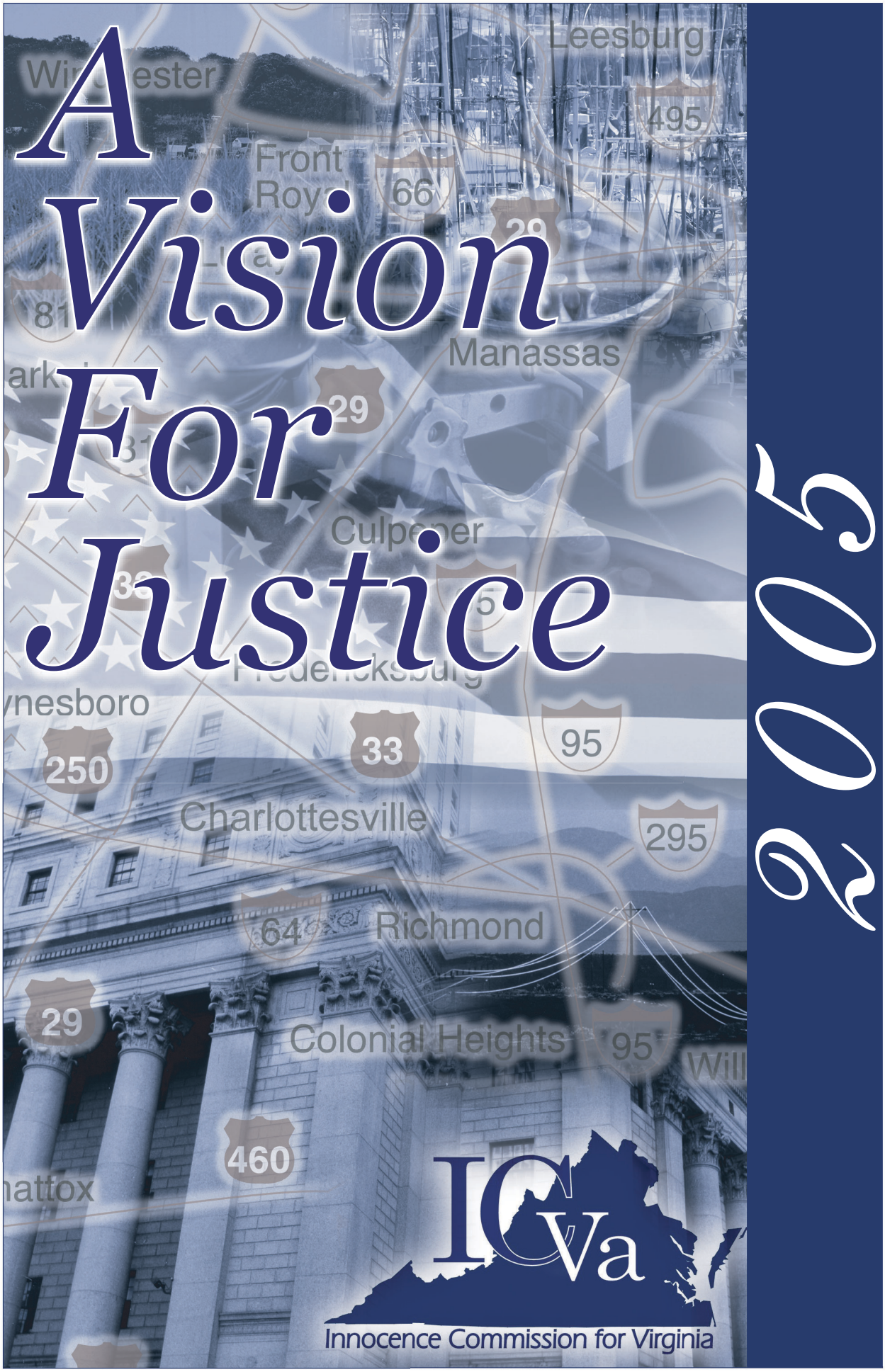
A Vision For Justice
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A Vision for Justice:

Report and Recommendations Regarding Wrongful Convictions in the Commonwealth of Virginia

March 2005

Presented By
The Innocence Commission for Virginia
P.O. Box 100871, Arlington VA 22210
http://www.icva.us

THIS REPORT IS DEDICATED TO THE VICTIMS OF VIOLENT CRIME AND THOSE WRONGLY CONVICTED.

THE INNOCENCE COMMISSION FOR VIRGINIA

The Innocence Commission for Virginia ("ICVA") is a nonprofit, nonpartisan organization dedicated to improving the administration of justice in Virginia. Formed in 2003, the ICVA is a collaborative effort of the Mid-Atlantic Innocence Project, the Administration of Justice Program at George Mason University, and the Constitution Project, part of Georgetown University's Public Policy Institute. A brief description of each of the three sponsoring organizations, and a listing of the ICVA's steering committee and advisory board members, is provided below.

The Mid-Atlantic Innocence Project (formerly the Innocence Project of the National Capital Region)

The Mid-Atlantic Innocence Project, housed at American University's Washington College of Law, is a nonprofit organization founded in 2000 in response to the increasing evidence that our criminal justice system is failing in its most critical functions: the conviction of the guilty and the exoneration of the innocent. The Mid-Atlantic Innocence Project's mission is to seek the exoneration and release from incarceration of persons who have been convicted of crimes that they did not commit in Maryland, Virginia, and the District of Columbia. The Mid-Atlantic Innocence Project receives approximately 40 to 60 new applications per month from inmates requesting assistance, screens the cases and, where appropriate, refers them to volunteer attorneys. The Mid-Atlantic Innocence Project is also active in legislative efforts to improve post-conviction access to forensic testing and to enact other reforms aimed at preventing and reversing wrongful convictions. The Mid-Atlantic Innocence Project is affiliated with the Innocence Network, a coalition of similar organizations across the nation.

The Administration of Justice Program at George Mason University

The Administration of Justice Program at George Mason University ("ADJ") is a multi-disciplinary team of professors and practitioners with experience in judicial and police administration, governmental transparency and reform, technological innovation, and legal reform. The program is anchored by six faculty members with backgrounds in criminal justice, law, public administration, political science, sociology, psychology, and research methods, and draws upon over 25 affiliated faculty members and 30 justice practitioners. In addition to training undergraduate students, the ADJ program has inaugurated Virginia's first and only doctoral program in criminal justice. ADJ faculty apply the insights of academe to the problems of the policy world, assisting practitioners at all levels through technical assistance, training, cooperative partnerships, and research.

The Constitution Project

The Constitution Project, based at Georgetown University's Public Policy Institute, combines scholarship and activism using a wide variety of practical efforts to promote constitutional dialogue in settings outside the judiciary. It creates bipartisan blue-ribbon committees of former government officials, judges, scholars, and other prominent citizens to reach across ideological and partisan lines, and across divides among the executive,

judicial, and legislative branches. The Constitution Project seeks consensus on issues that often the courts cannot resolve, and it develops guidelines designed to make constitutional issues a part of ordinary political debate. Based on these consensus positions, the Constitution Project then promotes public education and grassroots efforts to encourage serious constitutional dialogue in a variety of settings. The Constitution Project's current initiatives include: Constitutional Amendments, Courts (Judicial Independence), Death Penalty, Liberty and Security, Right to Counsel, Sentencing, and War Powers.

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The ICVA is deeply indebted to the volunteer attorneys and law firms involved in preparing this report and would like to thank the following law firms for their *pro bono* participation:

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King & Spalding
Morrison & Foerster
Skadden, Arps, Slate, Meagher & Flom
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EXECUTIVE SUMMARY

Between 1982 and 1990, no fewer than eleven individuals were wrongfully convicted in Virginia of serious felonies – rape and murder – and spent a collective 118 years in prison before their innocence was officially recognized by the Commonwealth. Meanwhile, in at least some cases, the actual perpetrators remained at large or committed other crimes for which they were eventually incarcerated. These wrongful convictions imposed huge costs on Virginians.

The ICVA is a nonprofit, nongovernmental, nonpartisan project dedicated to supplementing the ongoing work in the Commonwealth through recommendations to strengthen the reliability of its criminal justice system and to reduce the likelihood of future wrongful convictions.

Virginia is not alone. We know that wrongful convictions have occurred in other states, and national attention is focusing on the problems that underlie these wrongful convictions. In Virginia, for example, the case of Marvin Anderson, one of the exonerees studied in this report, has been made into a Court TV movie, featured in several publications, and highlighted on nationally syndicated shows.[1] In addition, Virginia's system of indigent defense has been the subject of national study, with the American Bar Association and other expert organizations calling for changes in the availability and payment of counsel for indigent criminal defendants.[2]

Recently, however, Virginia has begun to reform its criminal justice system, thanks to the Virginia State Crime Commission and lawmakers in both political parties. In 2002, voters approved a referendum to allow defendants an opportunity to introduce exculpatory DNA evidence post-conviction. Additional reforms signed into law by Governor Mark Warner in 2004 give defendants one opportunity to seek a "petition for a writ of actual innocence" based upon newly discovered evidence that was unavailable at trial. Most recently, the State Crime Commission released a report on mistaken eyewitness identification, issuing six recommendations to improve the procedures for conducting lineups in Virginia.[3]

The good faith and hard work of the Commonwealth's prosecutors and police, and the fine, national reputation of the Virginia Division of Forensic Science, has not been enough to minimize the risk of wrongful convictions. With this in mind, three organizations came together in 2003 to create the Innocence Commission for Virginia (ICVA), a nonprofit, nongovernmental, nonpartisan project dedicated to supplementing the ongoing work in the Commonwealth through recommendations to strengthen the reliability of its criminal justice system and to reduce the likelihood of future wrongful convictions.

The ICVA is sponsored by the Mid-Atlantic Innocence Project, the Administration of Justice Program at George Mason University and the Constitution Project, part of Georgetown University's Public Policy Institute. Directed by a five-person steering committee and supported by a seven-member advisory board, the ICVA's leadership reflects a broad range of views on justice and policy matters. In addition to the steering committee and the advisory board, the ICVA has been aided by *pro bono* attorneys at several notable law firms in Virginia and Washington, D.C., who conducted the case investigations and assisted with legal research. The ICVA's report is intended to contribute to the Commonwealth's own work by analyzing and evaluating the state's criminal justice system to ensure that errors are minimized.

The ICVA's study used the most conservative of criteria to identify the cases to review.

The ICVA's study used the most conservative of criteria to identify the cases to review. First, it focused on serious felonies because those are the cases in which the stakes are typically the highest. Second, it looked only at post-1980 convictions so that the data it studied would be the most recent and reliable. Finally, the ICVA included only cases in which there had been an official exoneration, through a governor's pardon or a court's order, or when prosecutors conceded that the wrong person had been convicted. These cases involved not just legal errors but factual mistakes, in which the wrong person was convicted of a serious crime and later cleared.

The wrongful convictions the ICVA identified largely resulted from honest people making honest mistakes. These mistakes, however, led to tragic results.

The ICVA's review reveals common themes among the cases, and compares those themes to other jurisdictions. The ICVA also conducted a confidential survey of law enforcement agencies and prosecutors' offices in the Commonwealth to determine their practices for eyewitness identification, custodial questioning, and discovery.

Because the Commonwealth's law enforcement, judicial, and criminal defense systems operate with good faith and integrity in the vast majority of cases, the ICVA's comprehensive examination reveals few instances of deliberate, wrongful conduct by those involved in the investigation, prosecution, and defense of these cases. The wrongful convictions the ICVA identified largely resulted from honest people making honest mistakes. These mistakes, however, led to tragic results, not only for the innocent men who were wrongfully convicted but also for those Virginians who suffered at the hands of the true perpetrators who were not apprehended. A better system will enable the Commonwealth to avoid these human costs, as well as the financial costs associated with the imprisonment of the innocent, the legal proceedings required to free them, and any later proceedings to convict the guilty.

The following factors underlie the wrongful convictions the ICVA identified in Virginia:

- The honest, mistaken identification of defendants by victims or other eyewitnesses, particularly in cases involving cross-racial identifications.
- Suggestive identification procedures, including photo arrays and lineups that unduly highlight a particular suspect.
- "Tunnel vision" by police officers and detectives, especially in high profile cases.
- Antiquated forensic testing methods of biological evidence that was later shown to be exculpatory.
- Inadequate, if not ineffective, assistance of defense counsel.
- Failure to disclose exculpatory reports or other evidence to the defense.
- High pressure interrogations involving suspects with mental incapacities.
- Inconsistent, and therefore suspicious, statements by defendants.
- The unavailability of adequate post-conviction remedies to address wrongful convictions once they have occurred.

Many exonerations occurred only because lawyers, usually volunteering their time, fought for many years to clear their clients, too often in the face of almost insurmountable odds erected by the Commonwealth seeking to preserve the conviction.

Some may say that the cases identified by the ICVA prove that the criminal justice system does work. After all, these eleven innocent men were ultimately exonerated. However, many of the exonerations occurred only because lawyers, usually volunteering their time, fought for many years to clear their clients, too often in the face of almost insurmountable odds erected by the Commonwealth seeking to preserve the conviction. The average time from conviction to exoneration in the eleven cases that the ICVA examined was close to eleven years, during which time Virginians spent over $2 million to imprison these innocent defendants. The emotional costs of these wrongful convictions – to the crime victims, to the wrongfully convicted, and to their families – are beyond measure. Because the consequences of wrongful conviction are so significant, it is essential

that steps be taken, to the extent practicable, to minimize the possibility that mistakes will continue to occur. The upheaval that occurs when an innocent person is exonerated, often years or even decades after conviction, extends to victims and the wrongly convicted alike, as well as to their families and communities.

The conviction of an innocent person has broad implications for the criminal justice system. Every time a crime occurs and the justice system convicts the wrong person, the truly guilty person remains at large, free to inflict more damage on the community. Victims, who have a right to see their victimizers punished, suffer when the criminal justice system convicts the innocent, and suffer again if the true perpetrator is apprehended and the victims must relive the crime through another trial. The public may come to doubt the competency of justice professionals and the legitimacy of the justice process. The unnecessary costs of wrongful incarceration, appeals, and retrials are a tremendous strain on all Virginians.

Society, policy makers, and those involved in the criminal justice system should make every effort to avoid wrongful convictions and should provide relief where wrongful convictions occur.

And, of course, the innocent individual suffers a devastating loss of freedom and other civil rights. For the exonerated defendant, release from prison does not immediately or necessarily begin the process of healing. Although programs exist to help guilty inmates transition back to society with housing, counseling, employment and other support, the innocent are more often simply released back into the community with no help, and inadequate or no compensation for the wrong inflicted upon them.

To avoid these costs and consequences, it is essential that society, policy makers, and others involved in the criminal justice system, make every effort to avoid wrongful convictions, and to provide relief where wrongful convictions occur. The ICVA offers specific recommendations, detailed in the next section of this report, which it believes would improve the reliability of Virginia's criminal justice system.

RECOMMENDATIONS

The ICVA recommends the following reforms to prevent wrongful convictions in Virginia and to provide redress where wrongful convictions occur:

A. Eyewitness Identifications

1. Multiple person lineups and multiple person photo arrays are significantly more reliable than single person or single photograph identification procedures. Therefore, law enforcement personnel should use multiple person lineups and multiple person photo arrays whenever practicable. Generally, identification procedures should include six to eight participants, including the suspect.

2. Only a single witness should participate in an identification procedure at one time. When conducting identification procedures, law enforcement personnel should include only one suspect per procedure, should include participants who are not suspects, and should, to the greatest extent possible, ensure a consistent appearance between suspects and other participants so that suspects do not stand out.

3. Law enforcement personnel should instruct each witness that the person who committed the crime may or may not be included in the identification procedure and that the witness should not feel obligated to make an identification unless the witness recognizes the perpetrator. Each witness should be instructed that it is just as important to clear an innocent person of wrongdoing as it is to identify the perpetrator.

4. Law enforcement officials who conduct identification procedures should not know the identity of the actual suspects in order to reduce unintended influence on the witnesses during identification procedures, and witnesses should be informed that the person conducting the procedure does not know which participant is the suspect. Law enforcement officers should avoid giving feedback to witnesses during or after identification procedures.

5. Law enforcement personnel should adopt sequential rather than simultaneous identification procedures.

6. If a photo array is used, law enforcement personnel should show the photos to the witness one at a time, and they should obtain a statement from the witness as to whether the person in the photo is or is not the perpetrator, the degree of confidence of the witness in any identification, and the nature of any similarities or differences the witness observes between the photo and the perpetrator all before moving on to the next photo. The same procedure should be followed if a live person lineup is used.

7. Law enforcement personnel should videotape identification procedures, to the extent practicable, and, at a minimum, should audiotape identification procedures. Taping should include conversations between the witness and police immediately prior to commencement of the identification procedure.

8. Virginia courts should permit, in appropriate cases, the introduction of expert testimony on the issue of human memory as it relates to the identification process and on the issue of best practices for eyewitness identification procedures. Virginia courts should also instruct jurors to carefully consider the reliability of eyewitness identifications.

B. Interrogation Procedures

1. The Virginia General Assembly should require law enforcement personnel to videotape custodial interrogations of suspects in all homicide and serious felony cases, to the extent practicable.

2. The Virginia General Assembly should require law enforcement personnel to record the entire interrogation process, including the initial advice of rights given to suspects, from the beginning of custodial interrogation in the stationhouse until the point when all police questioning has ended.

3. The Virginia General Assembly should provide that failure to record an entire, complete custodial interrogation would make any confession obtained from that interrogation potentially subject to a general exclusionary rule.

4. Law enforcement officers should avoid using high-pressure interrogation practices when questioning children and suspects who have developmental disabilities.

5. Virginia courts should permit, in appropriate cases, the introduction of expert testimony concerning the factors that can contribute to false confessions.

C. Discovery Practices

Virginia should amend the formal discovery rules to mandate open-file discovery procedures.

