

VIRGINIA STATE CRIME COMMISSION



Virginia Post-Conviction DNA Testing Program and Notification Project

2019 ANNUAL REPORT

VIRGINIA POST-CONVICTION DNA TESTING PROGRAM AND NOTIFICATION PROJECT

EXECUTIVE SUMMARY

The Virginia Post-Conviction DNA Testing Program and Notification Project (“Project”) was a unique and unprecedented opportunity to address potentially wrongful convictions related to archived case files (1973 to 1988) at the Virginia Department of Forensic Science (DFS).¹ The primary objectives of the Project were to:

- perform post-conviction DNA testing of biological evidence retained in these archived case files because such testing was not available at DFS at the time of the original convictions; and,
- notify convicted individuals that biological evidence relating to their convictions was retained in these archived case files and may be suitable for DNA testing.

There are many factors that contribute to wrongful convictions. Post-conviction DNA testing has proven to be an effective tool in identifying wrongful convictions. Most states now allow for post-conviction DNA testing, which has led to an increase in the number of exonerations nationwide in recent years. Virginia is no exception to this trend. Since 1989, DNA evidence has been a substantial factor in 20 of the 56 total exonerations in Virginia.

In 2001, Virginia enacted legislation allowing convicted felons to request court ordered post-conviction DNA testing in their cases. Subsequently, in accordance with this new law, three individuals requested that DFS conduct post-conviction DNA testing on biological evidence retained in its archived case files. Post-conviction DNA testing was ordered and conducted for these cases between 2001 and 2004, which resulted in these three individuals being exonerated of crimes for which they had been wrongfully convicted.

In response to these three exonerations, Governor Mark R. Warner directed DFS in September 2004 to conduct a review of a random sample of ten percent

of its archived serology case files to identify cases containing biological evidence related to sex offenses. This resulted in testing of 31 cases and led to three additional wrongfully convicted individuals being exonerated. In 2005, as recommended by DFS, Governor Warner ordered a full review and DNA testing of biological evidence in the remaining archived case files for all felony crimes against persons. The Department of Forensic Science then completed a review of over 530,000 archived case files to identify those that contained biological evidence believed to be suitable for DNA testing and at least one named suspect.

In 2008, the Virginia General Assembly included language in the state budget requiring the Forensic Science Board to notify convicted individuals if evidence suitable for DNA testing had been retained in DFS archived case files. This mandate was initially undertaken by DFS on behalf of the Forensic Science Board. In order to accomplish this mandate, the Forensic Science Board created a DNA Notification Subcommittee. Based upon the mandate of the General Assembly and guidance from the DNA Notification Subcommittee, an individual was deemed eligible for notification if the following criteria were met:

- the DFS archived case file contained DNA evidence believed to be suitable for testing;
- the DFS archived case file listed at least one named suspect; and,
- the named suspect was convicted of an offense related to the DFS archived case file.

Emergency legislation was enacted by the Virginia General Assembly in 2009 to provide further direction for the Project. The legislation addressed various matters relating to the notification efforts and authorized the Chair of the Crime Commission to provide guidance for these notification efforts. The Crime Commission directed its staff to assist the Forensic Science Board with notification efforts each year from 2009 through the conclusion of the Project.

The combined efforts of DFS and Crime Commission staff led to the identification of 969 named suspects in 860 DFS archived case files who were convicted of a felony offense against a person and were thus eligible to receive notification. Post-conviction DNA testing was conducted on biological evidence from all 860 DFS archived case files. Staff from DFS and the Crime Commission, along with numerous other stakeholders, ensured that all 969 individuals eligible for notification were ultimately notified, determined to be deceased, or had all leads exhausted in attempting to locate them.

As part of the final Project case file review, DFS and Crime Commission staff identified an additional 1,809 named suspects who were initially determined to be “ineligible” by DFS in the early phases of the Project when federal grant funding for DNA testing of the Project case files was restricted to violent felonies. It was ultimately determined that 289 of these named suspects were convicted and thus were eligible for notification. Attempts were then made to locate these 289 additional eligible individuals and notify them that they could request post-conviction DNA testing of biological evidence retained in the DFS archived case files.

Staff from DFS and the Crime Commission completed a joint review of all Project case files as a final step to ensure that all information relating to the post-conviction DNA testing outcome and notification status for each eligible individual was captured and reflected consistently in the records of each agency. DFS and Crime Commission staff presented an update on the status of the Project to the Forensic Science Board on October 3, 2019. The Forensic Science Board unanimously voted that once notifications were made to the additional eligible individuals who were initially classified as “ineligible,” due diligence had been met and all reasonable efforts had been made to notify eligible individuals as mandated in the 2008 budget language enacted by the General Assembly. Notification letters were sent to all remaining additional eligible individuals by January 2020. As such, due diligence was met and all reasonable efforts were made to notify eligible individuals as mandated by the General Assembly.

This Project proved very successful in identifying wrongful convictions in Virginia. There were 13 wrongfully convicted individuals exonerated as a result of the post-conviction DNA testing and notification efforts stemming from this Project. Additionally, the Project led to at least 16 DNA data bank “hits” to offenders who were not listed as named suspects in the DFS archived case files.

Many lessons were learned in over a decade of work on this Project that can provide guidance to others who undertake a similar project, including the following:

1. One singular entity should be responsible for completion of the project.
2. Cooperation between state and local government agencies is essential.
3. Numerous databases and public information search tools must be used when attempting to locate individuals requiring notification.
4. Successful notification of individuals often requires numerous and repeated efforts.
5. Case files should be screened to confirm the probative value of the biological evidence and prioritize cases for post-conviction DNA testing.
6. Post-conviction DNA testing results should be used to prioritize notification efforts at the outset.
7. Sufficient funding must be available to conduct post-conviction DNA testing.
8. Independent laboratories should be considered as an option for performing post-conviction DNA testing in order to avoid delaying work on current DNA cases at state laboratories.
9. Notification letters sent to individuals should provide clear information on the project and any actions required by the recipient.
10. Procedures should be in place to respond to questions stemming from notification letters.

BACKGROUND

The *Post-Conviction DNA Testing Program and Notification Project* (“Project”) provided a unique opportunity to address potentially wrongful convictions in cases from 1973-1988 as DNA testing was not available at DFS at the time of the original convictions.² Wrongful convictions have enormous ramifications for the criminal justice system and society at large. Wrongfully convicted individuals, victims, and their respective families³ are affected, as well as the witnesses, attorneys, judges, and other criminal justice professionals involved in the case. Furthermore, when an individual is wrongfully convicted, the actual perpetrator of the crime remains free. Ultimately, wrongful convictions undermine the public’s confidence in the criminal justice system, which prides itself on justice, fairness, and finality.

A range of factors have been identified as contributing to wrongful convictions, such as:⁴

- age of the defendant;
- false accusations or perjury by witnesses;
- false confessions by the defendant;
- forensic evidence errors;
- inconsistent statements made by the defendant;
- ineffective assistance of criminal defense counsel;
- informant testimony;
- juror misconduct (implicit or explicit);
- misconduct by government officials;
- misidentification of the perpetrator by witnesses;
- race/ethnicity of the defendant;
- suggestive identification procedures;⁵ and/or,
- “tunnel vision.”⁶

DNA has proven to be a powerful tool in addressing wrongful convictions because it can be retained for many years if stored under favorable conditions. This allows biological evidence from crimes that was collected decades ago to

undergo DNA analysis today and yield DNA profiles for comparison. Although the criminal justice system emphasizes finality, evolutions in scientific study may discredit previous forensic approaches⁷ or make it possible to test or re-test biological evidence retained in cases. While DNA evidence is routinely utilized in modern day investigations and court proceedings, it can also be used to examine past convictions that occurred at a time when such testing was unavailable, inconclusive, or inadmissible in court proceedings.⁸

Post-conviction DNA testing may conclusively prove that an individual did not commit the crime in question or raise enough reasonable doubt to reverse or set aside a conviction. Currently, most states allow for post-conviction DNA testing; however, states may limit which types of convictions are eligible (i.e., any crime, only felonies, only *some* felonies) or the criteria that must be met in order for testing to be granted.⁹ As the number of post-conviction DNA testing requests has increased, there has been a growing consensus that the criminal justice system must respond effectively to such requests.¹⁰

As a result of the increase in post-conviction DNA testing, the number of exonerations has also grown. Exonerations occur when a person is convicted of a crime but is either “declared to be factually innocent by a government official or agency with the authority to make that declaration,” or is “relieved of all the consequences of the criminal conviction by a government official or body with the authority to take that action.”¹¹ Based on this definition, there have been 2,552 exonerations in the United States since 1989 according to the National Registry of Exonerations.¹² DNA evidence was a substantial factor in over 500 of these exonerations.¹³

Post-conviction DNA testing can also assist law enforcement by identifying the actual perpetrator of the crime, which can solve past cases and prevent future crime. For instance, according to data from the Innocence Project, actual perpetrators have been identified in 162 DNA exoneration cases in the United States.¹⁴ These 162 actual perpetrators were convicted of 152 violent crimes, including 82 sexual assaults, 35 murders, and 35 other violent crimes, that occurred while wrongfully convicted persons were incarcerated.¹⁵

Virginia Background

Virginia has not been immune from the issue of wrongful convictions. Factors contributing to wrongful convictions nationwide have also occurred in numerous Virginia cases,¹⁶ and DNA evidence has been particularly useful in identifying wrongful convictions. Since 1989, there have been 56 exonerations in Virginia, with DNA evidence being a substantial factor in 20 of those exonerations.¹⁷

The Supreme Court of Virginia first ruled that the results of DNA testing were admissible as evidence at trial in 1989.¹⁸ The Virginia General Assembly then codified the admissibility of DNA evidence to “prove or disprove the identity of any person” in any criminal proceeding during the Regular Session of the 1990 General Assembly.¹⁹ In 2001, the Virginia General Assembly enacted legislation allowing convicted felons to request the preservation and testing of human biological evidence in their cases, which could then be used during the newly created writ of actual innocence process to allow the Supreme Court of Virginia to determine whether their felony conviction should be overturned based on that biological evidence.²⁰

ORIGINS OF THE PROJECT - THE FIRST THREE EXONERATIONS (2001-2004)

Following enactment of the 2001 post-conviction DNA testing legislation, three individuals made requests for DFS²¹ to test biological evidence discovered in DFS archived case files from the early 1980s. Post-conviction DNA testing resulted in the exoneration of these three individuals: Marvin Lamont Anderson, Julius Earl Ruffin, and Arthur Lee Whitfield.

