

Virginia State Crime Commission

DNA Notification Project Update

2015

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Background

The Crime Commission continued to be involved in the Forensic Science Board's DNA Notification Project. The Crime Commission's Executive Director serves as a member of the Forensic Science Board as a designee of the Commission Chair, and also serves as the Chair of the Board's DNA Notification Subcommittee, which is charged with the oversight of the notification project.

In 2004, over 3,000 criminal case files were discovered in storage at the Virginia Department of Forensic Science (DFS) that contained biological evidence, possibly suitable for DNA testing. Governor Mark Warner ordered a review of all the files in an effort to determine whether there were any individuals who had been wrongly convicted and could be exonerated by the saved evidence. The case files were from the years 1973-1988, when DNA testing had either not yet been invented, or testing results had not yet been ruled admissible in Virginia courts. With advancements in science, testing this DNA evidence now may provide evidence that could show whether the individuals were guilty or innocent of the crimes for which they were convicted.

The Forensic Science Board was tasked with ensuring that all individuals who were convicted due to criminal investigations, in the previously mentioned case files, be informed that such evidence exists and is available for testing. As a result, the DNA Notification Subcommittee was created in 2008 by the Forensic Science Board to identify and notify individuals whose case files were found to have biological evidence suitable for testing. Due to concerns raised by members of the Forensic Science Board regarding the release of information, Senator Kenneth Stolle introduced Senate Bill 1391 during the 2009 Session of the Virginia General Assembly, which mandated that the Forensic Science Board ensure that everyone entitled to notification be notified. The bill, which was passed and signed by the governor, also allowed certain identifying information to be disseminated to pro bono attorneys assisting with the notification portion of the project, and expressly authorized the involvement of the Crime Commission in making notification determinations. Crime Commission staff is responsible for confirming the notification of all individuals who meet the relevant criteria: they were convicted of a crime, and DNA evidence is contained in their case file. Crime Commission staff worked closely with DFS to create databases with all the pertinent information of each case file in an effort to determine who requires notifications. The Mid-Atlantic Innocence Project, along with Crime Commission staff, helped prepare and train the pro bono attorneys for the notification process. Crime Commission staff, court clerks, and Commonwealth's Attorneys from around Virginia assisted in verifying convictions for named suspects in the files. In 2014, the Virginia Indigent Defense Commission hired contract employees who successfully notified over 100 individuals and discovered information for numerous additional cases.

At the September 2014 Crime Commission meeting, staff was directed to review all inconclusive case files to see if additional testing could be beneficial. Additionally, staff was directed to notify the next of kin for those deceased defendants determined to be "eliminated."

2015 Summary of Activities

Staff implemented the directive from the September 2014 Crime Commission meeting by focusing their efforts on reviewing inconclusive case files, completing next of kin notifications, and working towards determining a final status for each individual entitled to notification.

Inconclusive Case File Review

Inconclusive case files include outcomes where biological evidence was present, and was tested, but the results of the testing were insufficient for a definite conclusion to be reached. Some of these evidence samples could be retested, and with the better testing available today, might be able to provide a definite conclusion. For these files, Crime Commission members decided to prioritize testing based on the incarceration status of the defendant, in the following order:

1. Individuals with spermatozoa present in the DNA sample who were currently incarcerated;
2. Individuals who were incarcerated;
3. Individuals with spermatozoa present in the DNA sample who were not incarcerated; and,
4. All remaining cases.

The DNA Notification Subcommittee met twice during the spring of 2015. The Subcommittee members are Vince Donoghue, Essex Commonwealth's Attorney; W. Steven Flaherty, Colonel, Virginia State Police Superintendent; Kristen J. Howard, Virginia State Crime Commission; and, David A. C. Long, Esq. At the March meeting, members discussed retesting the cases in which initial post-conviction results were deemed "inconclusive." It was decided that Crime Commission staff, Indigent Defense Commission staff, and a staff member from the Department of Forensic Science and the Mid-Atlantic Innocence Project should first determine if testing could be probative of the defendant's guilt or innocence. At the April meeting, the members approved a plan of action for the review of 421 case files with "inconclusive results." This plan was presented to the Forensic Science Board at its May 13, 2015, meeting and was unanimously approved.

A total of 421 inconclusive case files were reviewed; 61 of them included evidence containing spermatozoa or seminal fluid, while 360 did not. Staff further reviewed those 61 cases and recommended 33 for additional testing.¹ Additional testing was recommended because staff believed that the new technology currently available could be instrumental in re-testing the biological evidence remaining and that the results might be probative of a defendant's guilt or innocence.

The Department of Forensic Science is responsible for the testing portion of the project. In 2014, the General Assembly allocated \$150,000 to DFS to outsource testing of inconclusive cases to an independent lab. According to DFS, of the 33 cases recommended for additional testing, there were 46 evidence samples and 44 reference samples pulled from the files and sent to Bode Cellmark Forensics for testing in November and December of 2015. Of the 33 cases, 7 involved defendants who were incarcerated at that time, which were prioritized so their samples were tested first. Testing results were received by DFS in 27 of the cases in May, and 4 cases in June. We are still waiting for the results in the remaining 2 of the 33 cases.

Next of Kin Notification

The Crime Commission directed staff to notify family members of deceased defendants whose cases resulted in an “eliminated” test outcome. An “eliminated” outcome means that the named defendant was not a contributor to the DNA profile of the evidence involved in the case. Crime Commission staff reviewed all 82 “eliminated” case files. Of those eliminated, 19 defendants were determined to be deceased. Staff was directed by Crime Commission members to notify family members of these deceased defendants. One of the deceased defendants had already been officially exonerated prior to his death. After reviewing the remaining 18 defendants’ case files, Crime Commission and DFS staff decided to send letters to only 13 defendants’ next of kin. While the remaining 5 case files did contain biological evidence, it was determined to be from a source, such as the victim’s blood, that would not be probative of the deceased defendant’s possible innocence. Staff worked with the Attorney General’s Office in an effort to locate the best mailing address for possible next of kin using people finder databases and other various research tools. Crime Commission staff also worked with the Department of Corrections to locate additional information from defendants’ Pre-Sentence Investigation Reports that could potentially identify next of kin. After thoroughly examining records, staff sent letters to 11 next of kin for 10 of the defendants.²

Notification Status Project

Crime Commission staff began reviewing all applicable Project case files and creating a database with pertinent information, including defendants’ names, last known addresses, and whether notices were mailed to verify that the final notification status of each named convicted defendant is up-to-date and accurate. Staff plans to continue work on this project in 2016.

¹ However, only 33 were sent for testing because one case no longer had any remaining evidence to test.

² Letters to the next of kin for the deceased, eliminated defendants were mailed in March 2016. As of June 2016, four mailings have been returned with positive ID of next of kin.