorial pardon.

We start with the 28 exonerees who were compensated pursuant to the 2004 statute by the Virginia General Assembly. As Table 3 shows, only seven<sup>5</sup> were exonerated by DNA evidence. Significantly, however, 27 of these exonerees received an absolute pardon or a writ of factual innocence from the Virginia Supreme Court or Virginia Court of Appeals.<sup>6</sup> The average amount of years lost per exoneree was 13.7 years.

Legislation was introduced, but not passed, with respect to only two exonerees, Calvin Wayne Cunningham and Davey Reedy.<sup>7</sup> The sponsor of Cunningham’s compensation bill withdrew it after Cunningham, a DNA exoneree, was convicted of other crimes. Reedy, convicted of murdering his children in an arson, was not a DNA exoneree, but was given an absolute pardon by the governor. The pardon followed years of expert analysis of the evidence that excluded the presence of accelerants. The press reported at the time that prosecutors opposed compensation at a Virginia Senate subcommittee hearing, which apparently persuaded the panel to not recommend approval of compensation.

After statute	# With bills	# DNA	# absolute pardons	Court Writ	Lost years
Passed	28	7	17	10	13.7
Failed	2	1	1	0	14.2
Unfiled	[10]	1	0	2	4.9

TABLE 3

Monroe’s and Reedy’s failure to receive compensation, apparently due to the objection of prosecutors, suggests another possible weakness of the Virginia system. Politically, it is not difficult to understand why a legislative committee would be reluctant to forward compensation legislation over the strong opposition of a local prosecutor. However, local prosecutors frequently cast doubt on the innocence of people who are or have been found factually innocent. If Virginia prosecutors were more active in lobbying against compensation for more exonerees, Virginia’s rate of compensation would likely be much lower.

<sup>5</sup> Bennett Barbour, Victor Burnette, Willie Davison, Thomas Haynesworth, Winston Scott, Philip Leon Thurman and Arthur Lee Whitfield.

<sup>6</sup> The one exception is Paul Crum, Jr. who was released on a writ of habeas corpus and thus falls outside the scope of the statute. It was determined that his attorney did not provide him adequate assistance of counsel when he advised Crum to plead no contest to a charge of obstruction of justice when his actions did not constitute obstruction under Virginia law.

<sup>7</sup> Calvin Wayne Cunningham and Davey Reedy.

That leaves 10 post-statute exonerees for whom no legislative proposal for compensation was made. Of the 10,<sup>8</sup> only two, Garry Diamond and Curtis Moore, were DNA exonerees. None of the 10 received pardons. Only two, Diamond and David Copeland, received writs of innocence from a Virginia court. Diamond had been convicted of another sexual assault. Copeland remained in custody and pled guilty to unrelated federal charges. Moore died before his DNA exoneration. Thus, there are rational explanations why these three men were not compensated.

The average lost years for these 10 exonerees was 4.9 years, but the two highest, David Boyce and Michael Hash, were by far incarcerated the longest. Without them, the average was just two years. Boyce and Hash filed federal civil rights cases, Hash's being filed very shortly after his exoneration. Both settled their cases, for \$2 million and \$500,000, respectively. Boyce's settlement exceeded the amount he would have been paid by the state. Hash's was slightly lower.

### *Conclusion*

Certain empirical characteristics suggest a well-functioning state statutory compensation system in Virginia. Those include a high percentage of exonerees listed on the National Registry applying for compensation, a high percentage granted compensation, and a high percentage of the total lost years subject to a compensatory award.

Virginia's rate of filing, 70%, is above the national average of 58%. In Virginia, the non-filings were generally explainable. The eight pre-statute exonerees had relatively short average incarcerations and were (with one exception) neither DNA exonerees nor recipients of pardons. The same was generally true with the 10 post-statute exonerees, two of whom were convicted of other crimes.

Virginia could consider expanding the definition of "wrongfully convicted" beyond those receiving absolute pardons or writs of innocence to include, for instance, those receiving a writ of habeas corpus. That, however, would likely require the legislature to make its own innocence determination. Those potentially eligible for compensation under an expanded definition would need to summon the political muscle needed for legislative compensation. Those with shorter wrongful incarcerations and without findings of innocence by another branch of government are less likely to find legislative success. That is a downside of a system like Virginia's.

The percentage of those seeking and ultimately getting compensation in Virginia is well above the national average. As explained, four of the six denied appeared to present reasonably strong cases for compensation. Again, there are possible explanations for them, but that is the point. The lack of transparency in a legislature-driven compensation system allows bills to stall without clear explanation.

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<sup>8</sup> David Bryant, Michael Chaplin, Edgar Coker, Maligie Conteh, David Copeland, Garry Diamond, Michael Hash, Curtis Moore, Maverick Thomas, and Mark Weiner.

Virginia's high percentage of years lost covered by statutory compensation suggests that the Commonwealth has done well in compensating those most harmed by wrongful conviction. Beyond statutory compensation, of the 20 exonerees who did not receive state compensation from the legislature, seven received recoveries in civil rights cases against state entities and others appear to have won malpractice cases. Ultimately, even putting aside the malpractice cases, 88% of the lost years experienced by Virginia exonerees has been covered by state statutory compensation or a civil rights case recovery. Aside from Vermont, with only three exonerees, that is the highest in the country.

Analysis of Virginia's data paints a reasonably consistent story. When an exoneree is exonerated by DNA analysis and/or has received a pardon from the governor on actual innocence or a writ of innocence from a court, Virginia has generally compensated the exoneree. These exonerees had, generally, longer periods of wrongful incarceration. In contrast, perhaps not surprisingly, those who served modest sentences and were not found innocent by another branch of government were much less likely to be compensated.

While Virginia has a history and practice of compensating exonerees, future success depends largely on the continued bipartisan approach taken by the legislature and the apparent reluctance of prosecutors to oppose compensation. If it becomes difficult to find legislative sponsors, or if political polarization makes agreement on these bills difficult, or if future governors were less inclined to grant absolute pardons, or if the governor for some reason started vetoing these bills, the Virginia system could falter.

Virginia's unique reliance on the legislature does, though, have one other meaningful benefit to exonerees. In most states, it is a judge or administrative agency that makes the compensation decision. Often, these come with little news coverage or fanfare. In Virginia, however, it is the entire state legislature, often after hearing testimony from the exoneree, that passes legislation which is then signed by the governor. That the representative bodies of the citizens of Virginia compensate exonerees in this way represents an emphatic public statement that the Commonwealth as a whole recognizes that a terrible mistake had been made and that the exoneree deserves state-sanctioned remedy. As some exonerees have stated, that is an important and meaningful step in their recovery.