D. Unwarranted Focus on Single Suspect or "Tunnel Vision"

1. Tunnel vision, in which officers jump too quickly to the conclusion that a particular suspect is guilty or focus solely on one person to the exclusion of other viable suspects, is a special danger in law enforcement. Law enforcement agencies should train their officers to document all exculpatory, as well as inculpatory, evidence about a particular suspect/individual that they discover and to include this information in their official reports to ensure that all exculpatory information comes to the attention of prosecutors and subsequently to defense attorneys.

2. Law enforcement agencies should train their officers to pursue all reasonable lines of inquiry, whether they point toward or away from a particular suspect.

3. During the initial training of their officers and during refresher training for experienced officers, law enforcement agencies should present studies of wrongful convictions to highlight the pitfalls of "tunnel vision."

E. Defense Counsel

The Virginia General Assembly should adopt the reforms outlined by the Spangenberg Group, in its January 2004 report on Virginia's indigent defense system. The report was commissioned on behalf of the American Bar Association's Standing Committee on Legal Aid and Indigent Defense. Although the General Assembly created a new Indigent Defense Commission in March 2004 that requires training and certification for lawyers defending indigent clients and sets caseload limits for public defender offices, the following important issues remain:

1. The General Assembly should fund indigent defense services in cases requiring appointment of counsel at a level that ensures that all indigent defendants receive effective and meaningful representation.

2. The Indigent Defense Commission should adopt performance and qualification standards for both private, assigned counsel and public defenders. The standards should address workload limits, training requirements, professional independence and other areas to ensure effective and meaningful representation.

3. The Indigent Defense Commission should implement a comprehensive data collection system to provide an accurate picture of the provision of indigent criminal services in Virginia.

F. Scientific Evidence

1. The Virginia General Assembly should require that all biological evidence in serious felony cases be preserved to ensure it is available for post-conviction DNA testing.

2. The Commonwealth should continue and expand its latest initiative to examine and test biological evidence from old cases using DNA.

3. The Virginia General Assembly and the courts should provide sufficient resources so that indigent criminal defendants can obtain the services of expert witnesses to evaluate the scientific evidence offered against them and to testify, where appropriate, at trial on behalf of defendants.

4. The Virginia Supreme Court should adopt more stringent rules governing the admissibility of scientific evidence in criminal cases.

5. The Commonwealth should diligently pursue the audit of the Washington case.

G. Post-Conviction Remedies

1. The Virginia General Assembly should extend the availability of the writ of innocence to inmates who entered a plea other than not guilty.

2. The Virginia General Assembly should extend the availability of the writ of innocence to inmates whose evidence of actual innocence was not presented at trial due to ineffective assistance of counsel.

3. The Virginia General Assembly should eliminate the limitation on the number of petitions for a writ of innocence that an inmate who relies upon non-biological evidence may file.

Report and Recommendations

Part One
Introduction

I. Wrongful Convictions in Virginia

In compiling this report, the ICVA has studied the cases of eleven individuals who were wrongfully convicted in Virginia of serious felonies – rape and murder – between 1982 and 1990. These individuals spent a collective 118 years in prison before their innocence was officially recognized by the Commonwealth. It required many years and thousands of hours of legal assistance, much of it *pro bono*, to secure the release from confinement of these innocent citizens. Meanwhile, in at least some cases, the actual perpetrators remained at large or committed other crimes for which they were eventually incarcerated. The imprisonment of these innocent men, the legal proceedings that eventually resulted in their exoneration and release, and the crimes committed by the actual perpetrators who remained at large imposed huge costs on Virginia taxpayers.

Virginians spent over $2 million to imprison eleven innocent defendants. Their average time from conviction to exoneration was 11 years.

Virginians spent over $2 million to imprison the eleven innocent defendants mentioned in this report. Moreover, the current exoneration process is extremely costly. The average time from conviction to exoneration in the eleven cases that the ICVA reviewed was 11 years. Eventually the Commonwealth must pay hundreds of thousands of dollars in retrials if the actual perpetrator is apprehended and in compensation to innocent defendants erroneously convicted and imprisoned.

Meanwhile, when the wrong person is behind bars, the actual perpetrator often remains on the streets to endanger society. In at least one of the cases investigated – that of David Vasquez – four other brutal assaults might have been prevented if the correct perpetrator had been identified and prosecuted rather than the innocent man who was convicted. For those who have been victimized, the damage is compounded when the criminal justice system fails to identify and apprehend the actual perpetrator. Victims suffer again if the true felon is caught and victims must relive the crime through another trial. In turn, the public may come to doubt the competency of justice professionals and the legitimacy of the justice process.

Finally, of course, the innocent individual suffers a devastating loss of freedom and other civil rights, disruption of family and other relationships, loss of earning potential, and long-term psychological damage when wrongly convicted. The Mid-Atlantic Innocence Project is studying the effects of wrongful conviction on exonerees in Virginia. Studies of exonerees from other jurisdictions show that most exonerees suffer enduring personality change, post-traumatic stress disorder, and major problems of psychological and social adjustment.[4] Anecdotal evidence shows problems in obtaining employment, finding housing and transportation, and restoring family and social relationships.

Despite the good faith and hard work of the Commonwealth's prosecutors and police, and the fine, national reputation of the Virginia Division of Forensic Science, significant opportunities exist to further improve the accuracy of criminal justice proceedings in the Commonwealth.

Over the last two years, Virginia has instituted several laudable reforms to address the problem of wrongful convictions. For example, the Commonwealth recently empowered its courts to issue "Writs of Actual Innocence" based upon biological evidence that was unavailable at trial. In 2004, the Governor, responding to the expert recommendations of the Virginia State Crime Commission, signed a law that makes the Writ of Actual Innocence available in some cases that involve non-biological evidence; and, in early 2005, the State Crime Commission issued six recommendations to improve the procedures for conducting lineups in Virginia. The ICVA applauds these important steps towards addressing the problem of wrongful convictions and respectfully offers the recommendations contained in this report to further strengthen the reliability of criminal justice proceedings in Virginia and to reduce the likelihood that wrongful convictions will continue to occur.

II. Innocence Commission for Virginia

Despite the good faith and hard work of the Commonwealth's prosecutors and police, and the fine, national reputation of the Virginia Division of Forensic Science, significant opportunities exist to further improve the accuracy of criminal justice proceedings in the Commonwealth. With this in mind, the ICVA was formed in 2003 as a nonprofit, nonpartisan organization dedicated to improving the administration of justice in Virginia. The ICVA is directed by a steering committee and supported by a nonpartisan advisory board whose members are listed at the front of this report. The ICVA's report is intended to contribute to the Commonwealth's own work by analyzing and evaluating the state's criminal justice system to ensure that errors are minimized. Through its steering committee and advisory board, the ICVA reflects a broad range of views on criminal justice and policy matters – including a wide swath of political perspectives, thus mirroring those of the Commonwealth's citizens.

III. ICVA Investigation and Report

The ICVA's independent, objective, and thorough investigation into eleven wrongful convictions has identified several common factors behind the erroneous outcomes. This report describes the ICVA's investigation into wrongful convictions, using the most conservative of criteria to identify cases in which a defendant was officially exonerated of a serious, recent crime. The ICVA's researchers began by canvassing the Commonwealth, surveying law enforcement agencies, Commonwealth's Attorneys, defense lawyers, and other interested groups to identify these cases.

The ICVA's case selection criteria had three parts.

First, the ICVA focused on serious felonies, generally rape and murder. The ICVA acknowledges that wrongful convictions can occur in other types of cases and that the consequences of those mistakes are significant to all involved. But the stakes are highest in cases involving the most serious crimes, which is where the ICVA placed its focus.

The ICVA further limited the investigation to convictions post-1980, because available case information dissipates over time, affecting the reliability of data collection. Case files may be thrown out, the memories of witnesses may fade, and officials may retire or move. Furthermore, by focusing on relatively recent cases, researchers were able to obtain pertinent information on investigative and prosecutorial methods still in use.

Finally, the ICVA's researchers focused only on official exonerations, meaning cases in which a defendant's conviction was later overturned by a governor's pardon or a court's order, or when prosecutors conceded that the wrong person had been convicted. There are undoubtedly other cases in which the defendant's guilt is questionable, but even with a conservative definition of error there is no consensus about either the fact or the cause of error in those cases. The ICVA has thus limited its review to those cases in which the Commonwealth *itself* has officially acknowledged an erroneous conviction. These are not matters of legal error – where procedural shortcomings command a new trial or release – but cases of factual mistakes, in which the wrong person was convicted of a serious crime and later cleared.

To identify cases that met these criteria, the ICVA's researchers combed news accounts and legal archives and surveyed by mail law enforcement agencies, Commonwealth's Attorneys' offices, and nongovernmental

The ICVA limited its review to those cases in which the Commonwealth *itself* has officially acknowledged an erroneous conviction.

organizations throughout Virginia. The initial inquiry yielded twelve cases that appeared to meet each criterion. Further research suggested that one of these cases was a close but not exact match.[5] Although the ICVA provides the individual case research summaries from all twelve cases on-line, the findings and recommendations in the ICVA's report are based on the set of eleven official exonerations.[6]

Case investigations were conducted by *pro bono* lawyers from prominent law firms. Attorneys read case files, reviewed court transcripts, and interviewed participants, including law enforcement personnel, prosecutors, defendants, their families and their counsel, and reporters. In a few cases the information was fairly limited, where, for example, case documents remain under seal, but in most cases researchers were able to provide an expansive and in-depth description of the investigations and prosecutions that led to erroneous convictions.

As the case investigations progressed, it became apparent that particular practices constituted common themes among the cases. At this point the ICVA gathered legal research investigating similar practices in other jurisdictions as well as the federal and state norms that govern these matters. These reports on law and practice from other jurisdictions helped to inform the recommendations in this report.

Concurrently, the ICVA conducted its own survey of law enforcement agencies and Commonwealth's Attorneys' offices. Researchers contacted 276 law enforcement agencies, surveying staff on their practices for eyewitness identification and custodial questioning. In addition, researchers approached 120 Commonwealth's Attorneys' offices, seeking information on their discovery practices. Surveys were confidential, meaning that no agency or office is identified in this report or the accompanying data. The surveys and research methodology are described in Appendix B.

Following the completion of the case investigations, legal research into best practices nationwide, and surveys of Virginia law enforcement agencies and prosecutors, the ICVA convened first its steering committee and then the advisory committee to consider the many findings and their ramifications. The conclusions and recommendations in this report represent the consensus of those two groups.

The following sections of the report describe some of the factors that have contributed to erroneous convictions in Virginia and offer proposals to help minimize the likelihood that these same mistakes will cause wrongful

convictions in the future. In addition to this introduction, there are four other sections to the report. Part Two presents a summary of the ICVA's findings. Part Three provides summaries of the eleven cases of official exoneration. Part Four makes specific recommendations based upon Virginia's experience and legal research into best practices nationwide. Part Five is a conclusion. The report also has two appendices, setting forth the history of similar innocence commissions both in the United States and abroad, and explaining the statewide survey of law enforcement agencies and prosecutors' offices. All supplementary materials, including the complete case reports and research on post-conviction remedies in other states, are available on-line on the ICVA's web site, http://www.icva.us.

The ICVA hopes that this report will be received in the spirit in which it is intended – as a serious, extensively researched series of recommendations aimed at continued improvement to the Commonwealth's criminal justice system. The ICVA's recommendations can improve the process of criminal investigations and prosecutions in the Commonwealth, assuring Virginians that police, prosecutors, and defense counsel are following the latest, best practices to convict the guilty and protect the innocent.

The ICVA's recommendations can improve the process of criminal investigations and prosecutions in the Commonwealth, assuring Virginians that police, prosecutors, and defense counsel are following the latest, best practices to convict the guilty and protect the innocent.

PART TWO
SUMMARY OF FACTORS THAT HAVE CONTRIBUTED TO WRONGFUL CONVICTIONS IN VIRGINIA AND SUGGESTED CRIMINAL JUSTICE RREFORMS FOR VIRGINIA

To the extent that the wrongful convictions that the ICVA reviewed may have been avoidable, it is essential to understand how the errors occurred and to institute new practices to minimize the likelihood of their recurrence. Recognizing, of course, that each case presents unique facts, the ICVA has identified the following factors which have been linked to erroneous convictions in Virginia:

- **The honest, mistaken identification of defendants by victims or other eyewitnesses, particularly in cases involving cross-racial identifications. This problem is exacerbated by the heavy emphasis placed on, and great credibility given to, eyewitness identification in criminal prosecutions. The frailties of eyewitness identifications are most pronounced when a prosecution proceeds in the face of little corroborating evidence or even when the available evidence points to the defendant's innocence such as when a victim's initial description of the perpetrator does not match the suspect's characteristics.**

- **Suggestive identification procedures, including photo arrays and lineups that unduly highlight a particular suspect. These problems are most pronounced when they reinforce an initial, incorrect identification, such as when a victim picks the one color picture out of an array of otherwise black-and-white photos and then is shown that suspect in a lineup shortly thereafter.**

- **"Tunnel vision" by police officers and detectives. Many of the crimes were high profile, generating considerable press coverage and a public demand for quick resolution. In some cases, law enforcement became convinced that a particular suspect was the actual perpetrator even when other factors suggested innocence or alternative suspects.**

- **Antiquated forensic testing methods of biological evidence that was later shown to be exculpatory. With the availability of DNA testing and the Commonwealth's recent initiative to examine and**

test biological evidence from old cases, many of these problems have since been alleviated. Stricter evidentiary rules, better preservation of biological evidence, and effective use of the adversarial process to challenge the opinions of those who claim to be experts would optimize the role of DNA technology and other scientific evidence in preventing wrongful convictions.

- **Inadequate, if not ineffective, assistance of defense counsel. In none of the cases did a reviewing court later find ineffective assistance, but in several matters defendants had to rely on inexperienced or inattentive attorneys, proving their innocence only later when skilled counsel took over and devoted considerably more time to the cases post-conviction.**

- **Failure to disclose exculpatory reports or other evidence to the defense. In some cases, prosecutors were unaware that detectives or forensic specialists had relevant exculpatory evidence.**

- **Interrogations involving suspects with mental incapacities. Mentally impaired defendants are often confused and can be more easily convinced to "confess" to a crime, even when they do not understand the circumstances of the case.**

- **Inconsistent statements by defendants. Under the pressures of a criminal investigation, some suspects provided the police with contradictory information, thereby focusing suspicion on themselves. Officers understandably investigated these defendants further when their stories changed or their alibis were contradictory.**

- **The unavailability of adequate post-conviction remedies to address wrongful convictions once they have occurred. Virginia had made significant progress in this area in the past two years. However, even today, many of Virginia's exonerees would have to rely upon the clemency process and would have no remedy available to them in the Commonwealth's courts.**

Some may say that the cases identified by the ICVA are proof that the criminal justice system works – that post-conviction processes successfully and eventually exonerate the innocent. It is critical to understand, however, that many of the exonerations discussed in this report occurred not because of the traditional working of the system, but because lawyers, usually

Some may say that the cases identified by the ICVA are proof that the criminal justice system works – that post-conviction processes successfully and eventually exonerate the innocent. However, deciding whether "the system worked" depends on the definition of a working system.

volunteering their time, continued to fight for their clients for many years, in the face of almost insurmountable odds that were often erected by the Commonwealth's seeking to preserve the conviction.

Additionally, deciding whether "the system worked" depends on the definition of a working system. The cost to victims and their families in terms of the emotional trauma of realizing the actual perpetrator is still at large or reliving the crime if the actual perpetrator is apprehended cannot be measured. Even more significant is the trauma that is suffered by the innocent individuals who are wrongfully imprisoned, often for lengthy time periods. The average time from conviction to exoneration in the eleven cases the ICVA examined was close to eleven years.

The ICVA recommends the following reforms to prevent wrongful convictions in Virginia and to provide redress where wrongful convictions occur. These recommendations highlight measures that would improve Virginia's criminal justice system and offer the latest and best practices to law enforcement officers, prosecutors, and defense counsel alike.

I. Eyewitness Identifications

1. Multiple person lineups and multiple person photo arrays are significantly more reliable than single person or single photograph identification procedures. Therefore, law enforcement personnel should use multiple person lineups and multiple person photo arrays whenever practicable. Generally, identification procedures should include six to eight participants, including the suspect.

2. Only a single witness should participate in an identification procedure at one time. When conducting identification procedures, law enforcement personnel should include only one suspect per procedure, should include participants who are not suspects, and should, to the best extent possible, ensure a consistent appearance between suspects and other participants so that suspects do not stand out.

3. Law enforcement personnel should instruct each witness that the person who committed the crime may or may not be included in the identification procedure and that the witness should not feel obligated to make an identification unless the witness recognizes the perpetrator. Each witness should be instructed that it is just as important to clear an innocent person of wrongdoing as it is to identify the perpetrator.

4. Law enforcement officials who conduct identification procedures should not know the identity of the actual suspects in order to reduce unintended influence on the witnesses during identification procedures, and witnesses should be informed that the person conducting the procedure does not know which participant is the suspect. Law enforcement officers should avoid giving feedback to witnesses during or after identification procedures.

5. Law enforcement personnel should adopt sequential rather than simultaneous identification procedures.

6. If a photo array is used, law enforcement personnel should show the photos to the witness one at a time, and they should obtain a statement from the witness as to whether the person in the photo is or is not the perpetrator, the degree of confidence of the witness in any identification, and the nature of any similarities or differences the witness observes between the photo and the perpetrator - all before moving on to the next photo. The same procedure should be followed if a live person lineup is used.

7. Law enforcement personnel should videotape identification procedures, to the extent practicable, and, at a minimum, should audiotape identification procedures. Taping should include conversations between the witness and police immediately prior to commencement of the identification procedure.

8. Virginia courts should permit, in appropriate cases, the introduction of expert testimony on the issue of human memory as it relates to the identification process and on the issue of best practices for eyewitness identification procedures. Virginia courts should also instruct juries to carefully consider the reliability of eyewitness identifications.