*Marvin Lamont Anderson*²²

In January 2001, the Innocence Project sent a request to DFS asking for information on a 1982 case from Hanover County. The case file was retrieved from the State Records Center and reviewed by the Director of DFS, who found

a worksheet in the case file with portions of swabs of biological evidence affixed to it. The Director notified the Innocence Project of this finding.

Pursuant to the newly enacted Virginia Code § 19.2-327.1, the Innocence Project requested that the evidence be tested. On November 1, 2001, the Hanover County Circuit Court ordered that post-conviction DNA testing be conducted. The results of the court-ordered testing showed that the convicted individual, Marvin Lamont Anderson, was excluded as a possible contributor of the genetic material detected in the sperm fraction of the victim's vaginal/cervical area sample swabs.²³ Mr. Anderson was granted an absolute pardon for the crimes of rape (2 counts), abduction, sodomy, and robbery by Governor Mark R. Warner on August 20, 2002.²⁴

*Julius Earl Ruffin*²⁵

In June 2002, the Norfolk Commonwealth's Attorney's Office sent a request to DFS for information relating to a 1981 rape case. The case file was retrieved from the State Records Center and reviewed. Similar to Marvin Anderson's case, biological evidence was discovered that had been retained in the case file by the forensic scientist. On December 31, 2002, the Norfolk Circuit Court ordered DFS to conduct post-conviction DNA testing of the evidence. The results of the testing excluded Julius Earl Ruffin as a possible contributor to the genetic material detected from the sperm fractions of the evidence.²⁶ Mr. Ruffin was still incarcerated at the time of testing after having been ordered to serve five life sentences in this case. The Norfolk Commonwealth's Attorney contacted the Virginia Parole Board the day after the DNA testing results were issued, and Mr. Ruffin was released on parole that day. Mr. Ruffin was granted an absolute pardon for the crimes of rape, burglary, and forcible sodomy (3 counts) by Governor Mark R. Warner on March 19, 2003.²⁷

*Arthur Lee Whitfield*²⁸

In December 2003, the Norfolk Commonwealth's Attorney's Office sent another request to DFS for information relating to two rape cases involving two different victims that occurred on the same night in 1981. Upon review of

the case files retrieved from the State Records Center, it was also discovered that the forensic scientist had retained biological evidence in both files. On June 28, 2004, the Norfolk Circuit Court ordered DFS to conduct post-conviction DNA testing of this evidence. The results of the testing excluded Mr. Whitfield as a contributor to the evidence in both of the rape cases. Mr. Whitfield had been convicted in both cases and sentenced to 63 years after being misidentified by both victims. Mr. Whitfield was promptly released on parole August 23, 2004, after the Norfolk Commonwealth's Attorney's Office sent a letter to the Virginia Parole Board advising that he had been exonerated of the offenses by DNA testing. Mr. Whitfield was granted an absolute pardon for the crimes of rape (2 counts), sodomy, and robbery by Governor Timothy M. Kaine on April 3, 2009.²⁹

Discovery of Biological Evidence in DFS Archived Case Files from 1973-1988

In response to requests made in the Anderson, Ruffin, and Whitfield cases, DFS discovered that, from 1973 to 1988, some forensic scientists had routinely retained biological evidence in case files.³⁰ This era was a time before DFS was conducting DNA testing. During this time period, all submitted evidence was typically returned to the original submitting agency; however, some forensic scientists would affix remnants of the evidence that had undergone serological testing (e.g., swabs and cuttings) to worksheets in the case files.³¹ The discovery of this biological evidence led to this unprecedented Project.

EXECUTIVE BRANCH RESPONSE (2004-2007)

Governor Orders a Random Review of 10% of Serology Cases: 2004

Based on the first three exonerations, in September 2004, Governor Mark R. Warner directed DFS to conduct a review of a random sample of ten percent of its archived serology case files to identify cases containing biological evidence related to sex offenses.³² To minimize the impact on pending criminal cases at DFS, post-conviction DNA testing in the identified cases was conducted by a private laboratory. The post-conviction DNA testing outcomes

from this random sample of 31 identified cases³³ led to three additional individuals being exonerated: Phillip Thurman,³⁴ Willie N. Davidson,³⁵ and Victor Anthony Burnette.³⁶ All three individuals had been misidentified by the victims in the cases.³⁷

Governor Orders Full Case File Review and Post-Conviction DNA Testing: 2005

In December 2005, based on the results from the random review testing and on the recommendation of DFS, Governor Mark R. Warner ordered a full-scale review and post-conviction DNA testing of biological evidence in the remaining archived case files for all felony crimes against persons.³⁸ Approximately 534,000 archived case files from all four DFS regional laboratories for the time period between 1973 and 1988 were retrieved from the State Records Center and individually screened by DFS staff to determine if biological crime scene evidence was retained in each file.³⁹ Of the approximately 534,000 archived case files reviewed by DFS, less than 1% (3,051 of ~534,000) included swabs, cuttings, or threads containing biological evidence believed to be suitable for DNA testing. From the 3,051 case files with retained biological evidence, DFS staff identified 2,204 case files had at least one named suspect. These 2,204 case files formed the basis of the Project. Due to case files frequently having more than one named suspect, a review of the 2,204 Project case files resulted in a total of 3,026 named suspects for which the disposition of their respective cases needed to be determined.⁴⁰

DFS then began to collect individual identifying information on named suspects within the 2,204 Project case files. Over the course of the Project, there were a total of 860 cases involving 969 convicted individuals where post-conviction DNA testing was completed.⁴¹ Biological evidence related to the Project was first sent for post-conviction DNA testing in 2007. While the majority of post-conviction DNA testing occurred between 2007 and 2009,⁴² testing and re-testing was not finalized until 2017.⁴³ To minimize the impact to its pending forensic biology caseload, DFS contracted with an independent laboratory to complete the large majority of post-conviction DNA testing.⁴⁴

After the contract laboratory analyzed the evidence, DFS scientists reviewed the results and prepared a certificate of analysis for each Project case file. The certificates of analysis, which contained the results of the post-conviction DNA testing, were then sent to the original investigating agency and the respective Commonwealth's Attorney. Additionally, a copy of the certificate of analysis was sent to the eligible convicted individual, if that person requested a copy of the post-conviction DNA testing results.⁴⁵

The original case file for each of the 2,204 Project case files typically included the original request for laboratory examination (RFLE) form from the submitting law enforcement agency, bench notes and worksheets for the serological testing performed by DFS forensic scientists, and certificates of analysis (i.e., blood typing results, etc.). The retained biological evidence included remnants of the original evidence tested (swabs, cuttings, and/or threads) that were taped down to the serological worksheets in the files. A photograph of any worksheet containing retained biological evidence was placed in the original case file, and the original worksheet containing the taped down evidence was sent for DNA testing. Less frequently, the original case file would also include the arrest report. Any case where post-conviction DNA testing was performed would also have a DNA testing outcome file, which included the post-conviction DNA testing results, as well as all correspondence between DFS and the independent laboratory that completed the testing. There was also a legal file created for any case where testing was performed or where notification was attempted. The legal files contained documentation on all notification efforts and correspondence between DFS and other entities relating to the named suspect(s) in the case file.

JOINT EXECUTIVE BRANCH AND LEGISLATIVE BRANCH RESPONSE (2008-2020)

While this Project began solely as an executive branch initiative, its structure changed in 2008 when the General Assembly passed budget language requiring the Forensic Science Board (FSB) to “ensure that all individuals who were convicted due to criminal investigations, for which its case files for the

years between 1973 and 1988 were found to contain evidence possibly suitable for DNA testing, are informed that such evidence exists and is available for testing.”⁴⁶ After the enactment of this budget language, DFS undertook initial notification efforts on behalf of the FSB before assistance was provided by Crime Commission staff.

Creation of the FSB DNA Notification Subcommittee: 2008

In May 2008, the FSB created a DNA Notification Subcommittee to guide the Board’s efforts in fulfilling the mandate of the 2008 budget language. The Executive Director of the Virginia State Crime Commission (Crime Commission) serves on the FSB and was appointed to Chair the DNA Notification Subcommittee.⁴⁷ This subcommittee was responsible for overseeing the Project and developing a work plan to be adopted by the full FSB.

Ultimately, based on the 2008 budget language mandate and guidance provided by the subcommittee, it was determined that for an individual to be eligible for notification, the following criteria must have been met:

- the DFS archived case file contained DNA evidence suitable for testing;
- the DFS archived case file listed at least one named suspect; and,
- the named suspect was convicted of an offense related to the DFS archived case file.

Enabling Legislation for the DNA Notification Project: 2009

In developing a work plan for the Project, there was disagreement on the overall notification process and how sensitive information relating to the eligible individuals should be disseminated. Due to the large number of individuals eligible for notification, volunteers were used to assist with the Project, specifically *pro bono* attorneys.⁴⁸ During the Regular Session of the 2009 General Assembly, emergency legislation was passed which included the following six key measures to ensure successful completion of the Project:⁴⁹

- Directed the FSB to continue notification efforts as required by the 2008 budget language;
- Allowed for the sharing of criminal history record information;
- Required all state agencies to provide assistance as requested by the FSB;
- Ordered the FSB to utilize the services of *pro bono* attorneys;
- Authorized the FSB to utilize the services of other individuals, state agencies, and private organizations; and,
- Mandated that Project volunteers sign a waiver of liability and a confidentiality agreement, as well as receive training.⁵⁰

Additionally, this legislation authorized the Chair of the Crime Commission to provide guidance for notifying any additional individuals for whom receipt of notification was uncertain.⁵¹ The Crime Commission directed its staff to assist the FSB with notification efforts every year from 2009 through the conclusion of the Project in 2020.

Conviction Verification by DFS

As noted earlier, DFS staff previously reviewed approximately 534,000 archived case files and identified 2,204 Project case files with evidence believed to be suitable for DNA testing and at least one named suspect. The Project case files included 3,026 named suspects. After all of these named suspects were identified, the next step involved determining how many of those 3,026 named suspects had been convicted of any offense(s) related to the Project case file.

The task of verifying whether a named suspect had been convicted was initially undertaken by DFS. In seeking to determine whether an eligible individual had been convicted in relation to a Project case file, DFS requested in-state criminal history records from the Virginia State Police, as well as information from Circuit Court Clerks, Commonwealth's Attorneys, and law enforcement agencies.⁵²

Conviction Verification by Crime Commission Staff

Because verifying convictions was a time-consuming task, Crime Commission staff was asked to assist in determining whether named suspects had been convicted of any offenses related to the Project case files. During 2012 to 2013, staff was able to verify dispositions for over 1,100 cases across 83 circuit courts in the Commonwealth. Staff determined case dispositions by sending conviction verification request forms to Circuit Court Clerks and by visiting numerous courthouses.⁵³ As a result of these efforts, approximately 100 additional named suspects were identified as having been convicted of an offense related to a Project case file; therefore, post-conviction DNA testing and notification was required for these individuals.

The combined efforts of DFS and Crime Commission staff ultimately identified 969 individuals who were convicted of an offense related to a Project case file.⁵⁴ Extensive efforts were then made to locate these 969 eligible individuals and notify them of the existence of biological evidence in the DFS archived case files.

Notification of Eligible Individuals by DFS

The task of notifying eligible individuals was also initially undertaken by DFS on behalf of the FSB. The 2008 budget language directed the FSB to prepare two form letters for mailing to eligible individuals, one letter for when DNA evidence had been tested and one for when such evidence had not been tested.⁵⁵ In order to accomplish this mandate, DFS requested assistance from the Virginia State Police, Virginia Department of Corrections, Virginia Department of Motor Vehicles, and Virginia Department of Health - Office of Vital Records to determine whether eligible individuals were deceased or, if presumed living, the last known address and incarceration status of each eligible individual.

When address information for an eligible individual was identified, DFS sent notification letters via first-class mail and certified mail. A pre-stamped postcard was included with each letter. The individual receiving the letter was

asked to indicate on this postcard whether they were or were not the person specified in the letter, and, if so, whether or not they wished to receive a copy of the DNA testing results (certificate of analysis). The individual was further asked to return this completed postcard to DFS. If an eligible individual was incarcerated in a correctional facility, a first-class mailing was sent to both the individual and the warden or superintendent of the facility, with a request that the warden or superintendent have the letter hand-delivered to the eligible individual.

Notification letters were mailed to eligible individuals in 2008 by DFS between September and December.⁵⁶ These mailings resulted in over 300 confirmed notifications, with a significant portion of these notifications made to eligible individuals who were incarcerated within the Department of Corrections.

Notification of Eligible Individuals by Crime Commission Staff

In June 2009, DFS provided Crime Commission staff with an initial spreadsheet that included information on all Project case files with biological evidence believed to be suitable for DNA testing and at least one named suspect.⁵⁷ Crime Commission staff then began directly assisting DFS in notifying the remaining eligible individuals. As part of these notification efforts, staff requested information, assistance, and cooperation from numerous agencies, including the Virginia State Police,⁵⁸ Virginia Department of Corrections,⁵⁹ Office of the Attorney General,⁶⁰ Virginia Indigent Defense Commission and contract staff,⁶¹ Richmond City Public Defender's Office,⁶² and Virginia Department of Motor Vehicles.⁶³ Staff spent a significant amount of time coordinating these requests for information and merging the information provided by these agencies with existing information for each eligible individual. In addition, staff continuously updated DFS on any new information relating to an eligible individual's most recent address or incarceration status, or whether the individual was determined to be deceased. Furthermore, staff spent hundreds of hours manually entering the names of eligible individuals into various national people-finder and public record search tools, as well as conducting searches

of Virginia and other states' online sex offender registries, inmate locators, and obituaries.

Each time new information on a last known address of an eligible individual was identified, Crime Commission staff prepared mailings on behalf of the FSB and hand-delivered those materials to DFS to physically mail out to the eligible individual. It was not uncommon that several first-class and certified mailings to multiple different addresses were required in order to successfully notify a single eligible individual.

Conviction Verification and Notification of Eligible Individuals by Volunteers

In 2009, the DNA Notification Subcommittee of the FSB became responsible for coordinating the participation of *pro bono* attorney and law school student volunteers to assist with conviction verification and notification of eligible individuals. The Mid-Atlantic Innocence Project (MAIP) developed a training course for the volunteers and provided a total of seven trainings across the Commonwealth beginning in August 2009. The Virginia State Bar approved continuing legal education (CLE) credit for participants in this training course. Additionally, the Office of the Attorney General prepared liability waivers and confidentiality agreements for the individuals to sign as a condition of providing volunteer services.

Crime Commission staff assisted with case assignments for these volunteers. With limited exceptions, the volunteer effort proved challenging and produced marginal results for several different reasons. There was frequently a large gap in time between the volunteer requesting to participate, completion of the required MAIP training, and the case assignments made by Crime Commission staff, which impacted that volunteer's ability to assist. Additionally, some volunteers were not able or willing to participate in all aspects of the Project. For instance, some volunteers were willing to assist with conviction verifications and identification of last known addresses; however, they were uncomfortable or unwilling to provide in-person notifications to eligible individuals.⁶⁴

NOTIFICATION OF ELIGIBLE INDIVIDUALS BASED ON POST-CONVICTION DNA TESTING OUTCOMES

Crime Commission staff initially based notification efforts on the spreadsheet provided by DFS in June 2009.⁶⁵ This spreadsheet did not include the post-conviction DNA testing outcomes for each individual eligible for notification. In 2015, DFS provided post-conviction DNA testing outcomes for all eligible individuals, and Crime Commission staff was ultimately able to prioritize notification efforts for the 969 eligible individuals based upon these testing outcomes.⁶⁶

The post-conviction DNA testing outcomes were categorized as follows:

- **Eliminated:** eligible individual was not a contributor to the DNA profile obtained from evidence in the DFS archived case file.⁶⁷
- **Need Known:** a DNA profile was obtained from the evidence; however, a reference or “known” sample was needed from an individual (typically from the suspect or victim) to compare to the DNA profile obtained from the evidence in the DFS archived case file.
- **Inconclusive:** insufficient data existed to reach a conclusion, or no DNA profile was obtained from the evidence in the DFS archived case file.
- **Indicated/Not Eliminated:** eligible individual could not be eliminated as a contributor to the DNA profile obtained from the evidence in the DFS archived case file.

Crime Commission staff used these DNA testing outcomes to prioritize notification efforts from highest to lowest as follows: eliminated, need known, inconclusive, and indicated/not eliminated. The post-conviction DNA testing outcomes for the 969 eligible individuals were as follows:

- 84 eliminated;
- 144 need known;
- 490 inconclusive; and,
- 251 indicated/not eliminated.

Crime Commission Guidance

At the September 23, 2014, Crime Commission meeting, members voted on three matters impacting the notification efforts for eligible individuals where the post-conviction DNA testing outcome was eliminated, inconclusive, or indicated/not eliminated. Additionally, members provided guidance on post-conviction DNA testing for eligible individuals who had been convicted of misdemeanor offenses.