II. Interrogation Procedures

1. The Virginia General Assembly should require law enforcement personnel to videotape custodial interrogations of suspects in all homicide and serious felony cases, to the extent practicable.

2. The Virginia General Assembly should require law enforcement personnel to record the entire custodial interrogation process, including the initial advice of rights given to suspects, from the beginning of

custodial interrogation in the stationhouse until the point when all police questioning has ended.

3. The Virginia General Assembly should provide that failure to record an entire, complete custodial interrogation would make any confession obtained from that interrogation potentially subject to a general exclusionary rule.

4. Law enforcement officers should avoid using high-pressure interrogation practices when questioning children and suspects who have developmental disabilities.

5. Virginia courts should permit, in appropriate cases, the introduction of expert testimony concerning the factors that can contribute to false confessions.

III. Discovery Practices

Virginia should amend the formal discovery rules to mandate open-file discovery procedures.

IV. Unwarranted Focus on Single Suspect or "Tunnel Vision"

1. Tunnel vision, in which officers jump too quickly to the conclusion that a particular suspect is guilty or focus solely on one person to the exclusion of other viable suspects, is a special danger in law enforcement. Law enforcement agencies should train their officers to document all exculpatory, as well as inculpatory, evidence about a particular suspect/individual that they discover and to include this information in their official reports to ensure that all exculpatory information comes to the attention of prosecutors and subsequently to defense attorneys.

2. Law enforcement agencies should train their officers to pursue all reasonable lines of inquiry, whether they point toward or away from a particular suspect.

3. During the initial training of their officers and during refresher training for experienced officers, law enforcement agencies should present studies of wrongful convictions to highlight the pitfalls of “tunnel vision.”

V. Defense Counsel

The Virginia General Assembly should adopt the remaining reforms outlined by the Spangenberg Group, which in January 2004 released a report on Virginia's indigent defense system. The report was commissioned on behalf of the American Bar Association Standing Committee on Legal Aid and Indigent Defense. Although the General Assembly created a new Indigent Defense Commission in March 2004 that requires training and certification for lawyers defending indigent clients and sets caseload limits for public defender offices, the following important issues remain:

1. The General Assembly should fund indigent defense services in cases requiring appointment of counsel at a level that ensures that all indigent defendants receive effective and meaningful representation.

2. The Indigent Defense Commission should adopt performance and qualification standards for both private, assigned counsel and public defenders. The standards should address workload limits, training requirements, professional independence and other areas to ensure effective and meaningful representation.

3. The Indigent Defense Commission should implement a comprehensive data collection system to provide an accurate picture of the provision of indigent criminal services in Virginia.

VI. Scientific Evidence

1. The Virginia General Assembly should require that all biological evidence in serious felony cases be preserved to ensure it is available for post-conviction DNA testing.

2. The Commonwealth should continue and expand its latest initiative to examine and test biological evidence from old cases using DNA.

3. The Virginia General Assembly and the courts should provide sufficient resources so that indigent criminal defendants can obtain the services of expert witnesses to evaluate the scientific evidence offered against them and to testify, where appropriate, at trial on behalf of defendants.

4. The Virginia Supreme Court should adopt more stringent rules governing the admissibility of scientific evidence in criminal cases.

5. The Commonwealth should diligently pursue the audit of the Washington case.

VII. Post-Conviction Remedies

1. The Virginia General Assembly should extend the availability of the writ of innocence to inmates who entered a plea of other than not guilty.

2. The Virginia General Assembly should extend the availability of the writ of innocence to inmates whose evidence of actual innocence was not presented at trial due to ineffective assistance of counsel.

3. The Virginia General Assembly should eliminate the limitation on the number of petitions for a writ of innocence that an inmate who relies upon non-biological evidence may file.

PART THREE
SUMMARY OF CASES

Researchers investigated eleven cases that fit the case selection criteria set out by the ICVA, plus a twelfth case in which the defendant, though not officially exonerated, had been released from prison under circumstances suggesting serious error during the investigation phase of the case. While the ICVA's recommendations are based solely on the eleven cases of official exonerations, which are previewed here, all twelve of the detailed research reports that were compiled by the ICVA are available on-line at the ICVA's website, http://www.icva.us.

I. Marvin Anderson

In 1982, an all-white jury in Hanover convicted Marvin Anderson, an 18-year old African American man, of raping a white woman who erroneously identified him in a lineup. Police investigators focused on Anderson because the rapist had mentioned a white girlfriend, and Anderson was known to be living with a white woman at the time. Anderson differed from the victim's physical description; unlike the attacker, he was dark-complected, clean-shaven, and without scratches on his face. Detectives obtained a color photo of Anderson from his place of employment, which was the only color picture in an otherwise black-and-white photo array shown to the victim. The victim identified Anderson as her rapist. Within thirty minutes of the initial identification officers had arranged a lineup, at which time the victim again picked Anderson.

Anderson was convicted in a five-hour trial that relied entirely on the victim's identification.

Anderson was convicted in a five-hour trial that relied entirely on the victim's identification. Although DNA testing was not yet available at the time, a supervisor from Virginia's Bureau of Forensic Sciences testified that she had performed blood typing on swabs from both Anderson and the victim and she was unable to identify Anderson as the source of semen samples collected in the rape kit. Stories had also begun to circulate in the community that another man, Otis "Pop" Lincoln, was boasting of having committed the rape. Unlike Anderson, Lincoln had a criminal record for sexual assault and was, in fact, awaiting trial at the time for another sexual attack. Once the victim identified Anderson, however, the police did not pursue additional leads. In 1988, Anderson received a hearing on his petition for a writ of *habeas corpus*. Lincoln appeared and formally confessed to the crime, but the trial judge did not find Lincoln credible.

Anderson served 15 years for the rape, eventually winning parole in 1997. As DNA testing became increasingly available, Anderson sought re-testing of the samples from the rape kit. He was repeatedly told that biological evidence from the crime could not be found. Then, in 2002, Anderson was told that DNA evidence had been located, despite the fact that at the time, the crime lab's own internal protocol required that such evidence be returned to the submitting police department, where it was routinely destroyed. Anderson and his lawyers were successful in petitioning the Circuit Court of Hanover County to order DNA testing, the results of which positively excluded Anderson as a source of the semen sample and directly implicated Lincoln. Anderson applied for and received a pardon from Governor Warner and has received approximately $750,000 in compensation from the General Assembly for his time in prison.

II. Craig Bell

On October 5, 1986, a young woman was murdered in her apartment in Virginia Beach. She had lived there with her fiancée, Craig Bell, who was in the apartment at the time of the murder. The police investigation quickly centered on Bell as the most likely suspect. He and the victim had quarreled a few days prior to the murder; blood, clothing, and cigarettes found at the scene of the murder were consistent with his involvement; and Bell had made inconsistent statements to the police. However, the police failed to identify certain fingerprints, clothing, and hair samples found at the scene. Bell was convicted of second degree murder in 1987 and sentenced to 20 years in prison.

Two months after Bell's conviction, Jesse Calvin Smith was apprehended for peeping in windows late at night in the same apartment complex where Bell had resided. Detectives quickly connected Smith to two rapes that had occurred in the same apartment complex and after witness identifications he was charged with the crimes. Upon further questioning and after being shown pictures of the crime scene in Craig Bell's apartment, Smith confessed to the murder of Bell's fiancée. The next day the Commonwealth's Attorney petitioned the court to set aside Bell's conviction and release him from prison. On October 16, 1987, two days after Smith confessed and two months following Bell's incarceration, Bell was released. Bell has received a formal apology from the Commonwealth's Attorney, but despite the introduction of two bills in Virginia's General Assembly, he has not received compensation.

III. Jeffrey Cox

Jeffrey Cox was sentenced to life plus 50 years for the August 31, 1990, kidnapping and murder of a 63-year old Richmond woman whose brutally stabbed body was found dumped along a dirt road. Cox was not initially the chief police suspect, and no physical evidence linked Cox to the crime. Because he was known to associate with the principal police suspect, Cox's photo was shown to two neighbors of the victim, who claimed that Cox was the man who dragged the victim from her apartment late at night. Police suspected another man, Billy Madison, but they never charged him. The Commonwealth's case against Cox consisted of the testimony of the two eyewitnesses and the fact that Cox was confused about his alibi. In a single day he was tried, convicted and sentenced to life in prison plus fifty years. Police then destroyed some of the physical evidence that had been gathered, including potential DNA samples, even though the second perpetrator remained at-large. After defense counsel bungled the direct appeals process, Cox obtained new counsel to assist with his petition for a writ of *habeas corpus*. His new attorney discovered that the full criminal history of one of the eyewitnesses had not been presented to the jury, and that the jury was never told that the other eyewitness had criminal charges pending at the time she testified on behalf of the prosecution. In addition, the lawyer determined that both eyewitnesses had given demonstrably false testimony.

The federal investigation unearthed exculpatory evidence that had been collected by the Richmond police but never presented to the jury in Jeffrey Cox's case.

A couple of years later, an FBI agent, at Cox's request, launched a federal investigation into the murder and the Richmond Police Department's investigation of that crime. The federal investigation unearthed exculpatory evidence that had been collected by the Richmond police but never presented to the jury. Despite mounting evidence of Cox's innocence and questions of official misconduct, the Virginia Attorney General's Office opposed Cox's post-conviction appeals. In 2001, a different man – Steven Hood – was arrested and convicted of the same murder on the basis of evidence uncovered by federal investigators, but the Commonwealth's Attorney's Office continued to oppose Cox's *habeas* petition.

Finally, in the fall of 2001, shortly after the Virginia Supreme Court had granted Cox's appeal in his *habeas* case, the Virginia Attorney General's Office reached a settlement with Cox's attorneys in which the Commonwealth agreed that the writ should be granted, the convictions vacated, and Cox should be released from prison. The trial court acted accordingly and dismissed the original indictment. In 2002, the General Assembly awarded Cox $750,000 for his eleven years of wrongful incarceration.

IV. Russell Gray

On June 30, 1986, an altercation broke out in Richmond between several men, eventually leading to the shooting death of a young man. The decedent's wife and stepson both named Russell Gray as the assailant. The stepson was able to provide police officers a description of the perpetrator's clothing on the night of the murder – "Jamm-type" shorts – and picked Russell Gray out of a photo book, saying that he had seen Gray pull the trigger. The decedent's wife, while not an eyewitness to the crime, placed Gray at the scene of the crime moments before shots were fired and approximately fifteen minutes afterwards. However, she contradicted the other witness, saying that it was dark at the time of the shooting and that Gray had been wearing sweat pants.

Although Michael Harvey confessed that he committed the crime, Virginia's 21-day Rule prevented Russell Gray's release.

At trial, Gray called several witnesses who placed him at a different location at the time of the murder. He also told the jury that he never wore shorts because of a disfiguring scar on his leg, which he showed to jurors. Ultimately, the defense argued that Gray had little motive to commit the crime and that the only eyewitness to the crime, the victim's stepson, may have mistaken another man for Gray. Gray was convicted in a one-day trial and sentenced to 52 years in prison. His attorney, however, continued to investigate the case, interviewing more witnesses who all pointed to a different man, Michael Harvey, as the shooter. Harvey subsequently was interviewed by Detective Quick of the Richmond Police Department, the primary investigator on the case, at which time Harvey confessed to the crime.

Virginia's 21-Day Rule, however, prevented Gray's release. Left without judicial options, Gray wrote to Learned Barry of the Commonwealth's Attorney's Office, pleading his innocence. Barry was impressed with Gray's letters and agreed to meet with him. Convinced that Gray was innocent and that Harvey committed the crime, Barry took the case to the Virginia Parole Board, which recommended a pardon to the Governor's Office. In April 1990, three years after Russell Gray was wrongly convicted, Governor Wilder pardoned Gray and released him from prison.[7]

V. Edward Honaker

In 1984, a young woman was pulled out of her car by a man wearing camouflage and was raped and sodomized along the Blue Ridge Parkway. Her boyfriend was in the car with her and the two of them created a composite sketch of the attacker. Later, after Edward Honaker became a

suspect in a different rape case (for which he was eventually cleared), the police showed his picture to the young woman, who positively identified him as her attacker.

In addition to this eyewitness identification, the prosecution presented testimony from a forensic hair expert, who said Honaker was a definitive match with hair found on the victim's shorts. Prosecutors introduced evidence that Honaker drove a truck that resembled the attacker's, and camouflage clothes were found in Honaker's residence. In response, the defense offered alibis from Honaker, his family and friends, but the alibis were challenged by prosecutors and ultimately discounted by the jury. On April 10, 1985, Honaker was sentenced to three life sentences plus 34 years on seven felony counts.

After his conviction, Honaker sought the assistance of Centurion Ministries, an organization that works to free the wrongfully convicted. Centurion's investigation revealed that the victim and her boyfriend had been, at times, hypnotized in recalling the facts of the crime and that the initial description of the assailant was inconsistent with Honaker. Additionally, Honaker had undergone a vasectomy in 1976, a fact not known to the prosecution's witnesses and, although raised by Honaker in his testimony during the trial, never corroborated with any medical records. Centurion then began working with the Innocence Project at Cardozo Law School to secure DNA testing on the biological evidence collected in Honaker's case.

The prosecution agreed to release the evidence, but DNA testing was complicated by the victim's admission of a secret lover who could have contributed to the evidence. After several rounds of testing, including examinations by a private laboratory and the Virginia Division of Forensic Science, Honaker and both of the victim's boyfriends were excluded as possible sources of the biological evidence from the crime. Based on the DNA exclusion, Honaker filed for clemency. His petition was joined by the Commonwealth. On October 22, 1994, Governor Allen granted Honaker clemency. Honaker was released from prison after ten years of incarceration.

VI. Julius Ruffin

In 1981, a black man with a knife broke into a Norfolk woman's apartment and sodomized and raped her. The victim, a white woman, worked at Eastern Virginia Medical School at the time, where Julius Ruffin also worked as a maintenance man. Shortly after the rape, the victim had been

asked by police to look at mug shots, and she picked a photo of a dark-skinned man who was not Ruffin. However, several weeks after the attack the victim saw Ruffin, a light-skinned African American, and immediately called the police saying that she was certain she had just seen her attacker.

The victim was a compelling witness, and when coupled with the testimony of a forensic scientist that Ruffin's blood matched the rapist's blood and that of roughly eight percent of the male population, the prosecution had a good case. Ruffin testified at trial, also calling his brother and the brother's girlfriend, who testified that they were all together on the night of the rape.

The first trial deadlocked, nine white jurors in favor of conviction and three black jurors prepared to acquit. The case was declared a mistrial. A second trial ended the same way, with jurors split along racial lines. During voir dire at the third trial, the prosecutor used his peremptory challenges to remove the four black members of the jury pool. Ruffin's attorney did not object. After seven minutes of deliberations, an all-white jury convicted Ruffin of rape and related charges, the punishment for which was life in prison.

After seven minutes of deliberations, an all-white jury convicted Julius Ruffin of rape and related charges, the punishment for which was life in prison.

With the rise of DNA testing, Ruffin began a letter-writing campaign to have the Commonwealth re-test the evidence in his case. The Circuit Court of Norfolk responded that all evidence from his case had been destroyed in 1986. The Division of Forensic Science in Richmond and its lab in Norfolk also responded that they could not comply with his request. In truth, the evidence was available, but no one had checked thoroughly to determine its existence.

In 2002, Ruffin filed a request under a newly enacted Virginia statute for DNA testing of evidence in his case. The Commonwealth's Attorney had a prosecutor contact the state lab to see if any evidence still existed. The forensic scientist – now deceased – who had worked Ruffin's case had saved biological material in the lab's archives. With a court's order to reexamine the evidence, further testing excluded Ruffin as the rapist and identified a defendant already incarcerated in Virginia.

Ruffin was released 21 years after his original arrest, the Governor having issued Ruffin a pardon in March 2003. The victim has written Ruffin expressing her "sorrow and devastation" at his conviction, but in issuing a pardon, Governor Warner said, "I find no fault with the verdict of the jury based upon the evidence available to it at the time of trial, nor with the actions of the attorneys for the Commonwealth or the court at trial."

VII. Walter Snyder

Walter Snyder was convicted and sentenced to forty-five years in prison for the burglary and rape of an Alexandria woman in 1985. In a show-up identification, the victim named Snyder, who lived across the street, as the attacker, although she had been less certain in an earlier photo array. During their investigation, police found red shorts that were similar to the assailant's among Snyder's possessions, and officers claimed that Snyder had confessed, although he vigorously denied that he ever did. Snyder's nose was broken while he was in police custody, although there are differing accounts of what transpired.

The defense called a few alibi witnesses, who claimed that Snyder had been in bed sleeping at the time of the attack. Conventional serology failed to exclude Snyder as the perpetrator, as he had the same blood type as the attacker. But the strongest evidence at trial was that of the victim, who pointed at Snyder and identified him as her assailant. Snyder was convicted.

Snyder and his mother went through eleven attorneys after conviction to secure DNA testing of the biological evidence in the case. The Alexandria Commonwealth's Attorney agreed to testing, and in 1992 tests appeared to exclude Snyder as the rapist. However, Snyder's lawyer at the time did not know how to proceed to secure Snyder's release. With the help of Cardozo Law School's Innocence Project, the biological evidence was tested once more with the same result. Afterward, the FBI looked at the results and confirmed the methods used. In 1993, the Commonwealth's Attorney appealed to Governor Wilder for Snyder's clemency. Governor Wilder signed an executive order on April 23, 1993, releasing Snyder. Snyder subsequently filed a civil suit for wrongful conviction and police misconduct. That case has since settled, with the terms of settlement sealed and confidential.

VIII. David Vasquez

In 1984 a young lawyer was raped and strangled in her Arlington apartment. Two neighbors, including one whose brother was a potential suspect, placed David Vasquez at or near the crime scene. Vasquez, who was described by two neighbors as "creepy" and a "peeping Tom," used to live in the victim's neighborhood. He was known to have a low intellect and had moved to Manassas, about 30 miles away, where he worked at a McDonald's restaurant and lived with his mother.

Arlington County detectives visited Vasquez and in interrogation were successful in obtaining a confession. Much of the confession consisted of the detectives feeding facts to the suspect, which Vasquez simply parroted back and affirmed. Vasquez later fell into "a spell," in which he seemed possessed, and began to repeat the facts of the crime (which were consistent with those provided to him in the interrogation). Detectives believed they were dealing with a disturbed murderer.

Officers had obtained Vasquez's confession in two separate sessions, before which however they had not read him his *Miranda* rights. Vasquez's admissions, thus, were excluded, but a third confession that had been taken a day after the original interrogation and followed the required *Miranda* warnings, was admitted. Left with the prospect of a capital conviction for a crime that he likely did not commit, Vasquez's lawyers convinced him to plead guilty to second degree murder, a plea offered to him by the Commonwealth's Attorney and accepted by the court.

Much of the confession consisted of the detectives feeding facts to the suspect, which David Vasquez simply parroted back and affirmed.

About three years following the first rape and murder, Arlington experienced a similar crime. The detective assigned to the case, Joe Horgas, recalled Vasquez's case and the fact that detectives believed at the time that Vasquez had not acted alone. Police, however, had done little in the interim to search for Vasquez's partner. Horgas visited Vasquez in prison about the new crime and left with the sense that Vasquez was not guilty.

The new rape and strangulation fit into a pattern of similar crimes that had been committed along a line from Richmond to Arlington. The crimes had begun in 1982 and continued through the first Arlington murder, then reaching a three-year lull before they resumed with a 1987 murder in Richmond. Horgas became convinced that the crimes were linked and that they were the work of a single suspect, Timothy Spencer, against whom Horgas began to build a case. At the time, Horgas's methods were novel, and until he convinced the FBI of Spencer's guilt, several of his colleagues remained skeptical. But the head of the FBI's Behavioral Science Unit replied that the so-called "South Side Strangler" was responsible for both of the Arlington murders and that he had acted alone. This seemed to rule out Vasquez, who was in prison at the time of the second murder.

In response to the FBI's report as well as the results of its own internal investigation, the Arlington Commonwealth's Attorney became convinced of Vasquez's innocence and contacted the defendant's attorney to file a

pardon application with the Governor. In January 1989, Governor Baliles pardoned Vasquez, who was released from prison that evening. Subsequent to his release, details of Vasquez's time in prison arose. Despite an agreement in his plea deal, Vasquez had not been assigned to a psychiatric unit in prison, instead remaining in the general population where he was repeatedly raped and abused. In response, the General Assembly passed a $117,000 annuity that provides Vasquez a $1,000 monthly payment. In a separate matter, Spencer was convicted of murder, sentenced to death, and executed.

IX. Earl Washington

In 1984, Earl Washington, Jr., an African American man with an IQ of around 69, was convicted and sentenced to death for the rape and murder of a young, white mother of three from Culpeper. Washington was arrested on an unrelated charge a year after the murder, and while in custody, he confessed to five other crimes, including the Culpeper murder. Although investigators easily dismissed his false confessions to four of the crimes, they interrogated and eventually charged Washington in connection with the Culpeper murder despite several inconsistencies between his confession and known facts of the crime.

Questioning revealed that Washington did not know the race of his victim, the address of the apartment where she was killed, or that she had been raped. Only after three attempts at a rehearsed confession did authorities accept and record Washington's statement. Washington had to be taken to the crime scene three times and coached by officers to pick out the victim's apartment.

The prosecution's case hinged on Washington's statements as well as his identification of a shirt given to the police by the victim's family six weeks after the crime. The defense failed to point out the inconsistencies of the prosecution's case, especially the results of the Commonwealth's serological analysis of the seminal fluid found on the blanket at the scene of the crime, which did not match Washington. At trial, the Commonwealth's psychologist testified, claiming that Washington was competent when his statement was given. The defense did not present a competing witness.

At the penalty phase of the trial, Washington's inexperienced defense counsel did not offer any counterargument to the jury concerning a sentence of death. The jurors returned with their verdict of death on January 20, 1984. In a separate matter, Washington pled guilty in May of that year to a

case of burglary and malicious wounding and was sentenced to two consecutive fifteen-year sentences.

Washington's direct appeal failed. With an execution date of September 1985 looming, Washington was able to retain *pro bono* counsel and secure a stay of execution only nine days before he was scheduled to die. However, the U.S. Court of Appeals for the Fourth Circuit denied Washington's *habeas* claims, including the failure of his trial counsel to introduce exculpatory biological evidence and because of his "confessions."

Washington was successful in obtaining DNA testing of the biological evidence, which excluded him as a contributor of the seminal stain found at the scene of the crime. However, Washington was barred by the 21-Day Rule from introducing the new evidence to prove his innocence. Instead, on January 14, 1994, then Governor Wilder commuted Washington's sentence to life imprisonment. Washington remained in prison for six more years before his counsel persuaded then newly elected Governor Gilmore to seek additional DNA testing. On October 2, 2000, Governor Gilmore announced the results of the new tests and granted Earl Washington an absolute pardon for the capital murder conviction, although Gilmore refused to consider the unrelated burglary and malicious wounding charges.

Although the victim could not provide police with enough information to design a composite of her attacker, she later identified Troy Webb.

Notwithstanding the Governor's refusal to pardon the lesser charges, the Virginia Department of Corrections determined that Washington would have been eligible for parole on these convictions a decade earlier. On February 12, 2001 Earl Washington was released from prison to parole supervision. He has since filed a civil suit alleging that police and prosecutors coerced him into confessing to a crime he did not commit and ignored details that proved his innocence.

X. Troy Webb

On January 23, 1988, a white, 25-year old Virginia Beach woman was robbed and raped in the parking lot of her apartment complex. In the subsequent investigation, the victim could not provide police with enough information to design a composite of her perpetrator, and she was unable to identify him in a mug-shot book. Three weeks after the attack, however, the investigating detective went to the victim's house and presented her with a photographic lineup of six individuals. This time, she was able to make an identification: she identified one of the men in the photographic lineup, Troy Webb, an African American, as the perpetrator. The detective returned to her house the next day and presented her with a second

photographic lineup. Again, she identified Webb. Based on this identification as well as serology tests that could not conclusively rule out Webb (nor the victim's boyfriend) as the perpetrator, Webb was arrested and charged with rape, abduction with intent to defile, robbery, and use of a firearm during the commission of a robbery.

In a two-day jury trial the following year, Webb was found guilty of all charges and was sentenced to forty-seven years in prison. Webb continued to maintain his innocence. In 1996, lawyers from Cardozo Law School's Innocence Project contacted the Virginia Beach Commonwealth's Attorney's Office, seeking to retest the DNA evidence in the case. Deputy Commonwealth's Attorney Pamela Albert, the same lawyer who had prosecuted Webb, agreed to petition the Circuit Court to order the testing of evidence from the victim, her boyfriend at the time, and Webb. Subsequent DNA tests excluded both the boyfriend and Webb. With support from the Commonwealth's Attorney for Virginia Beach, the Innocence Project successfully petitioned Governor Allen for clemency, which he granted on October 16, 1996.

XI. Arthur Lee Whitfield

On August 14, 1981, two women were raped within forty-five minutes of each other in the same neighborhood in Norfolk, Virginia. Both women were accosted at knife-point by a black man as they got out of their cars near their homes. Both women were forced by their attacker to go to a near-by secluded spot where they were sodomized, raped, and robbed.

The police investigation of these two rapes focused on Arthur Whitfield because police suspected him of committing a burglary that occurred two miles away from the rapes on the same night. The burglar matched the same general description as the rapist and, like the rapist, the burglar carried a knife. The police put Whitfield's color photograph in an array containing color photographs of five other people and showed the array to the first rape victim. She selected Whitfield's photograph and said she was ninety-five percent sure he was the man who raped her. Both victims viewed separate in-person lineups the next day at the police station, and both victims immediately identified Whitfield as their assailant.

Whitfield, who was twenty-seven years old, was charged with sexually assaulting the two women and with attempting to break into a third woman's home. The trial judge later severed the three cases and set them for separate trials. In January 1982, Whitfield stood trial for the rape, sodomy, and

robbery of the first victim. The judge permitted both rape victims to testify at the first trial and each victim identified Arthur Whitfield as her attacker. Whitfield did not testify in his own defense, but four defense alibi witnesses testified that Whitfield attended a birthday party on the night of the incident and was present at the party at the time of the crime. The jury convicted Whitfield on all three counts and sentenced him to a total of forty-five years in prison. Fearing that another jury would convict him in his upcoming trial for the rape of the second woman and sentence him to an equally long prison term, Whitfield pled guilty to the second offense. Pursuant to the plea agreement, the judge sentenced Whitfield to an additional eighteen-year sentence, and the Commonwealth dropped the attempted burglary charges in the third case.

Although Whitfield pled guilty to the second offense, he always maintained he was innocent of all of the charges. The Virginia Supreme Court rejected his appeal from his trial in the first rape case and affirmed his conviction, finding no reversible error. Whitfield later asked the Circuit Court for the City of Norfolk for a copy of his trial transcript so that he could prepare a petition for *habeas corpus* relief, but his petition was rejected and he never filed a *habeas* petition.

A statute enacted in 2002 allows Virginia inmates to petition the courts to order the preservation and DNA testing of biological material that might prove the inmate's innocence. Whitfield subsequently filed a *pro se* petition under this statute, and the court later appointed a lawyer to assist him. The Virginia Division of Forensic Science discovered that, although all of the other evidence in Whitfield's cases had been destroyed, the serologist who originally examined the evidence in his cases had taped samples from the rape kits in both cases to the inside of her files. DNA testing of those samples later showed that Whitfield did not match the DNA from the semen found in either rape case. Instead, the DNA from both rapes matched the profile of another person who was already serving time in a Virginia prison for a subsequent rape. Whitfield was immediately released on parole on August 23, 2004, after serving twenty-two years in prison.

PART FOUR
RESEARCH AND RECOMMENDATIONS
BEST PRACTICES FOR VIRGINIA

Fortunately, post-conviction processes successfully and eventually exonerated all of the individuals whose cases the ICVA reviewed. It is important to understand, however, that many of the exonerations discussed in this report occurred not because of the traditional working of the system, but because lawyers, usually volunteering their time, continued to fight for their clients for many years, in the face of almost insurmountable odds. Moreover, the fact that all eleven of the ICVA's exonerees obtained relief is largely a function of the ICVA's case selection criteria. The ICVA's report focuses only on those cases in which a defendant was *officially* exonerated of serious felonies, but the factors leading to these wrongful convictions apply more generally to the Commonwealth's criminal justice system. It is possible, then, that other innocent defendants whose cases do not meet the ICVA's conservative criteria remain imprisoned.[8] Moreover, to the extent that wrongful convictions occur in the future, post-conviction remedies in Virginia, even after recent reforms, still do not provide adequate or reasonable avenues for relief in many cases.

The following sections of this report address factors that have contributed to wrongful convictions in the Commonwealth, and present recommendations to minimize the likelihood that similar mistakes will occur in the future.

Pretrial eyewitness identifications are among the most powerful tools available to police and prosecutors in criminal investigations and criminal trials.

I. Eyewitness Identifications

A. Introduction

Pretrial eyewitness identifications are among the most powerful tools available to police and prosecutors in criminal investigations and criminal trials. Out-of-court procedures in which victims or witnesses identify a suspect as the person who committed the crime often seal the fate of an accused long before trial. A defendant who chooses to go to trial despite being identified as the perpetrator faces an uphill and daunting battle, for judges, juries, and the public place overwhelming weight on the testimony of eyewitnesses and victims of crime when they point to a defendant in court and state: "That is the person who committed this crime."

This supreme confidence is frequently misplaced, for mistaken pretrial eyewitness identifications rank high among the factors that cause innocent people to be convicted of crimes that they did not commit. Seventy-five percent of the more than 100 DNA exonerations nationwide involve mistaken eyewitness identifications. [9] Virginia's history of wrongful convictions mirrors this tendency. Psychological and social research suggests that common pretrial identification procedures, widely used by law enforcement in the Commonwealth, contribute to and can actually produce mistaken identifications. This same body of research verifies that simple reforms that have little or no financial costs and that do not burden or impede law enforcement can effectively reduce the possibility of mistaken identifications and make identification procedures more accurate and reliable. These best practices also can help reduce baseless claims of inappropriate police behavior in the identification process.

Seventy-five percent of the more than 100 DNA exonerations nationwide involve mistaken eyewitness identifications. Virginia's history of wrongful convictions mirrors this tendency.

B. Virginia Law on Eyewitness Identification

More than thirty years ago, the United States Supreme Court set the constitutional standard for determining whether a pretrial identification by a witness is reliable and may be used at trial against an accused.[10] Only those identification procedures that are "so impermissibly suggestive as to give rise to a very substantial likelihood of irreparable misidentification" are unreliable, violate due process, and may not be used in court.[11] The Virginia Supreme Court, like other state courts, has implemented the U.S. Supreme Court's standard by applying a totality of the circumstances approach in weighing pretrial identifications.[12] Virginia courts consider five factors: (1) the witness's opportunity to view the criminal at the time the crime was committed; (2) the witness's degree of attention during the incident; (3) the accuracy of the witness's prior description of the perpetrator; (4) the level of certainty demonstrated by the witness during the identification procedure; and (5) the length of time between the crime and the identification.[13]

In practice, the Virginia courts reject most challenges by defendants alleging suggestive and unreliable identification procedures. Even overly suggestive identification procedures have been admitted in court when the identifications were deemed otherwise reliable. For example, identifications in which the accused stood out as distinctive among the array,[14] in which the accused was viewed alone rather than in a group,[15] and even procedures conducted after eyewitnesses were told a specific suspect was the perpetrator, have all been admitted at trial against defendants after courts concluded that the witnesses' identifications of the accused were reliable.

The Virginia courts leave the decision whether to allow expert testimony on eyewitness identification to the discretion of the trial judge. However, the courts have only sanctioned expert eyewitness testimony in narrow circumstances, such as cases involving "cross-racial identification, identification after a long delay, identification after observation under stress, and psychological phenomena as the feedback factor and unconscious transference."[16] Virginia courts have also consistently refused to permit special jury instructions concerning reliability of eyewitness identifications, reasoning that these instructions have the "effect of emphasizing the testimony of those witnesses who made identifications."[17]

It is possible that Virginia law and practice may soon change on some aspects of eyewitness identification. The Virginia State Crime Commission studied identification procedures utilized by law enforcement agencies in the Commonwealth, concluding in a January 2005 report that "there is overwhelming psychological evidence supporting the need for changes in the current procedures Virginia law enforcement is required and trained to use in conducting in-person and photographic lineups." As part of that report, the Crime Commission issued six recommendations to:[18]

The Virginia State Crime Commission has concluded that "there is overwhelming psychological evidence supporting the need for changes ... in conducting in-person and photographic lineups."

- Amend the *Code of Virginia* to require local police and sheriff's departments to have a written policy for conducting in-person and photographic lineups.

- Request the Department of Criminal Justice Services ("DCJS"), in cooperation with the Virginia State Crime Commission, to establish a workgroup to develop a model policy for conducting in-person and photographic lineups.

- Request DCJS, through regulation, to amend the entry level and in-service training requirements regarding lineups to include only use of the sequential method, by October 1, 2005.

- Request DCJS to work with the Virginia Law Enforcement Professional Standards Commission to include the sequential method for conducting lineups as part of the accreditation process for law enforcement agencies.

- Require DCJS, in conjunction with the Crime Commission, work with the Virginia Sheriff's Association and the Virginia Chiefs of Police Association to assist members in using and understanding the benefits

of the sequential method of lineups; presentation to each association's annual meetings will occur.

- Amend the *Code of Virginia* to designate the Virginia State Police, through their oversight of the Central Criminal Records Exchange, as the repository for all mug shots and queries for photographic lineups.

This report was submitted to the Virginia General Assembly in early 2005, and the Assembly subsequently adopted requirements for written policies for conducting in-person and photographic line-ups.

C. Eyewitness Identification Research

Eyewitnesses substantially overestimate the amount of time that they witnessed an event and focused on a suspect's face, especially when they are under a great deal of stress.

When the U.S. Supreme Court and the Virginia Supreme Court adopted standards governing the reliability of eyewitness identifications, little empirical research had been done to test whether the rules used by courts to assess the effects of suggestive eyewitness identification procedures were themselves reliable.[19] Since then, however, psychologists have conducted numerous studies on the reliability of eyewitness identifications that call into question whether these confirming factors adequately guard against mistaken identifications.[20] These studies identify three primary flaws in the U.S. Supreme Court's standard and demonstrate that current methods do not account for either the vagaries of individual memory or the suggestive methods that can fill in the blanks in that memory and cause erroneous identifications.

The first factor used by the courts – an eyewitness's opportunity to view the assailant – has been shown to rely too heavily on the witness's "self report,"[21] and has been empirically proven to be highly unreliable.[22] Eyewitnesses substantially overestimate the amount of time that they witnessed an event and focused on a suspect's face, especially when they are under a great deal of stress.[23] At the same time, witnesses typically underestimate the amount of time the perpetrator's face was out of view.[24]

These findings critically undermine the reliability of the second factor used by the courts – the eyewitness's degree of attention during the incident. Again, this factor relies upon self-reporting, which can be extremely unreliable when the witness is under a great deal of stress.