First, Crime Commission members voted that the next of kin (spouse, child, or parent) of a deceased eligible individual with an *eliminated* post-conviction DNA testing outcome should be notified. Crime Commission staff identified 18 of these deceased eligible individuals and determined, in consultation with DFS, whether post-conviction DNA testing of evidence in the respective case file would be probative in nature. It was determined that post-conviction DNA testing of the biological evidence was probative in regard to convictions for 11 of these deceased eligible individuals. Crime Commission staff prepared mailings for the next of kin that were similar to what had been provided to eligible individuals. These mailings asked the recipient to verify that they were next of kin to the deceased eligible individual and, if so, DFS subsequently provided the next of kin with the post-conviction DNA testing outcome (certificate of analysis). Crime Commission staff successfully notified next of kin for 8 of the 11 deceased eligible individuals whose post-conviction DNA testing outcome was eliminated.⁶⁸

Second, Crime Commission members voted that DFS should re-test the biological evidence of eligible individuals where the initial DNA testing outcome was *inconclusive* with a new DNA testing method (Y-STR) to determine if this new method could develop sufficient evidence to reach a conclusion. Staff from the Crime Commission, DFS, the Virginia Indigent Defense Commission, and MAIP completed a legal review of over 400 case files with inconclusive post-conviction DNA testing outcomes and identified 60 case files that contained spermatozoa or seminal fluid evidence, as Y-STR testing only examines male DNA.⁶⁹ DFS scientists then completed a scientific

review of the 60 case files recommended for retesting following the legal review. This joint review resulted in 34 cases with inconclusive post-conviction DNA testing outcomes being recommended for additional testing. One of these cases did not have enough remaining biological evidence to submit for testing; therefore, a total of 33 cases were sent for Y-STR testing. The Y-STR testing resulted in the following post-conviction DNA testing outcomes:⁷⁰

- 25 cases remained *inconclusive*;
- 6 cases were *need known* with a DNA sample needed from the eligible individual;
- 1 case was *need known* with a DNA sample needed from the victim; and,
- 1 case was an *indicated/not eliminated*.

DFS mailed notification letters regarding the updated post-conviction DNA testing outcomes to all 33 eligible individuals regardless of whether they had previously been notified. Similar to prior post-conviction DNA testing in the Project, DFS contracted with an independent laboratory to complete the Y-STR or mini-STR DNA analyses to minimize the impact to their existing forensic biology caseload.

Third, Crime Commission members voted that no additional resources should be used to notify eligible individuals whose post-conviction DNA testing outcome was *indicated/not eliminated*.

Finally, Crime Commission members voted that DFS should not conduct post-conviction DNA testing for eligible individuals with misdemeanor convictions unless either the eligible individual or the victim requested such testing.

OVERALL NOTIFICATION STATUS OF ELIGIBLE INDIVIDUALS

The notification status of the 969 eligible individuals requiring notification is as follows:

- Notified: 436

- Deceased: 280
- Unable to Locate (all leads exhausted): 253

Table 1 illustrates the notification status of the 969 eligible individuals categorized by post-conviction DNA testing outcome.

Table 1: Notification Status of Eligible Individuals by DNA Testing Outcome

NOTIFICATION STATUS	POST-CONVICTION DNA TESTING OUTCOME				TOTAL
	Eliminated	Need Known	Inconclusive	Indicated/ Not Eliminated	
Notified	64	30	191	152	436
Deceased	18	59	158	46	280
Unable to Locate	2	55	141	53	253
TOTAL	84	144	490	251	969

Source: Virginia State Crime Commission analysis of the DFS Post-Conviction DNA Notification Project Database. Note: These figures exclude the 289 additional eligible individuals originally classified as “ineligible.”

CHALLENGES IN NOTIFICATION EFFORTS

Nearly 75% (716 of 969) of the eligible individuals requiring notification were successfully notified or were determined to be deceased. There were several challenges to successfully notifying the remaining 26% (253 of 969) of eligible individuals.⁷¹ The cases in the Project were between 30-45 years old, and in many instances vital identifying information, such as dates of birth and social security numbers, were unavailable. This issue, combined with the fact that many of the eligible individuals had common names, made it difficult to identify the correct individuals. In some instances, legal name changes as a result of marriage, divorce, or other reasons, made it difficult to identify and locate the correct individual. Further, eligible individuals frequently changed their residences within Virginia, and other states and countries. Finally, there were a number of cases where staff was extremely confident that the correct eligible individual had been located; however, that individual never returned the postcard verification included in the mailing, and therefore could not be considered notified.

ADDITIONAL ELIGIBLE INDIVIDUALS REQUIRING NOTIFICATION

As part of a final review of the 2,204 Project case files with evidence suitable for post-conviction DNA testing and at least one named suspect, Crime Commission and DFS staff identified additional eligible individuals in these case files who were originally classified as “ineligible” by DFS in the early phases of the Project. This classification was made primarily because federal grant funding for post-conviction DNA testing of evidence in the Project case files was restricted to *violent* felonies. In total 1,809 named suspects were identified who had initially been determined to be “ineligible.” Crime Commission staff ultimately determined that 16% (289 of 1,809) of these individuals were convicted of an offense,⁷² thus making them eligible to receive notification:

- 122 were convicted of at least one felony;⁷³ and,
- 167 were convicted of at least one misdemeanor.⁷⁴

The vast majority of the biological evidence retained in these “ineligible” case files had not undergone post-conviction DNA testing.⁷⁵ Therefore, the notification letters sent to these additional eligible individuals advised them of the options for requesting post-conviction DNA testing and of the free legal assistance that may be available from the Mid-Atlantic Innocence Project. The additional eligible individuals convicted of felonies were informed that post-conviction DNA testing would be performed upon court order,⁷⁶ while those individuals convicted of misdemeanors were advised that DNA testing would only be performed upon request if it was determined that the evidence was probative.

The notification status of the 289 additional eligible individuals who were originally classified as “ineligible” is as follows:

- Notified: 56
- Deceased: 88
- Unable to Locate (all leads exhausted): 145

As of June 5, 2020, no requests had been made for post-conviction DNA testing by any of these additional eligible individuals.

CROSS-VALIDATION AND JOINT REVIEW OF CASE FILES

Over the course of this Project, Crime Commission staff reviewed the original DFS case file for all 2,204 Project case files, along with the corresponding post-conviction DNA testing outcome and legal files, multiple times to ensure that all identifying information that could assist in locating eligible individuals was captured and cross-validated.

Once all leads for notifying eligible individuals were exhausted and cross-validation of files was completed, Crime Commission and DFS staff met to review all 2,204 Project case files to verify agreement in terms of (i) post-conviction DNA testing outcome (i.e., eliminated, need known, inconclusive, indicated/not eliminated, additional eligible, ineligible), (ii) notification status (i.e., notified, deceased, unable to locate); and, (iii) whether staff collectively determined that all leads had been exhausted in attempting to locate and notify eligible individuals. This joint review was an essential final step in the Project to ensure that all information, including post-conviction DNA testing outcome and notification status for each eligible individual, was captured and reflected consistently in both DFS and Crime Commission records.

DUE DILIGENCE DETERMINATION

On October 3, 2019, DFS and Crime Commission staff presented an update on the status of the Project to the FSB.⁷⁷ The FSB unanimously voted that once notifications were made to the additional eligible individuals who were initially classified as “ineligible,” then due diligence had been met and all reasonable efforts had been made to notify eligible individuals as mandated in the 2008 budget language enacted by the General Assembly.⁷⁸ The Crime Commission received a final update on the status of the Project from Commission staff at its October 15, 2019, meeting.⁷⁹ The FSB submitted its

annual report, which contained a final update on the Project, to the General Assembly in November 2019.⁸⁰

Notification letters were sent to all remaining additional eligible individuals as of January 2020. As such, due diligence was met and all reasonable efforts were made to notify eligible individuals as mandated by the General Assembly.

WRONGFUL CONVICTIONS

As previously noted, there have been 56 exonerations in Virginia, and DNA evidence has been a substantial factor in 20 of those exonerations.⁸¹ The post-conviction DNA testing and notification efforts stemming from this Project resulted in the exonerations of the following 13 individuals:⁸²

- Marvin Lamont Anderson⁸³
- Bennett Barbour⁸⁴
- Victor Anthony Burnette⁸⁵
- Calvin Cunningham⁸⁶
- Willie Neville Davidson⁸⁷
- Garry Diamond⁸⁸
- Thomas Haynesworth⁸⁹
- Curtis Jasper Moore⁹⁰
- Julius Earl Ruffin⁹¹
- Winston Lamont Scott⁹²
- Philip Leon Thurman⁹³
- Roy L. Watford, III⁹⁴; and,
- Arthur Lee Whitfield.⁹⁵

These 13 exonerations included six pardons, six writs of actual innocence based on biological evidence, and one special circumstance.⁹⁶ These exonerated individuals served a combined total of nearly 150 years in prison and shared several common factors, including:⁹⁷

- all 13 were male;

- all 13 were convicted of at least one sex offense;
- 11 of the 13 were African American;⁹⁸ and,
- 11 of the 13 were convicted in all or in part due to misidentification by witnesses.⁹⁹

In addition to the 13 exonerations, there were at least 16 cases where post-conviction DNA testing stemming from this Project led to hits of DNA profiles in the Virginia DNA Databank of persons *not* named in the DFS archived case file, such as:¹⁰⁰

- The sperm fraction of the swabs in the Marvin Lamont Anderson case file identified the DNA contributor as a different individual who was subsequently convicted of the 1982 sexual assault.
- The sperm fraction of the evidence in the Julius Earl Ruffin case file matched to the DNA of a different individual who was serving multiple life sentences for rape and forcible sodomy convictions in another case.
- The sperm fractions from the evidence in the Arthur Lee Whitfield case file were also consistent with the DNA of the perpetrator identified in the Julius Ruffin case file.
- Evidence retained in the Phillip Thurman case file identified the DNA contributor as a different individual who was subsequently convicted of that 1985 rape offense.
- Evidence retained in the Thomas Haynesworth case file identified the DNA contributor as a different individual who was serving multiple life sentences for rape offenses that occurred after Mr. Haynesworth's arrest in 1984.
- Evidence retained in the Bennett Barbour case file identified the DNA contributor as a different individual who was subsequently convicted of that 1978 rape offense.
- Evidence retained in the Curtis Jasper Moore case file identified the DNA contributor as a different individual who was subsequently

convicted of that 1978 murder and rape offense, ultimately resulting in a life sentence.