Assessing the accuracy of prior descriptions of the perpetrator by eyewitnesses – the third factor used by courts – also is based on a faulty premise.[25] This factor presupposes that if the eyewitness's description of

the perpetrator given soon after the crime accurately describes the defendant, the witness's subsequent identification of the defendant is likely reliable. In fact, however, there is no meaningful correlation between a witness's description of the perpetrator and the accuracy of the witness's subsequent identification of a particular suspect in a lineup.[26]

Research shows that suggestive identification procedures, including comments and feedback from law enforcement to eyewitnesses, can significantly contribute to mistaken identifications.[27] In a 1998 study, participants were shown a video of a suspect they were later told committed a crime. They then viewed a photo array that did not include the correct suspect, and were asked to make an identification.[28] After making an identification, researchers gave the participants either positive feedback, negative feedback, or no feedback at all, and then researchers interviewed the participants about their identification.[29] The results of the experiment showed that participants who were given positive feedback not only gave much higher estimates of their level of certainty at the time they made their identification, but they also gave higher estimates of the quality of their view of the suspect, the speed with which they made the identification, the quality of their memory of the incident, their degree of attention and the ease with which they made the identification – even though they all had identified the wrong photo.[30]

There is no meaningful correlation between a witness's description of the perpetrator and the accuracy of the witness's subsequent identification of a particular suspect in a lineup.

These results are striking because they indicate that suggestion during an identification process "leads eyewitnesses to distort their reports of the witnessing experience across a broad array of questions."[31] Yet this type of inherently inaccurate self-reporting is a significant factor that courts in Virginia and elsewhere use to assess the reliability of eyewitness identifications. As a result, the very "existence of suggestiveness [in the identification process] serves to guarantee that the witness will pass" the reliability test, a test that is then used to justify the suggestive procedure.[32]

This body of research reveals two overarching concerns with traditional identification procedures. First, research shows that suggestive comments – both unconscious and intentional – by law enforcement personnel or others that confirm a witness's identification can significantly and erroneously increase the witness's confidence in an identification, even if the witness is mistaken.[33] Other suggestive procedures, such as those that present the suspect in ways that make the suspect stand out from the other participants, can give witnesses false confidence in their identifications. Moreover, witnesses whose confidence has been inflated often deny that a reinforcing comment or suggestive lineup in any way influenced their identification.[34]

The second concern involves the problem of "relative judgments" – a witness's tendency to select the individual in an identification procedure who looks most like the offender.[35] Under traditional police procedures, officers ask witnesses to view a group of photographs displayed together or a group of individuals shown together in a lineup, and ask them whether they can identify the perpetrator(s). Because there is always someone in the group who looks more like the actual offender than anyone else, witnesses are prone to identify the individual that most resembles the offender, rather than to refrain from making an identification if they are not sure or do not see the perpetrator.[36] Research shows that witnesses then confuse or replace their memory of the true perpetrator with the image of the person who looked most like the offender in the identification procedure.[37]

Witnesses are prone to identify the individual that most resembles the offender, rather than to refrain from making an identification if they are not sure or do not see the perpetrator.

To address these problems, researchers recommend that witnesses be shown photographs or individuals in a lineup sequentially – that is, one at a time – rather than all together as a group. Researchers recommend that witnesses be asked to determine, upon looking at each photograph or individual, whether the witness recognizes the perpetrator. A recent, comprehensive analysis of twenty-five studies comparing simultaneous and sequential lineups and photo array procedures indicated that sequential procedures reduced the chances of a mistaken identification by nearly one-half.[38] This study also suggested that sequential techniques might reduce the rate of accurate identifications when the culprit is present in the identification procedure, although the reduction is not nearly as pronounced as the reduction in mistaken identifications.

D. Virginia Law Enforcement Identification Procedures and Practices

The ICVA received responses to its survey from 108 Virginia law enforcement agencies that have general law enforcement functions and report that they regularly conduct pretrial identification procedures with victims and witnesses. As Table One indicates, about six percent of these agencies reported that they use the most suggestive identification procedure: showing a witness a single photograph of a suspect. Nearly sixty-three percent of agencies reported using show-up identifications, when a suspect was quickly apprehended by police near the scene of the crime and is shown to eyewitnesses. Twenty-eight percent of the agencies use in-person lineups as an identification tool, and ninety-eight percent show multiple photographs to eyewitnesses in photo arrays or photo spreads.

TABLE ONE – OUT-OF-COURT IDENTIFICATION METHODS USED BY AGENCIES WITH LAW ENFORCEMENT DUTIES

Identification Method	% of Agencies That Employ Method
Show-Ups	63
Lineups	28
Photo Arrays	98
Single Photo	6

N = 108

A number of Virginia law enforcement agencies exacerbate the weaknesses of eyewitness identification by the procedures they employ.

A number of Virginia law enforcement agencies exacerbate the weaknesses of eyewitness identification by the procedures they employ. In three-quarters of the cases reported to the ICVA in which identification procedures were used, the officer in charge "always" or "mostly" knows the identify of the suspect who is the subject of the procedure. Although eighty-five percent of law enforcement agencies report that they never tell eyewitnesses that the suspect is included in a lineup or photo array, nearly a quarter fail to tell witnesses that they do not have to identify anyone in the identification procedure. When showing photos to eyewitnesses, seventy-seven percent of responding agencies present the photographs together in a group, while fewer than fifteen percent display the photographs one at a time. Similarly, eighty-three percent of agencies that use in-person lineups present the participants together in a group; just two percent show the participants one at a time. These findings are consistent with those obtained by the Virginia State Crime Commission, which in 2004 found that less than five percent of responding law enforcement agencies in the Commonwealth "solely us[e] the sequential method to conduct photographic lineups."[39] Nor do departments videotape eyewitness identifications so that jurors can observe the entire process. Seventy-eight percent of agencies reported that they never videotape, while an additional fourteen percent said they rarely do so.

Several law enforcement agencies submitted comments along with their survey responses that reflect sensitivity to suggestive identification procedures. Some departments said they ask witnesses to articulate a percentage of certainty for their identification or ask witnesses if they are "one hundred percent positive." One agency said it usually asks witnesses:

> if they see [the] suspect. Witness[es] must indicate they are absolutely sure of identity, we do not [accept] maybes . . . . We absolutely require a very positive response on identification. However, NO pressure is put on witnesses and witnesses are NOT told to identify someone unless there is no doubt in their mind. [Emphasis in original.]

Another department said witnesses are told they do not have to identify someone, "especially if there is any hesitation evident," and a third department said it uses a standard instruction sheet that informs witnesses they are not required to identify any of the photographs. One law enforcement agency said it recently switched from showing photographs to witnesses simultaneously to showing them sequentially. Finally, in response to the survey question asking whether the officer administering the identification procedure knows the likely suspect, one agency said that its officers always do, "but we are considering getting an officer that is not familiar with the case."

In the Commonwealth, nine of the eleven official exonerations investigated by the ICVA involved mistaken eyewitness identifications.

E. Mistaken Identification in the Cases of Virginia Exonerees

Nationally, over seventy percent of exonerations included mistaken identifications among the factors that led to wrongful convictions.[40] In the Commonwealth, nine of the eleven official exonerations investigated by the ICVA involved mistaken eyewitness identifications.[41] Wrongful convictions due to mistaken identifications seem to be particularly prevalent in rape and sexual offenses cases. Nationwide, eighty-eight percent of wrongful rape convictions were based in large part on misidentifications. In Virginia, seven of the eight sexual offense cases studied by the ICVA included a mistaken identification by a witness or victim. Race, and particularly the propensity for error when members of one race attempt to identify suspects from another race, also plays a role in mistaken identifications both nationally and in Virginia.[42] Across the country, fifty percent of exonerated rape defendants were black men misidentified by white women, a ratio similar to that found in the cases examined by the ICVA.

1. Marvin Anderson

Marvin Anderson's case is a telling example of how a mistaken identification can lead to the conviction of an innocent man. Although Marvin Anderson did not match the victim's physical description of her attacker in several important ways, the police included his photograph in a

photo identification procedure shown to the victim. During the initial photo identification, the police showed the victim between six and ten photographs. All of the photographs were black and white mug shots except for Anderson's, which was a color photograph taken by his employer. Within half an hour of the photo lineup, the victim viewed an in-person lineup, also including Anderson, in which she again identified him as her assailant. Anderson was the only one of the seven live lineup participants whose picture was also in the photo array.

2. Walter Snyder

In Walter Snyder's case, the photo array shown to the rape victim contained a picture depicting only Snyder's head and shoulders while the photos of the other participants displayed their full body. In addition, the rape victim testified at trial that the police had told her that Snyder lived across the street from her. She later reportedly saw Snyder outside his home and told police that his thighs looked familiar. Three months after the attack, the police carefully arranged an opportunity for the victim to view Walter Snyder by himself in the police station under circumstances that made it clear he was a suspect, and she identified him as her rapist.

3. Julius Ruffin

The victim in Julius Ruffin's case had a chance encounter with him in an elevator at work and believed he was possibly her attacker. Officials at her work arranged for Ruffin to come to her office so she could get a better look at him, and afterward she felt sure he was the rapist. After being questioned by police and denying involvement in the crime, Ruffin agreed to participate in a live lineup. The police put Ruffin, a light-skinned African-American man, in a lineup consisting solely of dark-complected African-American men. Each lineup participant wore hospital scrubs, but Ruffin stood out as the only participant to wear jewelry or a t-shirt under the scrubs. Moreover, each of the other participants already was incarcerated and reportedly appeared ungroomed in comparison to Ruffin. The victim identified Ruffin as her assailant after the lineup.

4. Edward Honaker

Edward Honaker was identified by the rape victim and her boyfriend, also an eyewitness to the crime, in photographic arrays done four months after the rape. However, not until years after his conviction did evidence come to light that the police had arranged for the victim and her boyfriend to

undergo hypnosis, and only while they were under hypnosis were they able to identify Honaker's photograph in the array.[43] In addition, the two witnesses were allowed to view the photos together, further tainting the reliability of each identification.

5. Arthur Whitfield

Arthur Whitfield's case highlights the potential danger posed when a suspect stands out from the other participants in an identification procedure. The first rape victim told police that her assailant had distinctive, light eyes and both victims testified at trial about the rapist's unusual light eyes, yet Whitfield was the only lineup participant that the woman viewed who had light eyes. In addition, the second rape victim testified at trial that none of the other lineup participants had the same complexion as Whitfield.

Experts have proposed a series of simple modifications to identification procedures. Most of the reforms carry no financial costs and require no or little training before officers are able to put them into practice in the field.

Whitfield also did not match the second rape victim's description of her assailant in one very important way. She told the police on the day that she was raped that the perpetrator was "kissing" and "necking" at her during the entire assault and she specifically said he did not have facial hair. Photographs taken during Whitfield's lineup one week after the assaults showed he had a heavy moustache.

The two rape victims also had significant contact with each other that could have unconsciously influenced their identifications of Whitfield. The two women knew each other and even drove to the police station together to view the Whitfield lineup. During the drive, they "compared notes" by discussing the descriptions they gave to the police of their assailant.

F. Best Practices for Identification Procedures

In light of the significant findings of modern psychological research on eyewitness identifications, experts have proposed a series of simple modifications to identification procedures that are designed to minimize the chance of misidentification and make eyewitness identifications more accurate and reliable. Most of the reforms carry no financial costs and require little or no training before officers are able to put them into practice in the field.

In October 1999, the U.S. Department of Justice ("DOJ") issued guidelines on identification procedures.[44] The DOJ recommends that law enforcement agencies adopt the following practices to prevent suggestive influences during photo arrays and lineups:

- use “fillers” or non-suspects who fit the witness's description of the perpetrator where it is possible to do so.
- include only one suspect in each lineup.
- avoid the reuse of fillers when showing a new suspect.
- ensure that no writing or information concerning a previous arrest is visible when conducting a photo lineup.
- ensure that the suspect and fillers share unusual features such as scars and tattoos.
- instruct witnesses prior to conducting identification procedures that the person who committed the crime may or may not be present in the group of photographs or individuals, and, therefore, it is just as important to clear innocent persons as it is to identify the perpetrator.
- avoid saying or doing anything that could potentially influence the witness's selection.
- record the results of the lineup.
- obtain a signed and dated statement of certainty from the witness as soon as the procedure is complete.

The practices recommended by the DOJ have been implemented by police departments around the country. For example, Illinois and New Jersey have adopted many of these recommendations for police and law enforcement, and have added additional important safeguards.[45] Both states are requiring that, where possible, photo arrays and in-person lineups be conducted sequentially rather than simultaneously so that the witness can determine whether an individual in the identification procedure is or is not the perpetrator, before viewing the next person or photograph, in order to minimize the problem of relative judgments. In addition, New Jersey’s best practices require that the person conducting the lineup not know which lineup participant is the suspect in the case.[46]

G. Recommendations for Reform in Virginia for Eyewitness Identifications

The ICVA recommends that the eyewitness identification procedures set out below be uniformly adopted and applied by law enforcement agencies throughout Virginia. There are several complementary ways to implement these reforms. First, Virginia should enact legislation that would require law enforcement agencies in the Commonwealth to adopt and implement these procedures, with sanctions for refusing to do so. The legislation should require that identification evidence be excluded or that prosecutors show good cause for their failure to follow the procedures. Second, Virginia courts should incorporate these recommendations into their analysis of the reliability and admissibility of pre-trial eyewitness identification procedures. Eyewitness identifications that were not the product of these procedures should receive heightened scrutiny by trial and appellate courts, including instructions to jurors to view such identifications with skepticism. Third, individual law enforcement agencies in Virginia should immediately adopt these procedures, train their officers to implement them properly, and require their officers to follow them.

1. **Multiple person lineups and multiple person photo arrays are significantly more reliable than single person or single photograph identifications. Therefore, law enforcement personnel should use multiple person lineups and multiple person photo arrays whenever practicable. Generally, identification procedures should include six to eight participants, including the suspect.**

Show-up identifications performed in the vicinity of the crime, shortly after the crime occurred, and usually under exigent circumstances, have been used to narrow police focus to possibly guilty suspects. Such measures, however, come with considerable risks of suggesting guilt when a suspect is innocent. The risk is raised to an unacceptable level when single-participant identification procedures occur even later after a crime. Sometimes these one-suspect identifications occur by chance and are not arranged by the police. Julius Ruffin's case is one example of a chance encounter between the victim and someone she perceived as her offender. However, at other times the police may arrange for eyewitnesses to view a suspect days, weeks or more after the crime occurred under circumstances where no exigency exists, like in Walter Snyder's case.

The ICVA recommends that these types of show-up identifications or single-witness photo identifications be avoided when substantial time has

passed since the crime. Not only are the resulting identifications suggestive, but research also has shown that the effects on witnesses' diminishing memories may taint the reliability of future proceedings. Although the ICVA's survey indicates that most Virginia law enforcement agencies avoid single photograph identification procedures, a small minority occasionally still use these techniques.

Further, the number of participants in an identification procedure should be sufficient to fairly test an eyewitness's ability to identify the true perpetrator. While no magic number exists, the ICVA recommends, based on the available research and the practices of numerous law enforcement agencies across the country, that six to eight participants, including the individual suspected by the police, is an appropriate number.

2. **Only a single witness should participate in an identification procedure at one time. When conducting identification procedures, law enforcement personnel should include only one suspect per procedure, should include participants who are not suspects, and should, to the greatest extent possible, ensure a consistent appearance between suspects and other participants so that suspects do not stand out.**

Witnesses should not be allowed to participate in identification procedures together, in order to avoid witnesses' influences on each others' decisions. To further reduce the possibility of misidentification, in cases in which there is more than one suspect, experts recommend that only one suspect at a time be included in an identification procedure. Additional spots in a lineup, or further pictures in a photo array, should be reserved for similar looking non-suspects, who are commonly called "fillers."

The ICVA urges Virginia law enforcement agencies to ensure, to the greatest extent possible, that non-suspect participants in identification procedures have a consistent appearance to the single suspect included in the lineup or photo array. Marvin Anderson, Julius Ruffin, and Walter Snyder serve as examples of the tragic consequences that may flow from identification procedures in which suspects inappropriately stand out from the other participants, whether from the quality of photo used, participants' attire, or their physical attributes. All three men were misidentified and spent years in jail for crimes that they did not commit.

Marvin Anderson, Julius Ruffin, and Walter Snyder serve as examples of the tragic consequences that may flow from identification procedures in which suspects inappropriately stand out from the other participants, whether from the quality of photo used, participants' attire, or their physical attributes.

3. **Law enforcement personnel should instruct each witness that the person who committed the crime may or may not be included in the identification procedure and that the witness should not feel obligated to make an identification unless the witness recognizes the perpetrator. Each witness should be instructed that it is just as important to clear an innocent person of wrongdoing as it is to identify the perpetrator.**

Eyewitnesses naturally approach identification procedures with the idea that a suspect will be included in the photo array or lineup. An instruction to witnesses that the perpetrator may or may not be included in a photo array or lineup helps counter eyewitnesses' inclination to identify a participant regardless of whether the actual offenders are included in the procedures. Research shows that witnesses who do not receive this instruction are more likely to identify a participant even when the true offender is not included in the procedure.[47] The reverse, however, is not true; a witness who receives the instruction is no less likely to identify an offender when the true perpetrator is present in an identification procedure.[48]

The ICVA recommends that Virginia law enforcement agencies use uniform and standardized written instructions for witnesses viewing identification procedures. These instructions, which should conform to the recommendations in this report, should be read verbatim to all witnesses viewing photo arrays and lineups, and the witnesses should be asked to sign the instructions acknowledging they received and understood them. Law enforcement personnel should instruct each witness that the person who committed the crime may or may not be included in the identification procedures and that the witness should not feel obligated to make an identification unless the witness recognizes the perpetrator. Each witness should be instructed that it is just as important to clear an innocent person of wrongdoing as it is to identify the perpetrator.

4. **Law enforcement officials who conduct identification procedures should not know the identity of the actual suspects in order to reduce unintended influence on the witnesses during identification procedures, and witnesses should be informed that the person conducting the procedure does not know which participant in the procedure is the suspect. Law enforcement officers should avoid giving feedback to witnesses during or after identification procedures.**

In judging the accuracy of pre-trial identifications, judges and juries place great weight in the level of confidence expressed by witnesses. As discussed earlier, however, research shows that witnesses' initial identifications and the level of confidence they later express in their identifications are highly susceptible to suggestive influences.[49]

It is rare for a law enforcement officer to deliberately steer a witness's identification, but unconscious body language, tone of voice, and questions or comments by the officials conducting an identification procedure can significantly influence the selections made by witnesses and can have long-term and pervasive effects on their memory. Indeed, in at least four of the cases investigated by the ICVA in which misidentifications occurred, the investigating officers knew the eventual exonerees were suspects and these officers were involved in the identification procedures with the eyewitnesses. Although it is not clear whether the officers' reactions or comments could have influenced the eyewitnesses' memories, it is essential that witnesses not receive unintended signals that might influence their decision-making.