LESSONS LEARNED

Many lessons were learned when addressing the numerous legal and logistical challenges that arose during this Project. Crime Commission and DFS staff identified aspects of the Project that functioned well, along with improvements that could be made to other areas of the Project. The following lessons can provide guidance to others who undertake a similar project.

One Singular Entity Should Be Responsible for Completion of the Project

There were many benefits to mandating that the Forensic Science Board be responsible for completion of the Project. An article published by the American Bar Association (ABA) cited this structure as a potential model for similar statewide notification systems requiring mass notification.¹⁰¹ Most notably, the article remarked favorably that policy decisions on cases and the mechanics of notification were made by a group of criminal justice stakeholders on the Board, as opposed to being left to the discretion of individual prosecutors.¹⁰²

Additionally, this centralized structure created accountability for completion of the Project. A report on the progress of the Project was required at each FSB meeting¹⁰³ and the FSB was required to make a final report on the status of the Project.¹⁰⁴ Further, the FSB is required to provide an annual report to General Assembly members.¹⁰⁵

While this structure had many advantages, a significant challenge was that the FSB is a policy board and not a functioning agency. As such, the FSB and DNA Notification Subcommittee were comprised of individuals who were full-time employees of various other agencies. This Project ultimately succeeded because of the assistance, cooperation, and perseverance of many individuals who carried out Project-related activities in addition to their demanding day-to-day job responsibilities at these other agencies. In retrospect, the creation

of an independent, ad hoc entity with staff whose only responsibility was Project-related activities would likely have led to an earlier completion of the Project.

Cooperation Between State and Local Government Agencies is Essential

The importance of cooperation between government agencies and the amount of time needed to establish working relationships and trust cannot be understated. Collaboration began early on with the dissemination of information about the Project to the criminal justice community. This sharing of information proved helpful in determining how various agencies could assist and which tools were available to locate eligible individuals requiring notification. This cooperation continued for over a decade, as individuals in the executive, legislative, and judicial branches of state government, along with local government officials, worked diligently to provide assistance with notification efforts.

Additionally, the success of the conviction verification portion of the Project was due to the resounding work of the Circuit Court Clerks and their staff, along with the support of the Virginia Court Clerks' Association. Relying on Circuit Court Clerks was a far more efficient method for verifying convictions than asking *pro bono* attorneys to research cases on a one-by-one basis because Clerks are intimately familiar with their record retention and retrieval practices.

Numerous Databases and Public Information Search Tools Must Be Used When Attempting to Locate Individuals Requiring Notification

The collection of information across databases and search platforms, as opposed to relying on a singular source, was essential to successfully locate and notify eligible individuals. The information contained within the internal databases of the Virginia State Police, Virginia Department of Corrections, Virginia Department of Motor Vehicles, and Virginia Department of Health - Office of Vital Records provided immeasurable assistance in verifying the identities of eligible individuals, identifying last known addresses, and

determining whether any of these individuals were deceased. Additionally, subscriptions to various people finder tools and other online resources were integral in locating eligible individuals. Finally, conducting internet searches of various public sources of information, such as newspaper articles and obituaries, proved particularly helpful.

Successful Notification of Individuals Often Requires Numerous and Repeated Efforts

The amount of time required to *truly* meet due diligence in attempting to notify all eligible individuals cannot be underestimated. Completion of the Project required multiple iterations of notification efforts over numerous years by various agencies before it was determined that all leads had been exhausted in attempting to locate an eligible individual. This process was very tedious and required persistence to ensure that all reasonable efforts to identify and locate eligible individuals were made and documented accordingly.

Case Files Should Be Screened to Confirm the Probative Value of the Biological Evidence and Prioritize Cases for Post-Conviction DNA Testing

One of the most important lessons learned from the DNA testing portion of the Project was that an improved screening process for the testing of biological evidence in the archived case files would have been beneficial. At the beginning of the Project, any archived case file with biological evidence where a named suspect had been convicted of a felony offense against a person was sent for DNA testing. In retrospect, case files should have been screened to determine whether DNA testing would be probative of the convicted individual's guilt or innocence of the offense. Such screening would have saved a significant amount of time, resources, and costs.

A screening process was ultimately used for cases later in the Project. In September 2014, the Crime Commission recommended retesting of the 421 cases with "inconclusive" results. DFS received \$150,000 in Virginia's FY16 budget for this retesting. A screening process was developed and implemented for these 421 cases in order to determine whether the biological evidence in

each case file was probative and whether to submit the case for retesting. As a result, only 33 cases were sent for retesting and DFS was able to return \$75,000 of the funds allocated.

Post-Conviction DNA Testing Results Should Be Used to Prioritize Notification Efforts at the Outset

An important lesson learned during the notification portion of this Project was that it would have been helpful if the DNA testing outcomes were made available at the beginning of the project so that notification efforts could have been prioritized based upon the testing outcome. For example, had the DNA testing outcomes been available at the outset, cases with an outcome of “eliminated” would have taken priority over cases with an “indicated/not eliminated” outcome. As such, if a similar project were to be undertaken in the future, it is recommended that the DNA testing outcomes be made immediately available to the entity responsible for notifying eligible individuals.

Additionally, when developing terminology for DNA testing outcomes, how the public interprets the terms should be taken into account. For example, during this Project the scientific term “eliminated” was used for DNA testing outcomes that excluded the convicted person as a DNA contributor to the biological evidence in the case file; however, many members of the public could inadvertently interpret the scientific term “eliminated” as having the same meaning as the legal term of “exonerated.”

Sufficient Funding Must Be Available to Conduct Post-Conviction DNA Testing

It must be strongly emphasized that the DNA testing portion of this Project was supported by both federal and state funds. DFS would not have been able to complete DNA testing on the biological evidence in the archived case files without these additional federal and state funds to supplement its existing operating budget. As such, any similar project should determine how much

funding will be necessary and available to conduct such DNA or other scientific testing.

Independent Laboratories Should Be Considered as an Option for Performing Post-Conviction DNA Testing in Order to Avoid Delaying Work on Current DNA Cases at State Laboratories

By outsourcing post-conviction DNA testing to an independent laboratory, DFS was able to ensure that such testing was performed without delaying work by DFS on its forensic biology caseload for pending investigations and criminal cases. Additionally, if a state laboratory will be responsible for reviewing the work of an independent laboratory (e.g., writing reports or uploading profiles to CODIS), it is critical that a digital file format for sharing information between these entities be determined in advance.

Notification Letters Sent to Individuals Should Provide Clear Information on the Project and Any Actions Required by the Recipient

Much time and attention was put into developing the format and wording of notification letters to eligible individuals as part of this Project; however, it was not uncommon for recipients to be confused about why they received the letter and what they were supposed to do in response. Additionally, there were instances when someone other than the intended recipient, such as a spouse or other family member, opened the letter.

Therefore, when drafting such a notification letter, careful consideration must be given to the content of the document. Letters should provide enough information to help the recipient recall the particular offense (name, place of conviction, court case number or investigating agency, internal identification number, date of offense or conviction) without explicitly stating the nature of the actual offense. The letter should also explain to the recipient, in basic “everyday” language, why they are receiving the letter and what actions they are required or advised to take in response. Furthermore, the letter should contain clear instructions on what the reader should do if they are not the intended recipient of the letter (e.g., provide to the intended recipient, forward

to intended recipient, notify DFS that intended recipient is no longer at the address).

Procedures Should Be in Place to Respond to Questions Stemming from Notification Letters

In addition to providing clear information in the notification letter, a plan for how to handle the wide array of reactions that recipients may have to receiving the letter must be established. For example, during this Project some recipients expressed distrust about receiving a letter from a government entity, others were frustrated because they had moved on with their lives since the conviction, and a few were angry because they were not the person who had been convicted of the offense. Letter recipients with these concerns were referred to the Mid-Atlantic Innocence Project (MAIP) for assistance.

While some have suggested that referring letter recipients to volunteer groups for legal advice is the government dodging a responsibility to respond,¹⁰⁶ MAIP proved to be a valuable asset to the public over the course of the Project. Hundreds of individuals reached out to MAIP for advice and assistance related to the notification letters. In addition, MAIP was involved in many of the cases that resulted in an exoneration.

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Office of the Attorney General

Pro Bono Attorneys

Richmond City Public Defender's Office

Virginia Court Clerks' Association

Virginia Department of Corrections

Virginia Department of Forensic Science

Virginia Department of Health - Office of Vital Records

Virginia Department of Motor Vehicles

Virginia Indigent Defense Commission

Virginia State Bar

Virginia State Police

NOTES

¹ See Virginia Department of Forensic Science. *About DFS*. Retrieved from <https://www.dfs.virginia.gov/about-dfs/>. In Virginia, the Department of Forensic Science is responsible for providing “forensic laboratory services to the Commonwealth’s state and local law enforcement agencies, medical examiners, Commonwealth’s Attorneys, fire departments, and state agencies in the investigation of any criminal matter.”