It is rare for a law enforcement officer to deliberately steer a witness's identification, but unconscious body language, tone of voice, and questions or comments by the officials conducting the procedure can significantly influence the selections made by witnesses and can have long-term and pervasive effects on their memory.

For these reasons, the ICVA recommends that Virginia law enforcement agencies adopt the "double-blind procedures" that have been suggested by experts and implemented by other jurisdictions across the country. Specifically, the ICVA recommends that the officers conducting photo arrays and lineups not know which of the participants is the investigating officers' focus of interest. The fact that the officers do not know the identity of the suspect should be shared with witnesses so they will not be unduly influenced by the behavior of the officers conducting the procedure. Even if the law enforcement officer conducting the identification procedure does actually know the identity of the suspect, witnesses should still be instructed otherwise. For similar reasons, law enforcement officers should avoid giving feedback to witnesses during or after identification procedures. Congratulating a witness on his identification, for example, can alter the witness's perception, memory, and later testimony in court.

5. Law enforcement personnel should adopt sequential rather than simultaneous identification procedures.

As noted above, simultaneous identification procedures tempt witnesses to make relative judgments about the participants in a lineup or photo array and, sometimes, to identify a person who looks similar to the suspect but is not in fact the offender.

Sequential identification procedures, on the other hand, require witnesses to compare each photo array or lineup participant to their mental image of an individual perpetrator, and to make a decision about whether or not they recognize the offender. Sequential lineup procedures can be implemented by law enforcement agencies with little additional training or cost and are important in reducing the chances of mistaken identifications.

The Virginia State Crime Commission has strongly endorsed the benefits of sequential over simultaneous identification procedures.[50] The State Crime Commission has recommended that the entry-level and in-service training for law enforcement officers include only the use of the sequential method and that the sequential method become part of the accreditation process for law enforcement agencies.[51] The ICVA recommends that after law enforcement agencies have the opportunity to conduct an initial period of training in these new procedures, the Virginia General Assembly require law enforcement officers to use sequential identification procedures.

Sequential identification procedures, which require witnesses to view one individual at a time, can be implemented by law enforcement agencies with little additional training or cost.

6. **If a photo array is used, law enforcement personnel should show the photos to the witness one at a time, and they should obtain a statement from the witness as to whether the person in the photo is or is not the perpetrator, the degree of confidence of the witness in any identification, and the nature of any similarities or differences the witness observes between the photo and the perpetrator - all before moving on to the next photo. The same procedure should be followed if a live person lineup is used.**

Obtaining immediate feedback from an identification witness as the witness views a photographic array or a live lineup is critical to promoting accurate and reliable identification procedures. Eyewitness identification research described above shows that even unconscious or unintended suggestions or reinforcement of an identification can significantly and mistakenly increase a witness's level of confidence in that identification. Gathering information from a witness as the witness views each photograph or each individual in a live procedure separately will permit the judge or jury at any subsequent trial to assess whether the witness's identification has been consistent or has changed over time.

For these reasons, the ICVA recommends that law enforcement officers ask a witness whether or not the witness sees the perpetrator as each photograph or individual is viewed separately. If the witness makes an identification, law enforcement officers should ask the witness for his or her level of confidence in the identification and ask the witness to describe any

similarities or differences between the perpetrator and the photograph or individual selected in the identification procedure, all before the witness moves on to view a subsequent photograph or individual.

7. **Law enforcement personnel should videotape identification procedures, to the extent practicable, and, at a minimum, should audiotape identification procedures. Taping should include conversations between the witness and police immediately prior to commencement of the identification procedure.**

Police and other law enforcement officers are well-trained in recording and preserving the observations and experiences of victims and witnesses immediately after a crime occurs. Officers should apply these same skills to videotape a witness's identification of a suspect, the witness's level of confidence in the identification, and any other comments the witness has about the identification procedure. This practice will preserve the identification process for later review in court and will protect officers against unfounded claims of misconduct. To the extent that officers properly instruct witnesses and refrain from extraneous comments or feedback, a video recording can serve as proof of the officer's professional behavior and information about the witness's displayed confidence.

Expert testimony will help counterbalance the common misconceptions held by many jurors concerning eyewitness evidence.

8. **Virginia courts should permit, in appropriate cases, the introduction of expert testimony on the issue of human memory as it relates to the identification process and on the issue of best practices for eyewitness identification procedures. Virginia courts should also instruct jurors to carefully consider the reliability of eyewitness identifications.**

Several decades of scientific research into eyewitness identifications, described in Part Four, Section (I)(C) of this report, contradict or undermine the fundamental assumptions that courts and juries use to assess the reliability and accuracy of identification evidence. For example, although common sense might suggest otherwise, research shows that witnesses' self-reports about their opportunities to view assailants and their level of confidence in identifications are often inflated. Moreover, research also shows that witnesses who have made an identification tend to understate, minimize, or simply deny the impact of any subsequent influence or suggestions on their memory.

Expert testimony about human memory as it relates to the eyewitness identification process and about best practices concerning identification procedures will help counterbalance the common misconceptions held by many jurors concerning eyewitness evidence. Since this information is not within the range of common experience of a juror, it is an appropriate area for expert testimony.[52] Similarly, special cautionary instructions to juries concerning the reliability of eyewitness testimony will aid jurors in assessing this type of evidence. For these reasons, the ICVA recommends that Virginia courts, in appropriate circumstances, permit the introduction of expert eyewitness testimony and provide specific jury instructions concerning eyewitness evidence.

II. Interrogation Procedures

A. Introduction

In most criminal investigations, police suspicion begins to focus on a particular individual and investigators will question that suspect. Often, and particularly when there is a strong belief in the suspect's guilt, the goal of police questioning is to obtain a confession from the suspect, an admission of guilt that will form the heart of the later prosecution. Police questioning is usually done in private, whether the suspect is under arrest or not, and in a manner controlled by the police. When the police questioning results in a confession by the suspect, the investigation usually has reached its apex, and often its culmination. The defendant's confession later becomes one of the most compelling and effective arrows in the prosecutor's quiver in the subsequent criminal prosecution.

Modern police interrogation methods often rely upon psychological techniques. These techniques have proven to be extremely effective and have caused many truly guilty suspects to admit their responsibility for the crimes they have committed. However, today's interrogation methods are so effective, so powerful, and so calculated to obtain incriminating admissions, that they sometimes influence innocent people to falsely admit to crimes in which they had no involvement. Although the frequency of false confessions is difficult to quantify, research has demonstrated that false confessions are not isolated phenomena, but instead occur in disturbing numbers.

Five studies of erroneous prosecutions [53] conducted since 1987 have shown that anywhere from fourteen to twenty-five percent of the cases reviewed involved false confessions.[54] In the Virginia cases studied by the ICVA,

two of the eleven official exonerations involved innocent men – both facing the death penalty – who confessed to crimes that evidence later proved they did not commit. In a third case, the police claimed that the exoneree confessed, but he adamantly denied making any admission.

It is understandably difficult to fathom that innocent people would confess to crimes that they did not commit.[55] Yet false confessions do occur and their consequences extend beyond the injustice of accusing and incarcerating an innocent person. Unfortunately, false confessions have sidetracked the police from pursuing the real perpetrators, led police and prosecutors to resist reversing course once they have mistakenly concluded that the confessor is guilty, and caused courts to confirm convictions long after compelling evidence surfaces that the system has prosecuted the wrong person.

It is understandably difficult to fathom that innocent people would confess to crimes that they did not commit. Yet false confessions do occur and their consequences extend beyond the injustice of accusing and incarcerating an innocent person.

Because modern interrogation techniques are effective in obtaining confessions from guilty suspects, wholesale changes to interrogation tactics are neither practical nor necessary. Instead, a modest reform – videotaping the complete interrogation of suspects in serious cases – would reduce the possibility of false confessions while permitting officers to pursue and convict the guilty. Indeed, recording interrogations has proven to be a very effective law enforcement tool.[56]

Videotaping interrogations creates a permanent record that can become powerful evidence against the actually guilty, can conserve scarce prosecution and judicial resources by limiting meritless challenges to properly obtained confessions, and can limit frivolous claims of police misconduct during questioning. The videotape can be reviewed later by police, prosecutors, the defense, the courts, and juries so that the influence of the police interrogation techniques and the capabilities and limitations of the suspect being questioned can be measured and weighed by the responsible parties in the criminal justice system.

In addition to videotaping interrogations, law enforcement officials should revise their techniques to avoid the most high pressure tactics when interrogating children and suspects known to have mental retardation or mental illness or who are otherwise susceptible to manipulation and pressure. Law enforcement should be especially mindful when questioning these most vulnerable of suspects.

B. Virginia Law on Interrogation

Virginia law governing the interrogation of suspects mirrors federal constitutional law. The Virginia courts have held that Article I, Section 8 of the Virginia Constitution provides identical and coextensive protections as those provided by the Fifth Amendment to the United States Constitution.[57] Under federal constitutional law, criminal defendants' statement may be used against them in court if the statements meet two separate standards. Under the Due Process Clauses of the Fifth and Fourteenth Amendments, the statement must be voluntary and free of physical coercion, threats of violence, or improper promises or inducements.[58] In addition, according to United States Supreme Court in *Miranda v. Arizona*, suspects subjected to custodial interrogation must be advised of their right to remain silent and their right to counsel.[59]

The courts apply a "totality of the circumstances" approach to determine the voluntariness of confessions, considering both the circumstances surrounding the interrogation and the characteristics of the suspect. Among the factors relevant to the circumstances of interrogations, courts weigh the presence or absence of police coercion or inducement; the location, duration and continuity of the interrogation; and whether the suspects were advised of the right to counsel and the right to remain silent.[60] Courts also consider suspects' personal characteristics, including their age and level of maturity; their education level; the existence of any mental health problems or developmental disabilities; and suspects' physical condition, including whether they were sleep-deprived or under the influence of drugs or alcohol.[61]

In practical terms, the question of whether a court admits a defendant's statement often hinges on a credibility determination – does the court credit the officers' assertion that they did not overbear the defendant's will, or does the court believe the defense that the statement was involuntary? Practice suggests that the courts regularly rule in favor of the prosecution.[62]

Virginia courts have allowed expert testimony to help explain false confessions by defendants with mental retardation or mental disorders.[63] However, there appear to be no reported Virginia cases in which the courts have permitted expert testimony about such issues when defendants have normal mental capacity.

C. False Confession Research

Considerable research examining false confessions has concluded that many factors play a role, including fear of violence, coercive interrogation tactics, intoxication, diminished capacity, ignorance of the law, and mental impairment.[64] While some innocent suspects who confess to the police are socially marginalized individuals (the poor, the uneducated, those of lower intelligence or who suffer from mental illnesses, and juveniles),[65] the vast majority of reported false confessions come from cognitively and intellectually normal people.[66] For these individuals, false confession may be perceived as a logical response to their predicament, given the significant sentence reductions that can result from cooperating with the police.

Of these several factors, perhaps the most important is the effectiveness of police interrogation techniques, which rely on subtle (and sometimes even overt) forms of manipulation, deception, and coercion. These techniques have been repeatedly upheld by the courts. In the modern, psychological form of interrogation, police often isolate a suspect; repeatedly and consistently accuse the suspect of committing the crime; reject proffered alibis; confront the suspect with true and false incriminating evidence; offer alternative scenarios that "recast the suspect's behavior so that he is no longer morally and/or legally culpable;" and offer inducements to confess.[67]

The vast majority of reported false confessions come from cognitively and intellectually normal people.

These methods are designed to persuade suspects that:

> the evidence against them is overwhelming, that their fate is certain (whether or not they confess), and that there are advantages that follow if they confess. Investigators elicit the decision to confess from the innocent in one of two ways: either by leading them to believe that their situation, though unjust, is hopeless and will only be improved by confessing; or by persuading them that they probably committed a crime about which they have no memory and that confessing is the proper and optimal course of action.[68]

While many innocent suspects are able to resist these techniques and maintain their innocence during questioning, some succumb to the pressure and confess to crimes that they did not commit.

The developmental characteristics of those with mental retardation make them particularly susceptible to suggestive interrogation tactics. They are concrete and slow thinkers, they tend to place great weight on short-term versus long-term consequences, and they have difficulty appreciating the seriousness of their situations. They often have short attention spans and

poor impulse control, are highly submissive, and are responsive to stress and pressure.[69] Further, because their brains have not yet matured, juveniles share many of the same developmental, cognitive, and social deficits as those with mental retardation, and are equally susceptible to the pressures of interrogation.[70]

D. Virginia Law Enforcement Interrogation Procedures and Practices

The ICVA surveyed Virginia law enforcement agencies about the methods they use to preserve statements made by suspects during custodial interrogation. Of the 108 responding agencies that interrogate suspects, eighty-seven percent have suspects write out statements; sixty-four percent have officers write down suspects' statements; eighty percent use audiotape to record suspects' statements; fifty percent use videotape to record suspects' statements; and three percent record statements in other ways. More telling is how often agencies videotape interrogations. Fewer than four percent of departments said they always videotape custodial interrogations, while an additional twelve percent reported that they mostly do so. In contrast, eighty-four percent of the responding agencies that question suspects said they never, rarely, or only occasionally use videotape to record interrogations. Although these numbers suggest that videotaping is far from routine among Virginia law enforcement agencies, a majority of departments has at some point videotaped custodial interrogation. Presumably, then, the practice is not foreign to Virginia law enforcement. Tables Two and Three summarize these data.

Fewer than four percent of Virginia departments said they always videotape custodial interrogations.

TABLE TWO – METHODS USED TO RECORD CUSTODIAL INTERROGATION BY VIRGINIA LAW ENFORCEMENT AGENCIES

Method	% Of Agencies
Suspect Writes Statement	87
Officer Records Statement	64
Audiotape Statement	80
Videotape Statement	50
Other	3

N = 108

TABLE THREE – HOW OFTEN VIRGINIA LAW ENFORCEMENT AGENCIES RECORD CUSTODIAL INTERROGATION BY VIDEOTAPE

Method	% Of Agencies
Always	4
Mostly	12
Occasionally	30
Rarely	22
Never	32

N = 108

The ICVA's survey solicited additional comments from law enforcement agencies on their use of videotape equipment to record interrogations. Two agencies indicated that budget reasons limit their use of videotape to record suspects' statements, and both indicated a desire to use the technology if it were available. Another agency said it did not use videotape in all interrogations because not all interrogations take place in areas with video surveillance. Another agency indicated that most small departments cannot afford video equipment or do not have space available to implement videotaping. But the agency also indicated that for "the greater number of law-enforcement agencies," their officers' integrity and the need to maintain their credibility should lead them to conduct interrogations without compulsion or persuasion.

One law enforcement agency indicated that it uses videotaping in serious felonies and "cases involving children" and another echoed that comment when it indicated it uses videotape in child molestation cases. One department reported that the decision to videotape interrogations is at its officers' discretion or "when the circumstances dictate it prudent." Finally, two agencies said they do not use videotaping because "the Commonwealth's Attorney does not want it done" and the "prosecutor does not like video." A third law enforcement agency reported that the "Commonwealth's Attorney does not allow" videotaping.

Two of the agencies surveyed said they do not videotape interrogations because "the Commonwealth's Attorney does not want it done" and the "prosecutor does not like video."

E. False Confessions and Interrogation in the Cases of Virginia Exonerees

In a study of the first seventy DNA-based exonerations nationwide, defendants falsely confessed in fifteen cases (twenty-one percent of the cases examined).[71] A more recent study of 328 exonerations nationwide found false confessions in fifty-one cases, or fifteen percent of those exonerations. Further, it found that sixty-nine percent of innocent defendants with mental retardation or mental illness falsely confessed and forty-four percent of juvenile exonerees falsely confessed.[72]

Virginia's experience mirrors the national data. Of the eleven cases investigated by the ICVA, two cases (or eighteen percent of the cases reviewed by the ICVA) involved false confessions, but several more reflected problematic interrogation techniques. As the cases described below demonstrate, defendants facing the death penalty and suspects with intellectual and developmental disabilities were the most likely to offer a false confession.

Of the eleven cases investigated by the ICVA, two involved false confessions, but several more reflected problematic interrogation techniques.

1. Earl Washington

A year after the 1982 rape and murder of a young mother in Culpeper, Virginia, Fauquier County authorities arrested Earl Washington, a man with mental retardation, on a burglary and assault charge. Within two hours after police began interrogating him, Washington confessed to four unrelated Fauquier County crimes – two rapes, an attempted rape, and a breaking and entering. The Fauquier police never charged Washington with these four crimes, however, because in each case either the victim cleared Washington or the evidence was fundamentally inconsistent with his confession. During the same interrogation, police also questioned Washington about the Culpeper murder. He "acknowledged" that he committed the crime but gave no details, and police soon ended their initial questioning. Later that same day, while being questioned a second time about the Culpeper murder, Washington again admitted to killing the woman, but never mentioned a rape.

The next day, two police officers from the Culpeper Police Department questioned Washington about the murder. Again, he confessed to the crime, but his confession was riddled with statements directly contradicting the true facts of the crime. Officers took Washington to Culpeper so he could show them where he committed the crime, but he was unable to locate the crime scene – even when police drove him directly by the

apartment building where the victim was stabbed. He initially told the police that he had killed a black woman, although the victim was white, and he claimed that he had stabbed the victim only twice when the killer had actually stabbed her nearly forty times. Finally, Washington told the police that he had "kicked in the door" and found the victim alone. In actuality, the victim's two small children were in the home when she was attacked and the door had not been kicked in.