² Forensic Science Board. *2008 Annual Report*. Retrieved from <https://rga.lis.virginia.gov/Published/2008/RD358/PDF>. The case files were reviewed to “ascertain whether any individuals convicted of a certain set of crimes during that 15-year period may have been wrongly convicted” (p.2).

³ See, e.g., The National Center for Victims of Crime. *DNA & crime victims: Post-conviction testing and exonerations*. Retrieved from https://victimsofcrime.org/docs/DNA%20Resource%20Center/dna_exoner_ation_bro.pdf?sfvrsn=0.

⁴ See, e.g., Gould, J.B., & Leo, R.A. (2010). One hundred years later: Wrongful convictions after a century of research. *Journal of Criminal Law and Criminology*, 100(3), 825-868; Gould, J.B., Carrano, J., Leo, R., & Young, J. (2013). *Predicting erroneous convictions: A social science approach to miscarriages of justice*. Retrieved from <https://www.ncjrs.gov/pdffiles1/nij/grants/241389.pdf>; Huff, C.R. (2002). Wrongful conviction and public policy: The American Society of Criminology 2001 presidential address. *Criminology*, 40(1), 1-18; Olney, M., & Bonn, S. (2015). An exploratory study of the legal and non-legal factors associated with exoneration for wrongful conviction: The power of DNA evidence. *Criminal Justice Policy Review*, 26(4), 400-420; The Innocence Project. *All cases*. Retrieved from <https://www.innocenceproject.org/all-cases/>; The National Registry of Exonerations. *% exonerations by contributing factor*. Retrieved from <https://www.law.umich.edu/special/exoneration/Pages/ExonerationsContribFactorsByCrime.aspx>.

⁵ Suggestive identification procedures may occur at various times, such as during photo arrays, showups, or lineups.

⁶ “Tunnel vision” refers to an emphasized focus on a single suspect in a case.

⁷ See, e.g., Wicoff, B. (2019). Challenges in responding to mass forensic error. *Criminal Justice*, 34(3), 29-36. The author discusses how certain forensic approaches have recently come under scrutiny, including bite mark analysis, arson investigation, tool mark analysis, shaken baby syndrome, comparative bullet lead analysis, and blood stain pattern analysis (pp. 29-30). See also National Research Council. (2009). *Strengthening forensic science in the United States: A path forward*. Washington, D.C. Retrieved from <https://www.ncjrs.gov/pdffiles1/nij/grants/228091.pdf>; President’s Council of Advisor’s on Science and Technology (PCAST). (2016). *Report to the*

President. Forensic science in criminal courts: Ensuring scientific validity of feature-comparison methods. Washington, D.C. Retrieved from https://obamawhitehouse.archives.gov/sites/default/files/microsites/ostp/PCAST/pcast_forensic_science_report_final.pdf.

⁸ The first state appellate court to uphold the admission of DNA evidence was in Florida in 1988. *Andrews v. State*, 533 So. 2d 841 (Fla. Dist. Ct. App. 1988). DNA evidence was ruled admissible by the U.S. District Court for the District of Vermont in September 1990. *U.S. v. Jakobetz*, 747 F. Supp. 250 (D. Vt. 1990). The first U.S. Court of Appeals decision that addressed the admissibility of DNA evidence was in October 1990. *U.S. v. Two Bulls*, 918 F.2d 56 (8th Cir. 1990).

⁹ National Conference of State Legislatures. *Post-conviction DNA testing.* Retrieved from <https://www.ncsl.org/Documents/cj/PostConvictionDNATesting.pdf>.

¹⁰ See, e.g., National Commission on the Future of DNA Evidence. (1999). *Postconviction DNA Testing: Recommendations for handling requests.* Retrieved from <https://www.ncjrs.gov/pdffiles1/nij/177626.pdf>. Although somewhat outdated, this report identifies some of the key actors involved in such requests and identifies recommendations for prosecutors, defense counsel, judiciary, victim assistance, and laboratory personnel. See also Wicoff, B. (2019). Challenges in responding to mass forensic error. *Criminal Justice*, 34(3), 29-36. The author of this article states that “it is essential that stakeholders in the criminal justice system work together to create efficient and cost-effective institutional responses...” (p. 36).

¹¹ The National Registry of Exonerations. *Glossary.* Retrieved from <https://www.law.umich.edu/special/exoneration/Pages/glossary.aspx>.

¹² The National Registry of Exonerations. Retrieved June 2, 2020, from <https://www.law.umich.edu/special/exoneration/Pages/Exoneration-by-Year.aspx>. The number of DNA exonerations reported by the National Registry of Exonerations and the Innocence Project differs due to a variation in definitions.

¹³ *Id.*

¹⁴ Innocence Project. *DNA exonerations in the United States.* Retrieved June 2, 2020, from <https://www.innocenceproject.org/dna-exonerations-in-the-united-states/>. The number of DNA exonerations reported by the Innocence Project and the National Registry of Exonerations differs due to a variation in definitions.

¹⁵ *Id.*

¹⁶ See, e.g., Innocence Commission for Virginia. (2005). *A vision for justice: Report and recommendations regarding wrongful convictions in the Commonwealth of Virginia.* Arlington, VA: Innocence Commission for Virginia. Retrieved from <https://www.prisonlegalnews.org/media/publications/innocence%20commission%20of%20va%2C%20wrongful%20convictions%20report%2C%202005.pdf>; The National Registry of Exonerations. *% exonerations by*

contributing factor. Retrieved from <https://www.law.umich.edu/special/exoneration/Pages/ExonerationsContribFactorsByCrime.aspx>.

¹⁷ The National Registry of Exonerations. *Exonerations by state*. Retrieved June 2, 2020, from <https://www.law.umich.edu/special/exoneration/Pages/Exonerations-in-the-United-States-Map.aspx>.

¹⁸ *Spencer v. Commonwealth*, 238 Va. 295, 313-316, 384 S.E.2d 785, 797 (1989).

¹⁹ 1990 Va. Acts ch. 669. See VA. CODE § 19.2-270.5 (2019).

²⁰ 2001 Va. Acts ch. 873, 874. See VA. CODE §§ 19.2-270.4:1 and 19.2-327.1 through 19.2-327.6 (2019).

²¹ 2005 Va. Acts ch. 868, 881. In 2005, a major restructuring of the former Virginia Division of Forensic Science created the Department of Forensic Science as a department within the executive branch of the state government.

²² See, e.g., <https://www.innocenceproject.org/cases/marvin-anderson/>; Innocence Commission for Virginia. (2005). *A vision for justice: Report and recommendations regarding wrongful convictions in the Commonwealth of Virginia*. Arlington, VA: Innocence Commission for Virginia. Retrieved from <https://www.prisonlegalnews.org/media/publications/innocence%20commission%20of%20va%2C%20wrongful%20convictions%20report%2C%202005.pdf>.

²³ The post-conviction DNA testing results were included on a certificate of analysis dated December 6, 2001. In Virginia, the results of scientific testing are reported on a form prepared by DFS entitled “certificate of analysis.”

²⁴ Office of Governor Mark R. Warner. (2003). *List of pardons, commutations, reprieves and other forms of clemency*. Retrieved from <https://rga.lis.virginia.gov/Published/2003/SD2/PDF>.

²⁵ See, e.g., <https://www.innocenceproject.org/cases/julius-ruffin/>; Innocence Commission for Virginia. (2005). *A vision for justice: Report and recommendations regarding wrongful convictions in the Commonwealth of Virginia*. Arlington, VA: Innocence Commission for Virginia. Retrieved from <https://www.prisonlegalnews.org/media/publications/innocence%20commission%20of%20va%2C%20wrongful%20convictions%20report%2C%202005.pdf>.

²⁶ The post-conviction DNA testing results were included on a certificate of analysis dated February 11, 2003.

²⁷ Office of Governor Mark R. Warner. (2004). *List of pardons, commutations, reprieves and other forms of clemency*. Retrieved from <https://rga.lis.virginia.gov/Published/2004/SD2/PDF>.

²⁸ See, e.g., <https://www.innocenceproject.org/cases/arthur-lee-whitfield/>; Innocence Commission for Virginia. (2005). *A vision for justice: Report and recommendations regarding wrongful convictions in the Commonwealth of Virginia*. Arlington, VA: Innocence Commission for Virginia. Retrieved from <https://www.prisonlegalnews.org/media/publications/innocence%20com>

[mission%20of%20va%2C%20wrongful%20convictions%20report%2C%202005.pdf](#).

²⁹ Office of Governor Timothy E. Kaine. (2010). *List of pardons, commutations, reprieves and other forms of clemency*. Retrieved from <https://rga.lis.virginia.gov/Published/2010/SD2/PDF>.

³⁰ The biological evidence retained in these DFS archived case files consisted of remnants of evidence previously subjected to serological testing in the 1970s and 1980s; therefore, the amount of remaining biological evidence varied across the case files.

³¹ See, e.g., DFS presentation at the October 14, 2008, Crime Commission meeting. Available at http://services.dlas.virginia.gov/user_db/frmvsc.asp?viewid=125. Slide 4 provides an example of a photocopy of retained evidence on worksheets in the case files. This retention practice was discontinued by DFS in 1989 in order to meet accreditation standards.