The police did not use audio or videotape to record their interrogations of Washington, but instead obtained a written confession from him. With little physical evidence available at trial [73] and a case based largely on a questionable confession, the jury still convicted Washington of capital murder at his trial in 1984 and recommended that he be sentenced to death. Washington spent nearly ten years on death row and once came within nine days of being executed. In 1994, Governor L. Douglas Wilder commuted Washington's death sentence to life in prison based on DNA evidence that showed that sperm found in the body of the rape victim did not match Washington. Six years later, Governor James S. Gilmore granted Washington a full pardon after even more sophisticated DNA testing completely eliminated Washington as the contributor of the semen.

It is still unclear why Earl Washington would confess to a crime he did not commit. As a man of low intelligence, Washington was susceptible to pressure tactics in a police interrogation, and, indeed, the case suggests that officers may have coached, if not directed, his statements. However, because none of Washington's conversations with his interrogators were recorded, with the exception of the written confession that was prepared by the officers and only initialed by the near-illiterate Washington, it is difficult to say exactly what transpired between Washington and the officers outside of public view.

2. David Vasquez

After the 1984 rape of an Arlington woman, police went to the workplace of David Vasquez in Prince William County and, without telling him the reason for their request, asked him to come to the police station for an interview. At the Prince William County Police Station, the detectives questioned Vasquez, who has mental retardation, for several hours and tape recorded the interrogation. Police put off repeated requests by Vasquez to see his mother. Although Vasquez denied being in Arlington on the night of the murder, the police eventually told him, falsely, that his fingerprints were found inside the victim's home. Vasquez then told the police that he

might have been present in the victim's home the night of the murder, but he seemed confused about how he could have gotten there since he does not drive and his mother was working that evening. At one point, Vasquez said: "It was my imagination that was there, [but] how my body would get there if I didn't . . . ."

The police continued to question Vasquez, and his answers, although inculpatory, continued to be confused and became less comprehensible. Vasquez eventually "admitted" to the police that he had sexual intercourse with the victim and, later, that he killed her, but he could not supply details to the police, so they provided the details to him. At the end of the interview, Vasquez seemed to be talking to himself in a confused manner, repeatedly saying that he knew he was not present, that he did not know how his fingerprints got in the home, and that he did not commit the crime.

The police falsely told David Vasquez that his fingerprints were found inside the victim's home. A confused Vasquez eventually confessed: "It was my imagination that was there, [but] how my body would get there if I didn't...."

The police asked Vasquez to accompany them to Arlington County, where they questioned him again. He repeated his request to see his mother and additionally to see his psychiatrist, all to no avail. The second interrogation followed much the same pattern as the first. At some point, however, one officer left the interrogation room with the tape recorder, and during his absence Vasquez began giving a "dream" statement describing the details of the murder. The detectives described the "dream statement," only a portion of which recorded on audiotape, as "clear, certain. The vacancy was gone." The police arrested Vasquez after this statement and charged him with capital murder. After his arrest and processing, Vasquez repeated the "dream" statement again to the police.

In addition to his "confessions" and the eyewitness reports, the police found a hair at the crime scene that an expert concluded was "consistent" with Vasquez's hair and a pornographic magazine in Vasquez's home depicting a woman bound, gagged, and with a rope around her neck. However, Vasquez's blood type did not match the semen samples recovered from the victim and his shoes did not match shoe prints found outside the point of entry at the home.

Vasquez's attorneys moved to suppress all of his statements to the police. Although the court excluded the first two interrogations because the police had failed to advise Vasquez of his *Miranda* rights, it found Vasquez's last "dream" statement admissible because the *Miranda* warnings had been given and any taint from the *Miranda* violations had been removed. Faced with the possibility of the death penalty and the certainty that his own words would be used against him at trial, Vasquez accepted the

Commonwealth's Attorney's offer to plead guilty to second degree murder and burglary and the court sentenced him to thirty-five years in prison.

Almost three years later, after another murder with strikingly similar features, an Arlington detective began an investigation that convinced him that a serial murderer, Timothy Spencer, had committed several murders, including the one to which Vasquez pled guilty. The detective's exhaustive investigation ultimately persuaded the Commonwealth's Attorney that Spencer had committed the murder alone and that Vasquez was innocent, and the Commonwealth and the defense jointly sought a Governor's pardon. In January 1989, nearly five years after his arrest, Governor Gerald L. Baliles granted David Vasquez an absolute pardon, and he was released from prison.

3. Other Virginia Cases

Although the Washington and Vasquez cases are among the clearest instances of damaging false confessions, a number of the other cases the ICVA reviewed merit discussion.

i. Craig Bell

Craig Bell was convicted of murdering his fiancée in the middle of the night by stabbing her to death in their home. Although he consistently denied committing the crime in at least four unrecorded statements to the police,[74] the police claimed that Bell made inconsistent statements about important details of the crime to the police and to an emergency medical technician at the scene and used those inconsistencies to undermine Bell's credibility at trial. The police did attempt to videotape at least one of their interrogations of Bell, but discovered later that the audio portion of the recording failed to function. There was, thus, no independent basis on which the jury could weigh the veracity of these competing claims.

ii. Jeffrey Cox

Police arrested Jeffrey Cox six weeks after the abduction and murder of a sixty-three year old woman. During his unrecorded interrogation after his arrest, the police asked Cox where he was on the night of the murder. They also asked him whether he was at a party at Billy Madison's house, who unbeknownst to Cox was the prime suspect in the crime. Cox had been at a party at Madison's house around the time of the murder, and told police he was there on the night of the murder. It later turned out that Cox was

confused about the dates and had been with different people on the night of the murder. At trial, the prosecutor undermined Cox's alibi, and challenged the credibility of his alibi witnesses, because of Cox's prior statement to the police during his interrogation.

F. Best Practices for Interrogation Procedures

The crux of the problem posed by police interrogation practices that sometimes lead to false confessions stems from the fact that interrogations almost always occur in private and under circumstances in which the police are in complete control.[75] While the police sometimes make contemporaneous records of the course of interrogations – through notes, statements, or electronic recordings – suspects almost never do, and the police always control what parts of the interrogations or subsequent confessions are preserved, documented, or recorded. Moreover, police interrogation tactics are specifically designed to produce stress in suspects, which undermines the reliability of suspects' statements and actions during interrogations and purported confessions.

Police interrogation tactics are specifically designed to produce stress in suspects, which undermines the reliability of suspects' statements and actions during interrogations and purported confessions.

These realities create significant challenges for the judicial system when the reliability and truthfulness of confessions are considered in court. Because of the imbalance of power in the interrogation process and the tendency of juries and judges to believe the police version over those of criminal suspects, judges and juries are more inclined to accept the memories, perceptions, and assertions of the police over those of suspects when deciding whether confessions are true, or were the product of undue influence or coercion or, for some other reason, are, in fact, false.[76]

The number of known false confessions is substantial and steadily rising and the individual and societal costs are significant. Numerous experts, researchers, and a growing number of states and local jurisdictions have concluded that transparent interrogation practices that are comprehensively and accurately preserved for subsequent objective review are necessary to ensure the fair and reliable administration of justice. These jurisdictions have recognized that the best way to achieve these goals is to require their law enforcement agencies to videotape the interrogation of suspects.

For example, the highest courts in Alaska and Minnesota have mandated the electronic recording of custodial interrogations, with limited and carefully delineated exceptions.[77] Both courts have held that failure to comply with the videotaping requirements can lead to the exclusion of suspects' statements from court proceedings. Similarly, Illinois requires the

electronic recording of all custodial interrogations of juveniles.[78] In addition, effective July 18, 2005, Illinois will require the electronic recording of all custodial interrogations in homicide cases, unless a statutory exception applies.[79] Washington, D.C. law mandates the electronic recording of the interrogation of suspects in cases involving crimes of violence.[80]

In addition, a number of police departments have implemented the electronic recording of custodial interrogations of suspects in major felony investigations.[81] For example, Maryland's Prince George's County Police Department instituted mandatory videotaping of interrogations in all serious felonies in 2002.[82] In Florida, the Fort Lauderdale Police Department, the Broward County Sheriffs' Department, and the Miami Police Department all instituted mandatory videotaping in felony and/or homicide cases.[83]

Videotaping interrogations has garnered praise from participants in the criminal justice system in those jurisdictions that have adopted these procedures. According to Amy Klobuchar, the County Attorney for Hennepin County, Minnesota:

> At the time of the decision to require recording in Minnesota, most police and prosecutors in the state feared the new rule would make their jobs harder and undermine the cause of justice. But . . . it has become clear that video-taped interrogations have strengthened the ability of police and prosecutors to secure convictions against the guilty. At the same time, they have helped protect the rights of suspects by ensuring the integrity of the criminal justice process.[84]

Many law enforcement agencies surveyed from across the country about recording interrogations were "enthusiastically in favor of the practice."

The Supreme Court of Minnesota also noted the benefits from the preservation of valuable resources that seemingly have flowed since its decision to require interrogations to be videotaped, stating that since the Court mandated the recording of interrogations "fewer cases come before [the Court] in which a key issue is whether the suspect waived his or her constitutional rights during interrogation . . . ." [85] The Supreme Court of Minnesota stated that mandatory recordings "make it possible for defendants to challenge misleading or false testimony, reduce baseless claims against the state, and discourage unduly coercive police tactics." [86]

Significantly, a recent review identified more than 260 law enforcement agencies in 42 states that currently record custodial interrogations in many felony investigations. It found that "[v]irtually every officer with whom [the authors] spoke, having given custodial recordings a try, was enthusiastically in favor of the practice."

To prevent false confessions, some police departments also have instituted new procedures governing the interrogation of suspects with developmental disabilities. For example, the Broward County Sheriff's Department trains its deputies in recognizing developmentally disabled suspects and instructs them how to advise these subjects of their constitutional rights in understandable ways. That department also trains its officers to avoid leading or suggestive questions and questions that tell suspects the answers the officers are seeking.[89]

G. Recommendations for Reform in Virginia for Custodial Interrogations

The ICVA recommends that the Virginia General Assembly adopt mandatory rules requiring police and other law enforcement departments to comprehensively videotape, whenever practical, all custodial interrogations in serious felony cases. In those situations where videotaping interrogations is not possible, law enforcement should be required to use audiotape to record custodial interrogations in serious felony cases.

Uniform, thorough, and mandatory videotaping policies can save valuable police, prosecution, and judicial resources that might otherwise be spent on unnecessary pre-trial hearings and post-conviction challenges to legitimate convictions. It will create powerful evidence of guilt in the vast number of instances when suspects make reliable, genuine confessions to crimes they did commit. It also will reduce the number of frivolous challenges alleging that police either failed to advise suspects of their rights or did so in an inadequate manner, alleging that police used improper or high pressure interrogation practices, or alleging that incriminating statements were never made. In sum, recording interrogations will provide accurate, complete, and incontrovertible records that can objectively portray police interrogation practices and the physical, mental, emotional or other limitations or attributes of suspects that can, at times, contribute to or produce false confessions.

As with the recommendations in the previous section concerning eyewitness identification procedures, the following recommendations concerning interrogation practices should be achieved by legislation mandating the recording of interrogations in all serious cases whenever practicable; judicial decisions enforcing sanctions for the unexcused failure to comply with videotaping requirements; and videotaping policies and procedures implemented by law enforcement agencies at the local level.

1. **The Virginia General Assembly should require law enforcement personnel to videotape custodial interrogations of suspects in all homicide and serious felony cases, to the extent practicable.**

The ICVA recommends that the Virginia General Assembly adopt rules requiring law enforcement officers to videotape the custodial interrogation of suspects in homicide and serious felony cases whenever practicable. At a minimum, law enforcement should be required to use audiotape to record interrogations when videotaping is not practicable. Videotaping interrogations is the only reliable way to accurately record the verbal and nonverbal behavior and communication of police and suspects during custodial police questioning.[90] Audiotape fails to capture their body language, facial expressions, and demeanor, the physical proximity of the interrogators to the suspects, and myriad other factors that potentially can contribute to or induce false confessions, but is preferable to failing to electronically record interrogations at all.

Videotaping interrogations is the only reliable way to accurately record the verbal and nonverbal behavior and communication of police and suspects during custodial police questioning.

Law enforcement officers are not required, under current Virginia law, to obtain suspects' consent or even inform them that their interrogations are being electronically recorded.[91] Surreptitious recording of custodial interrogations is advantageous to law enforcement because it reduces the likelihood that suspects will measure their words, perform for the camera, or engage in other behavior that interferes with the interrogation process.

In the past, videotaping of all police questioning has been impractical; after all, police frequently question potential suspects at crime scenes, in their homes, at work, or in other locations where videotape equipment is not generally available. However, recent technological advances, including portable cameras and digital cameras, make videotaping and storing recorded interrogations more practical and affordable. This is all the more true when police and other law enforcement agencies use specifically designated rooms for custodial interrogation in their station houses. These areas can be, and often are, outfitted with videotape equipment that should be used to record custodial interrogations.

Recent technological advances, including portable and digital cameras, make videotaping and storing recorded interrogations more practical and affordable.

The ICVA recognizes that some Virginia law enforcement agencies, particularly smaller agencies, do not yet have videotape technology. Other jurisdictions have used federal law enforcement block grants that every state receives to fund the purchase of videotape equipment for interrogation purposes. The ICVA recommends that Virginia allocate some of its law enforcement block grant funds to assist local law enforcement agencies with the purchase of videotape equipment to be used to record custodial

interrogations. In the interim, the ICVA recommends that Virginia require law enforcement agencies that do not currently have videotape equipment to use audiotape to record interrogations, until all law enforcement agencies in the Commonwealth are able to install videotape technology. The additional recommendations described below for videotaping interrogations should apply equally to interrogations preserved by audiotape.

2. **The Virginia General Assembly should require law enforcement personnel to record the entire interrogation process, including the initial advice of rights given to suspects, from the beginning of custodial interrogation in the stationhouse until the point when all police questioning has ended.**

The benefits of mandatory videotaping of custodial interrogations for the accurate administration of justice can be achieved only if the entire interrogation process is recorded, from the initial *Miranda* warnings until the interviewing has ended.

The benefits of mandatory videotaping of custodial interrogations for the accurate administration of justice can be achieved only if the entire interrogation process is recorded, from the initial *Miranda* warnings until the interviewing has ended. Historically, police have often only documented custodial interrogations, either through written documents or electronic recordings, sometime after questioning has started and frequently only after suspects have begun to make incriminating statements. Requiring videotaping of custodial interrogations from the very beginning of police questioning in the stationhouse, including the initial *Miranda* warnings, through the very end of the police questioning will accurately and objectively preserve all of the police conduct and suspect behavior during the interrogation process.

A Florida wrongful conviction is an extreme example of the problem posed by taping only part of an interrogation:

> What jurors in the Behan murder case saw: a bland muddled 14-page narrative in which a 15-year-old mentally retarded Timothy Brown implicates himself in the shooting of Broward sheriff's Deputy Patrick Behan. What jurors did not see: the almost three-hour interrogation that preceded that "confession," an off-the-record span during which Brown claims he was screamed at, smacked, and menaced with a detective's revolver.[92]

Videotaping should start as soon as the police begin questioning a suspect in the stationhouse, and before the police first advise suspects of their *Miranda* rights. This will help eliminate many frivolous claims that improper or no warnings were given to suspects, and in some cases may verify that *Miranda* warnings were not properly administered. Every time the recording is interrupted, the police should be required to note the time

and reason for the interruption of the videotape and note the time that the videotaping resumed. This will ensure that the complete interrogation has been recorded and will prevent allegations that gaps in the recording of interrogations occurred.

Complete, recorded interrogations protect law enforcement officers against spurious claims of misconduct and are powerful evidence supporting valid confessions. Sometimes, recorded interrogations may expose false or otherwise unconstitutional confessions.

3. **The Virginia General Assembly should provide that failure to record an entire, complete custodial interrogation would make any confession obtained from that interrogation potentially subject to a general exclusionary rule.**

To ensure that law enforcement agents have an incentive to comply, the new legislation governing custodial interrogations should provide that the failure to record an entire, complete custodial interrogation would make any confession obtained from that interrogation potentially subject to a general exclusionary rule. The ICVA recommends that substantial violations of rules requiring videotaping of complete custodial interrogations should lead to suppression of any statements made by suspects during such interrogations. The ICVA further recommends that any violation of the videotaping rules be presumed to be substantial unless the prosecution proves by a preponderance of the evidence that the violation was not substantial.

Complete, recorded interrogations protect law enforcement officers against spurious claims of misconduct and are powerful evidence supporting valid confessions.

The Constitution Project has proposed carefully crafted rules, based on the American Law Institute's Model Code of Pre-Arraignment Procedure, delineating those violations of videotaping requirements that should be deemed substantial. The ICVA recommends that the Virginia General Assembly and courts adopt the Constitution Project's substantial violation standards, which will be available on the Constitution Project's web site, http://www.constitutionproject.org.[93] Consistent with the Constitution Project's standards, examples of substantial violations requiring the suppression of a suspect's statement would include the failure to use interrogation rooms outfitted with videotape technology when such facilities exist and intentional efforts to induce suspects to waive the right to the complete recording of custodial interrogations.

On the other hand, excusable failures to electronically record that would not lead to the suppression of suspects' statements would include unavoidable

power or equipment failures and the refusal of suspects to speak on tape.[94] Even in these circumstances, the ICVA recommends that trial courts provide cautionary instructions to juries that they should consider the lack of recording when deciding what was said and done and whether the purported statement was voluntary.

4. **Law enforcement officers should avoid using high pressure interrogation practices when questioning children and suspects who have developmental disabilities.**

The David Vasquez and Earl Washington cases illustrate the nationwide experience with false confessions; often the most vulnerable members of society are the most susceptible to the pressures of interrogation and sometimes those pressures cause them to falsely confess. For these reasons, many experts recommend that when police interrogate children or those they have reason to believe have mental retardation or other significant developmental disabilities, care should be taken to avoid high pressure, suggestive interrogation techniques because of the heightened possibility of eroding the reliability of these suspects' statements and the danger of inducing false confessions.