³² See, e.g., DFS presentation at the October 14, 2008, Crime Commission meeting. Available at http://services.dlas.virginia.gov/user_db/frmvsc.asp?viewid=125. Slide 5 provides the official directive issued by Governor Mark R. Warner in September 2004.

³³ These 31 cases are not included in the total number of cases reported in the full archived case file review ordered by Governor Mark R. Warner in 2005. DNA evidence retained in these 31 case files was sent to an independent laboratory for testing in 2004. The results of the post-conviction DNA testing of the 31 cases were as follows: in 16 cases, the individual could not be eliminated from the evidence that was tested; in 9 cases, the DNA testing results were inconclusive; and, in the remaining 6 cases, the individual was eliminated as a contributor to the DNA evidence retained. In 3 of the 6 cases where the individual was eliminated as a contributor, it was determined that either the individual had not been convicted of the offense in question *or* that the individual had been properly convicted based upon other information as determined by the respective Commonwealth's Attorney. The remaining 3 individuals in these 6 cases were exonerated. See Forensic Science Board. (2008, Jan. 9). *Meeting minutes*. Retrieved from <https://townhall.virginia.gov/L/GetFile.cfm?File=meeting\144\10470\Minutes DFS 10470 v2.pdf>. These meeting minutes provide additional discussion on the nine inconclusive cases in the 10% random review ordered by Governor Mark R. Warner in 2004. (Addendum 1).

³⁴ Office of Governor Mark R. Warner. (2006). *List of pardons, commutations, reprieves and other forms of clemency*. Retrieved from <https://rga.lis.virginia.gov/Published/2006/SD2/PDF>. See also <https://www.innocenceproject.org/cases/phillip-leon-thurman/>. Mr. Thurman spent nearly 20 years in prison for convictions of rape, assault and battery, and abduction stemming from a 1984 crime in Alexandria. Mr. Thurman was granted an absolute pardon by Governor Mark R. Warner on December 22, 2005.

³⁵ *Id.* See also <https://www.innocenceproject.org/cases/willie-davidson/>. Mr. Davidson served 11.5 years in prison for convictions of rape, burglary, and forcible sodomy (2 counts) stemming from a 1980 crime in Norfolk. Mr. Davidson was granted an absolute pardon by Governor Mark R. Warner on December 22, 2005.

³⁶ Office of Governor Timothy E. Kaine. (2010). *List of pardons, commutations, reprieves and other forms of clemency*. Retrieved from <https://rga.lis.virginia.gov/Published/2010/SD2/PDF>. See also <https://www.innocenceproject.org/cases/victor-burnette/>. Mr. Burnette served nearly 8 years in prison after being convicted of rape and burglary in 1979 in the City of Richmond. Mr. Burnette was granted an absolute pardon by Governor Timothy E. Kaine on April 3, 2009.

³⁷ See *infra* notes 93, 87, and 85, respectively.

³⁸ See, e.g., DFS presentation at the October 14, 2008, Crime Commission meeting. Available at http://services.dlas.virginia.gov/user_db/frmvsc.asp?viewid=125. Slide 6 includes the December 14, 2005, press release from Governor Mark R. Warner.

³⁹ See Forensic Science Board. (2008, May 7). *Meeting minutes*. Retrieved from <https://townhall.virginia.gov/L/GetFile.cfm?File=meeting\144\10581\Minutes DFS 10581 v2.pdf>.

⁴⁰ During this archived case file review, interns and part-time employees of DFS created a spreadsheet to enter data points related to the contents of the case files. This spreadsheet served as the foundational document for determining which case files required post-conviction DNA testing and which named suspects were eligible to receive notification. Portions of this spreadsheet were first provided to Crime Commission staff in June 2009.

⁴¹ See Forensic Science Board. *2019 Annual Report*. Retrieved from <https://rga.lis.virginia.gov/Published/2019/RD497/PDF>. This report includes additional details relating to funding for the Post-Conviction DNA Testing Program (p.2). These figures do not include the 31 cases tested in the 10% random review ordered by Governor Mark R. Warner in 2004.

⁴² See Forensic Science Board. *2009 Annual Report*. Retrieved from <https://rga.lis.virginia.gov/Published/2009/RD290/PDF>. As of October 13, 2009, a total of 829 cases had been sent to the contracting laboratory for post-conviction DNA testing (p. 3).

⁴³ Forensic Science Board. *2017 Annual Report*. Retrieved from <https://rga.lis.virginia.gov/Published/2017/RD423/PDF>. See also *infra* note 92. A “known” sample from Winston Lamont Scott was submitted for analysis in July 2017. The testing outcome in Mr. Scott’s case was initially listed as *need known* because his DNA sample was needed to compare to the DNA profile obtained from the case file evidence. DNA testing excluded him as a contributor to the DNA profile obtained from the evidence. Mr. Scott filed a petition for a writ of actual innocence in September 2017 and was ultimately

exonerated of the crimes of rape, carnal knowledge, and burglary in 2019. See *In re: Scott*, 297 Va. 166 (2019).

⁴⁴ The contract laboratory was ASCLD/LAB accredited at the time the DNA evidence was tested. While the large majority of post-conviction DNA testing was conducted by the contract laboratory, it should be mentioned that DFS did conduct some cases “in-house” after the grant funding ended.

⁴⁵ In order for an individual to be eligible for notification, the Project case file had to contain evidence suitable for DNA testing and at least one named suspect, and that named suspect must have been convicted of an offense related to the Project case file.

⁴⁶ 2008 Va. Acts ch. 879. Item 408(B) of the 2008 Appropriations Act.

Available at

<https://budget.lis.virginia.gov/item/2008/1/HB30/Chapter/1/408/>. See also VA. CODE §§ 9.1-1109 and 1110 (2019) for additional information about the Forensic Science Board. Note that the Forensic Science Board is a policy board within the executive branch of state government and therefore the Virginia Department of Forensic Science provides staffing for the Board.

⁴⁷ See VA. CODE § 9.1-1109(A)(7) (2019). Since 2007, the Executive Director of the Crime Commission has served on the Forensic Science Board as the designee for the Chair of the Crime Commission.

⁴⁸ See, e.g., Forensic Science Board. (2008, Aug. 6). *Meeting minutes*. Retrieved from

<https://townhall.virginia.gov/L/GetFile.cfm?File=meeting\144\11156\Minutes DFS 11156 v1.pdf>. These meeting minutes provide a more thorough discussion of initial concerns relating to the overall notification process and use of *pro bono* volunteers (pp. 4-7 and Addendums A, B, and C).

⁴⁹ 2009 Va. Acts ch. 172. This legislation (Senate Bill 1391) was introduced by the Chair of the Crime Commission, Senator Kenneth W. Stolle.

⁵⁰ *Id.*

⁵¹ *Id.*

⁵² See, e.g., Forensic Science Board. (2008, May 7). *Meeting minutes*. Retrieved from

<https://townhall.virginia.gov/L/GetFile.cfm?File=meeting\144\10581\Minutes DFS 10581 v2.pdf>. These meeting minutes provide a more detailed discussion of the efforts DFS undertook in collecting information relating to the Project case files from other agencies (Addendum 1).

⁵³ Circuit Court Clerks were asked to provide a copy of the final court order (by fax or mail) to assist in documenting case dispositions.

⁵⁴ This figure does not include individuals in Project case files that were originally classified as “ineligible” by DFS due to grant funding restrictions that had been placed on the post-conviction DNA testing. Further information about these additional eligible individuals who were initially deemed “ineligible” is available on page 21 of this report.

⁵⁵ 2008 Va. Acts ch. 879. Item 408(B) of the 2008 Appropriations Act.

Available at

<https://budget.lis.virginia.gov/item/2008/1/HB30/Chapter/1/408/>.

⁵⁶ See Forensic Science Board. *2009 Annual Report*. Retrieved from <https://rga.lis.virginia.gov/Published/2009/RD290/PDF>. See also Forensic Science Board. (2008, Oct. 8). *Meeting minutes*. Retrieved from https://townhall.virginia.gov/L/GetFile.cfm?File=meeting\144\11600\Minutes_DFS_11600_v2.pdf. These meeting minutes provide further details on the process for these initial notification letters (pp.3-6).

⁵⁷ *Supra* note 40.

⁵⁸ The Virginia State Police assisted by searching within their internal databases to determine last known addresses of eligible individuals.

⁵⁹ The Virginia Department of Corrections assisted by verifying whether an eligible individual was incarcerated in Virginia or another state, on detainer, on state probation or parole supervision for any offense, or had died while in DOC custody or on DOC supervision. The Department of Corrections also provided Crime Commission staff with presentence investigation reports which provided valuable information about the eligible individual, next of kin, and ties to certain areas or residences.

⁶⁰ The Office of the Attorney General assisted in locating eligible individuals by using their internal people search tools.

⁶¹ In 2014, contract employees with the Virginia Indigent Defense Commission conducted research, successfully located numerous eligible individuals, and found many leads for locating eligible individuals who had not received notification.

⁶² The Richmond City Public Defender's Office assisted on two occasions by completing hundreds of searches that led to the notification of multiple eligible individuals and the determination that some of these individuals were deceased.

⁶³ The Virginia Department of Motor Vehicles assisted in locating last known addresses for eligible individuals by searching within their internal databases.

⁶⁴ See, e.g., Forensic Science Board. (2009, Aug. 12). *Meeting minutes*. Retrieved from

https://townhall.virginia.gov/L/GetFile.cfm?File=meeting\144\12439\Minutes_DFS_12439_v2.pdf. These meeting minutes provide further discussion on some of the challenges relating to *pro bono* case assignments (pp.5-6).

⁶⁵ *Supra* note 40.

⁶⁶ See, Forensic Science Board (2015, Jan. 7). *Meeting minutes*. Retrieved from

https://townhall.virginia.gov/L/GetFile.cfm?File=meeting\144\22187\Minutes_DFS_22187_v2.pdf at p. 4.

⁶⁷ "Eliminated" does not mean that the individual was "exonerated." Elimination is a *scientific* term; whereas, exoneration is a *legal* term. A DNA testing outcome of "eliminated" does not mean that the DNA evidence alone is sufficient to exonerate the individual.

⁶⁸ Challenges in notifying next of kin were similar to the challenges in notifying eligible individuals as described on p. 4 of this report.

⁶⁹ See, e.g., Orchid Cellmark. (2007, Dec. 13). *An introduction to Y-STR Testing*. Available at

http://services.dlas.virginia.gov/user_db/frmvsc.asp?viewid=667.

⁷⁰ Forensic Science Board. *2016 Annual Report*. Retrieved from

<https://rga.lis.virginia.gov/Published/2016/RD449/PDF>.

⁷¹ At the September 23, 2014, Crime Commission meeting, members voted that no additional resources should be used to notify eligible individuals whose post-conviction DNA testing outcome was indicated/not eliminated. Those individuals accounted for 53 of the 253 eligible individuals with a post-conviction DNA testing outcome of indicated/not eliminated who were unable to be located.

⁷² Most of the case files for these named suspects contained documentation on the disposition of the case (i.e., convicted, *nolle prosequi*, dismissed, etc.). However, in 2019, Crime Commission staff conducted another conviction verification process for the additional named suspects whose case dispositions were unknown or unclear. Staff was able to verify the dispositions of over 370 named suspects across 75 circuit courts in the Commonwealth. As a result of these efforts, 120 individuals were determined to have been convicted and, thus, classified as an additional eligible individual for notification.

⁷³ The felonies were primarily for burglary, breaking and entering, grand larceny, and hit and run offenses.

⁷⁴ Approximately two-thirds of the misdemeanors were for felony sex offense charges that resulted in misdemeanor convictions. At the September 23, 2014, Crime Commission meeting, members voted that DFS should not conduct DNA testing for misdemeanor convictions unless requested either by the eligible individual or the victim.

⁷⁵ There were a small number of instances where the additional eligible individual who was originally classified as “ineligible” was also a named suspect in the same case as an eligible individual with a post-conviction DNA testing outcome of *eliminated, need known, inconclusive, or indicated/not eliminated*. As such, the biological evidence in these case files was tested for all individuals.

⁷⁶ See VA. CODE § 19.2-327.1 (2019).

⁷⁷ See Forensic Science Board. (2019, Oct. 3). *Draft agenda*. Retrieved from <https://townhall.virginia.gov/L/GetFile.cfm?File=Meeting\144\29659\Agenda DFS 29659 v1.pdf>.

⁷⁸ See Forensic Science Board. (2019, Oct. 3). *Final minutes*. Retrieved from <https://townhall.virginia.gov/L/GetFile.cfm?File=Meeting\144\29659\Minutes DFS 29659 v2.pdf>.

⁷⁹ Virginia State Crime Commission. (2019). *Post-conviction DNA Notification Project* presentation. Available at

<http://vscc.virginia.gov/2019/October/DNANotificationPowerPoint.pdf>.

⁸⁰ Forensic Science Board. *2019 Annual Report*. Retrieved from

<https://rga.lis.virginia.gov/Published/2019/RD497/PDF>.

⁸¹ *Supra* note 17.

⁸² See Urban Institute. (2012). *Post-conviction DNA testing and wrongful conviction*. Washington, DC: Urban Institute. As a grantee awarded funding by the National Institute of Justice (NIJ), DFS was obligated to provide access to the Project case files to an outside research team that was also funded by NIJ. This research team attempted to better understand the rate and correlates of wrongful convictions based on a portion of the Project case files. That study conceded several important limitations in attempting to determine a rate. Most importantly, the analysis was based on information solely within the Project case files, which frequently did not include the *context* of the existing evidence or other non-forensic facts that would be critical in making a determination of the probative value of the post-conviction DNA testing results.

⁸³ Office of Governor Mark R. Warner. (2003). *List of pardons, commutations, reprieves and other forms of clemency*. Retrieved from <https://rga.lis.virginia.gov/Published/2003/SD2/PDF>. See also <https://www.innocenceproject.org/cases/marvin-anderson/>.

⁸⁴ *In re: Barbour*, Record No. 120372, slip op. at 1-2 (Va. May 24, 2012) (unpublished). See also <https://www.innocenceproject.org/cases/bennett-barbour/>.

⁸⁵ Office of Governor Timothy E. Kaine. (2010). *List of pardons, commutations, reprieves and other forms of clemency*. Retrieved from <https://rga.lis.virginia.gov/Published/2010/SD2/PDF>. See also <https://www.innocenceproject.org/cases/victor-burnette/>.

⁸⁶ *In re: Cunningham*, Record No. 100747, slip op. at 1 (Va. Apr. 12, 2011) (unpublished). See also <https://www.innocenceproject.org/cases/calvin-wayne-cunningham/>.

⁸⁷ Office of Governor Mark R. Warner. (2006). *List of pardons, commutations, reprieves and other forms of clemency*. Retrieved from <https://rga.lis.virginia.gov/Published/2006/SD2/PDF>. See also <https://www.innocenceproject.org/cases/willie-davidson/>.

⁸⁸ *In re: Diamond*, Record No. 121462, slip op. at 1 (Va. Mar. 8, 2013) (unpublished). See also <https://www.innocenceproject.org/cases/gary-diamond/>.

⁸⁹ *In re: Haynesworth*, Record No. 090942, slip op. at 1-2 (Va. Sept. 18, 2009) (unpublished). See also <https://www.innocenceproject.org/cases/thomas-haynesworth/>.

⁹⁰ See, e.g., <https://www.law.umich.edu/special/exoneration/Pages/casedetail.aspx?caseid=3487>.

⁹¹ Office of Governor Mark R. Warner. (2004). *List of pardons, commutations, reprieves and other forms of clemency*. Retrieved from <https://rga.lis.virginia.gov/Published/2004/SD2/PDF>. See also <https://www.innocenceproject.org/cases/julius-ruffin/>.

⁹² *In re: Scott*, 297 Va. 166 (2019). See also <https://www.innocenceproject.org/cases/winston-scott/>.

⁹³ Office of Governor Mark R. Warner. (2006). *List of pardons, commutations, reprieves and other forms of clemency*. Retrieved from <https://rga.lis.virginia.gov/Published/2006/SD2/PDF>. See also <https://www.innocenceproject.org/cases/phillip-leon-thurman/>.

⁹⁴ *In re: Watford*, 295 Va. 114 (2018). See also <https://www.law.umich.edu/special/exoneration/Pages/casedetail.aspx?caseid=5288>.

⁹⁵ Office of Governor Timothy E. Kaine. (2010). *List of pardons, commutations, reprieves and other forms of clemency*. Retrieved from <https://rga.lis.virginia.gov/Published/2010/SD2/PDF>. See also <https://www.innocenceproject.org/cases/arthur-lee-whitfield/>.

⁹⁶ The special circumstance involved a deceased individual (Curtis Jasper Moore) whose conviction was previously overturned in 1980 on other grounds. See *Moore v. Ballone*, 488 F. Supp. 798 (E.D. Va. 1980). Mr. Moore was exonerated post-mortem when DNA testing from the Project led to the identification of the actual perpetrator. Mr. Moore is the only exonerated individual who was not notified of the post-conviction DNA testing outcome in his case; however, Mr. Moore's son was made aware of the testing results.

⁹⁷ Six of the 13 individuals were incarcerated at the time of the DNA testing results.

⁹⁸ Nine of the 11 individuals who were convicted in all or in part due to misidentification by a witness were African American.

⁹⁹ See *supra* notes 83-89, 91-93, and 95. The two individuals who were wrongly convicted due to factors other than witness misidentification were Curtis Jasper Moore (*supra* note 90) and Roy L. Watford (*supra* note 94).

¹⁰⁰ See Forensic Science Board. *2011 Annual Report*. Retrieved from <https://rga.lis.virginia.gov/Published/2011/RD277/PDF> (p. 2).

¹⁰¹ Wicoff, B. (2019). Challenges in responding to mass forensic error. *Criminal Justice*, 34(3), 29-36.

¹⁰² *Id.* See also VA. CODE § 9.1-1109(A) (2019) for the composition of the Forensic Science Board.

¹⁰³ 2008 Va. Acts ch. 879. Item 408(B) of the 2008 Appropriations Act. Available at <https://budget.lis.virginia.gov/item/2008/1/HB30/Chapter/1/408/>.

¹⁰⁴ 2009 Va. Acts ch. 172.

¹⁰⁵ VA. CODE § 9.1-1110(B) (2019).

¹⁰⁶ Wicoff, B. (2019). Challenges in responding to mass forensic error. *Criminal Justice*, 34(3), 29-36.