Virginia law enforcement agencies should adopt policies that prohibit the use of these high pressure interrogation techniques in these kinds of cases. Law enforcement officers have long been trained in the techniques for avoiding leading, suggestive questions when interviewing child victims, and these same techniques should be applied when questioning all vulnerable suspects, including those with developmental or mental disabilities. Law enforcement agencies also should provide training to their officers in identifying adults with intellectual deficits, as the Broward County Sheriff's Office has done.

5. **Virginia courts should permit, in appropriate cases, the introduction of expert testimony concerning the factors that can contribute to false confessions.**

Virginia law currently permits defense expert testimony about the factors that can lead suspects suffering from mental retardation to falsely confess to crimes that they did not commit. However, no reported Virginia appellate court decision addresses the admissibility of expert testimony on the factors contributing to false confessions in cases where the defendants do not suffer from any intellectual deficits.

Several research studies documenting proven false confession cases, many of which have been verified by DNA evidence, show that the majority of individuals who falsely confess possess normal intellectual functioning and are not mentally retarded. Expert testimony that can explain to jurors, in a general way, the factors that can lead people with normal intellectual capabilities to falsely confess will aid jurors in understanding a phenomenon that is not generally understood by lay people. The ICVA recommends that, in appropriate cases, the Virginia courts permit the introduction of such expert testimony whether or not the defendant suffers from mental retardation.

III. Discovery Practices

A. Introduction

The American criminal justice system is based on an adversarial model that places significant burdens on defendants to protect their own rights and interests and to discover the evidence that exists in the case that might be in the possession of the prosecution. In criminal cases, the initial gathering of evidence is normally done by the police and the prosecution. This information is almost never shared with defendants before formal charges are sought, and oftentimes, much of the evidence discovered by the police and prosecution is not shared even after charges have been filed. Nevertheless, information about the government's evidence against the accused, which is commonly called "pre-trial discovery," is critical to ensuring that the truth is revealed and avoiding the conviction of an innocent person. Pre-trial discovery is critical in order for defense counsel to adequately prepare for trial, confront the witnesses against the defendant, and advise the defendant on the strength of the prosecution's case and on the acceptability of any plea offer.

"Pre-trial discovery" is critical to ensuring that the truth is revealed and avoiding the conviction of an innocent person.

Fundamental constitutional due process rules require the government to disclose limited information to the defense in order to ensure a fair trial, including obviously exculpatory evidence. Some states have discovery rules that go substantially beyond the limited constitutional requirements and provide defendants with more disclosure of the government's evidence which allows them to better prepare for trial. In addition, some prosecutors have policies permitting open-file discovery in which they essentially share with the defense all of the information law enforcement has gathered in the case, except for confidential or privileged materials.

Nevertheless, because common discovery rules in criminal cases generally mandate that only limited information be disclosed to the defense, many defendants go to trial without a full understanding of the evidence and information in the prosecution's possession. This discovery tradition does not promote the thorough and adequate preparation by the defense for trial. Inadequate preparation by trial counsel can play a significant role in wrongful convictions.

Inadequate preparation by trial counsel can play a significant role in wrongful convictions.

B. Virginia Law on Discovery

Defendants' discovery rights in criminal cases in Virginia are limited. The Virginia rules governing discovery give defendants the right to copy any written statements or confessions and the substance of any oral statements made by defendants to the police. These rules also entitle defendants to copy the written scientific reports of the Commonwealth's experts, but not the work notes or memoranda on which the reports were based.[95] The rules further provide that if defendants can show that physical evidence in possession of the Commonwealth – including papers, documents, or tangible objects – may be material to preparation of their defense, the courts may order that defendants be permitted to inspect, copy, or photograph such evidence if the requests are reasonable.[96] Finally, prosecutors in Virginia are obligated to provide to the defense exculpatory evidence in their possession or in the possession of others acting on the Commonwealth's behalf, including the police.[97]

Defendants in Virginia are not legally entitled to and often do not receive other types of discovery that are generally provided to the accused in other jurisdictions.

Defendants in Virginia are not legally entitled to and often do not receive other types of discovery that are generally provided to the accused in other jurisdictions. For example, Virginia defendants preparing for trial are not entitled to the names and addresses of eyewitnesses to a crime, nor can they insist that the Commonwealth provide the names of its trial witnesses until the trial begins.[98] They are not entitled to written or oral statements made by prospective Commonwealth's witnesses to police officers in connection with an investigation or prosecution, unless such statements are exculpatory,[99] or to copies of police investigative reports.[100] When Commonwealth witnesses at trial have given previous statements to the police, defendants are not permitted to obtain copies of those statements after the witnesses testify on direct examination in order to cross examine the witnesses about inconsistencies between their statements.[101]

C. Virginia Commonwealth's Attorney Procedures and Practices Concerning Discovery

The ICVA surveyed Commonwealth's Attorneys about their discovery practices, seeking to understand under what circumstances they do or would share information with the defense. As Table Four indicates, half of the offices that responded to the survey provide the minimum required by law. Perhaps a better way of stating this result is that half of the responding Commonwealth's Attorneys Offices provide *more* discovery than is required by law. About forty percent of offices disclose investigative reports from police officers. A similar number provide witness statements. One-third of offices offer the names and addresses of the Commonwealth's witnesses who will testify at motion hearings or trial, while a quarter of prosecutors' offices provide summaries of reports from laboratory technicians or forensic experts if written reports are not prepared. Finally, twelve percent of offices disclose officers' field notes, and just four percent provide bench or lab notes from forensic experts.

TABLE FOUR – PROSECUTORS' DISCLOSURE PRACTICES

Disclosure Policy	% Responding Offices
Minimum Required by Law	50
Officers' Investigative Reports	42
Witness Statements	38
Names/Addresses of Witnesses	33
Summaries of Labs	25
Officers' Field Notes	12
Bench or Lab Notes	4

N = 26

When prosecutors were asked why they maintained an open file policy, their answers generally focused on issues of fairness and making sure that they comply with legal requirements to provide exculpatory evidence to the defense. As one office responded, the policy "avoids [the] failure to disclose exculpatory evidence" by forcing the "defendant to take responsibility for" investigating the case. Said another, "it is both fair and practical in day-to-day cases." Other offices said the policy helped to make prosecutions more efficient, including that open files policies help to "better identify cases that require trial or not," lead to "better plea negotiations,"

When prosecutors were asked why they maintained an open file policy, their answers generally focused on issues of fairness and making sure that they comply with legal requirements to provide exculpatory evidence to the defense.

and insulate the office from the failure to disclose evidence while having little practical effect on the success of prosecutions.

A 2004 report by the Spangenberg Group commissioned by the American Bar Association comprehensively reviewed the indigent defense system in Virginia, including the discovery process.[102] The Spangenberg Report was based on in-depth interviews with judges, court clerks, prosecutors, public defenders, and court-appointed attorneys in thirteen of Virginia's thirty-one judicial circuits and reviews of documents, databases, and other information. That report found that in many criminal cases in which prosecutors do not have defendant statements and obviously exculpatory information, defense counsel receive no discovery at all, not even the police reports that form the basis for the criminal accusations against the defendants.

Three of the eleven cases of official exonerations that the ICVA investigated involved failures by the police and prosecutors to reveal critical exculpatory information to the defense, the disclosure of which could have played a role in preventing these unjust convictions.

Furthermore, the Spangenberg Report noted that in a number of counties, including even those with purported "open file discovery" policies, the discovery is dependent upon an individual defense lawyer's relationship with the Commonwealth's Attorney, and that sometimes defense counsel receive more discovery if they choose not to file formal discovery requests with the court. Finally, that report found that even in counties in which the prosecutors have express "open file discovery," defense counsel sometimes believe the prosecutors do not share everything with them.[103] Conversely, however, some Commonwealth's Attorneys offices surveyed by the ICVA reported that "some defense attorneys never look at the files."

D. Discovery Issues in the Cases of Virginia Exonerees

Three of the eleven cases of official exonerations that the ICVA investigated involved failures by the police and prosecutors to reveal critical exculpatory information to the defense, the disclosure of which could have played a role in preventing these unjust convictions. These findings are consistent with national studies of wrongful convictions that find that failures to disclose exculpatory information to the defense and other discovery violations play significant roles in the conviction of innocent people.[104]

1. Walter Snyder

In the Walter Snyder case, the police failed to disclose to the defense that the rape victim initially told them that the room was dark and she could not see the face of the rapist, although she later testified at trial that she could

see his face and identified Snyder as the perpetrator. Similarly, the police never disclosed that when the victim looked at a photo array of suspects, she indicated that four of them, not including Snyder, looked familiar and also stated that Snyder's eyebrows looked familiar, but that she was not prepared to identify Snyder as the rapist. The detective instead testified at trial that the victim positively identified Snyder as the rapist during this procedure. Finally, the victim told police that her attacker had smooth, soft hands and smelled like alcohol and body odor, but these facts were never disclosed to the defense. Instead, after learning that the police suspect, Snyder, worked with his hands as a heating and cooling repairman and lived in the basement of his parent's home, the victim testified at trial that the rapist smelled of alcohol, smoke and "a musky-type odor . . . kind of a combination of oil and a basement."

2. Edward Honaker

In the Edward Honaker case, the rape victim and her male companion told a park police ranger that the rapist drove a yellow or light colored truck. The victim further told the ranger that the attacker wore a very large crucifix and she indicated that "she was not allowed to clearly see the individual during the entire sequence of events." All of this information was contained in the park ranger's written report, which was never turned over to the defense. At trial, both the victim and her companion identified Honaker's blue truck as the one driven by the rapist. The prosecution also introduced into evidence at trial a small crucifix belonging to Honaker that was seized from his home, suggesting that this was the one identified by the victim.

Finally, and most importantly, the police and prosecution never revealed to the defense that four months after the crime, the rape victim and her boyfriend were hypnotized, and for the first time identified Honaker's photograph as that of the rapist. Nor did the prosecution disclose that the two witnesses were together during the hypnosis while they were viewing photographs. Under Virginia law at the time, these witnesses' post-hypnotic recollections, their out-of-court identification of Honaker's photograph, and their in-court identification of Honaker as the rapist would not have been admissible at trial.[105]

3. Jeffrey Cox

The police and prosecutors failed to disclose to the defense in Jeffrey Cox's case significant information that would have undermined the credibility of the two key prosecution eyewitnesses in the case. The police and

prosecutors never revealed that one of the two witnesses who identified Cox as the kidnapper had multiple felony convictions. The prosecution also failed to correct the record at trial when the witness perjured himself about his criminal record. Nor did the prosecution disclose that the other eyewitness had pending criminal charges for failing to appear in court when she identified Cox at a pre-trial hearing. In addition, this witness was being prosecuted for trespassing and assault by the same Commonwealth's Attorney's office that was prosecuting Cox for abduction and murder. The prosecutor put her charges on hold until after Cox was convicted, when the charges were dismissed. Instead of sharing this information with the defense, the prosecutor vouched for the veracity of both witnesses in his closing argument when he stated:

> Now, what did we produce to convince you beyond a reasonable doubt? We took two eyewitnesses, not one, but two people who have absolutely no axe to grind, and no reason to come in here and misidentify anybody. They are simply citizens in the City of Richmond that happen to be living in the community on the night this occurred.

The prosecution also did not provide to the defense a forensic laboratory report that indicated that two hairs found on the victim's body were very fine, white Caucasian hairs, which could not have matched Cox's brown hair. The police also did not turn over a second, exculpatory composite drawing that differed from one provided to the defense, nor did they disclose a "Crime Stoppers" report containing descriptions of the abductor derived from the government's two eyewitnesses that did not match Jeffrey Cox's physical description.

E. Best Practices for Discovery Procedures

In civil litigation, where parties' contractual, statutory or other rights are contested, the American legal tradition permits thorough and oftentimes exhaustive discovery of the evidence and information possessed by the opposing side. Civil litigation often requires parties to share documents and to respond in writing to questions or "interrogatories" from the opponent, and permits parties to depose key witnesses under oath. In contrast, in criminal cases in which defendants' liberty and sometimes their lives are at stake, prosecutors' obligations to share information are drastically more limited.

Over thirty years ago, the Criminal Justice Section of the American Bar Association ("ABA") created a comprehensive set of Criminal Justice Standards addressing every facet of the criminal justice system, including the discovery process.[106] When the ABA issued the initial seventeen volume standards in 1968, United States Supreme Court Chief Justice Warren Burger described the project as "the single most comprehensive and probably the most monumental undertaking in the field of criminal justice ever attempted by the American legal profession in our national history." [107]

The ABA Discovery Standards are designed to promote the fair and expeditious resolution of criminal cases, to provide defendants with sufficient information to make informed plea decisions, to permit thorough preparation for trial and minimize surprise, to reduce trial interruptions and delays, to conserve judicial and professional resources, and to minimize burdens on victims and witnesses.[108] To this end, the Second Edition of the Discovery Standards states that prosecutors should disclose the following information to the defense within a reasonable time before trial and permit the defense to inspect, copy, test and photograph documents and tangible objects: [109]

- All written and all oral statements of the defendant or of any co-defendant that are within the possession or control of the prosecution and that relate to the subject matter of the offense charged, and any documents relating to the acquisition of such statements.

- The names and addresses of all persons known to the prosecution to have information concerning the offense charged, together with all written statements of any such person that are within the possession or control of the prosecution and that relate to the subject matter of the offense charged. The prosecution should also identify the persons it intends to call as witnesses at trial.

- The relationship, if any, between the prosecution and any witness it intends to call at trial, including the nature and circumstances of any agreement, understanding or representation between the prosecution and the witness that constitutes an inducement for the cooperation or testimony of the witness.

- Any reports or written statements of experts made in connection with the case, including results of physical or mental examinations and of scientific tests, experiments, or comparisons. With respect to each expert whom the prosecution intends to call as a witness at trial, the

prosecutor should also furnish to the defense a curriculum vitae and a written description of the substance of the proposed testimony of the expert, the expert's opinion, and the underlying basis of that opinion.

- Any tangible objects, including books, papers, documents, photographs, buildings, places, or any other objects, which pertain to the case or which were obtained for or belong to the defendant. The prosecution should also identify which of these tangible objects it intends to offer as evidence at trial.

- Any record of prior criminal convictions, pending charges, or probationary status of the defendant or of any codefendant, and insofar as known to the prosecution, any record of convictions, pending charges, or probationary status that may be used to impeach any witness to be called by either party at trial.

- Any material, documents, or information relating to lineups, show-ups, and picture or voice identifications in relation to the case.

- Any material or information within the prosecutor's possession or control which tends to negate the guilt of the defendant as to the offense charged or which would tend to reduce the punishment of the defendant.

- If the prosecution intends to use character, reputation, or other act of evidence, the prosecution should notify the defense of that intention and of the substance of the evidence to be used.

- If the defendant's conversations or premises have been subjected to electronic surveillance (including wiretapping) in connection with the investigation or prosecution of the case, the prosecution should inform the defense of that fact.

- If any tangible object which the prosecutor intends to offer at trial was obtained through a search and seizure, the prosecution should disclose to the defense any information, documents, or other material relating to the acquisition of such objects.

Many states have adopted discovery rules in criminal cases that are modeled on the expansive policy urged by the ABA Discovery Standards. At least twenty-one states require prosecutors to provide to the defense most of the information called for by the ABA Discovery Standards,[110] and

more than half the states require prosecutors to provide the majority of this information to defendants.[111] In contrast, only three states entitle defendants to as little discovery as prosecutors are obligated to provide in Virginia,[112] and no state allows prosecutors to provide less discovery than is required under Virginia procedures.[113]

F. Recommendations for Discovery Practice Reform in Virginia

Discovery problems contributed to some of the wrongful convictions investigated by the ICVA. In some instances, the undisclosed information was obviously exculpatory and the failure to disclose was in violation of existing law. However, in other instances, the information that was not disclosed was not as obviously exculpatory from the perspective of the prosecution but clearly would have been viewed as exculpatory by defense counsel. Much of this information was contained in police reports or witness statements that could have been used by the defense to cast doubt on the government's case had the reports been shared. In some of the cases, forensic reports that supported the defense theory were never shared with the defense.

Only three states entitle defendants to as little discovery as prosecutors are obligated to provide in Virginia, and no state allows prosecutors to provide less discovery than is required under Virginia procedures.

No matter the reason that exculpatory material was not provided to the defense in these cases, there seems little question that more expansive discovery might have prevented the wrongful conviction of innocent defendants. Reforming the discovery process by mandating the disclosure of more information through open file discovery procedures would help make sure that failure to disclose does not contribute to future wrongful convictions.

1. Virginia should amend the formal discovery rules to mandate open-file discovery procedures.

The ICVA recommends that the General Assembly and the courts require that Commonwealth's Attorneys share with the defense all the information that law enforcement and prosecutors have collected and have in their files, except for confidential and privileged information or any information that, if disclosed, could endanger witnesses or otherwise pose substantial threats to public safety. In these instances, prosecutors should be required to clearly demonstrate the need to withhold this information.

Virginia's current discovery rules are among the most restrictive in the nation, providing criminal defendants with little more than what is constitutionally mandated. Currently, Virginia prosecutors are not required

to disclose any of the following information to the defense, unless it contains exculpatory material:

- the names and addresses of prosecution witnesses;
- the investigative reports prepared by law enforcement officers;
- the statements made by codefendants to a State agent which the Commonwealth intends to use at a joint hearing or trial, the substance of such oral statements, and copies of reports containing the substance of such oral statements;
- written witness statements and summaries of oral statements given to the law enforcement officers by witnesses;
- relevant information or material regarding specific searches and seizures, wiretaps or eavesdropping, the acquisition of statements made by the defendant to a State agent that the Commonwealth intends to use at a hearing or trial, and pretrial identification of the defendant by a witness for the Commonwealth.

Prosecutors who practice open file discovery report that their policies do not hamper prosecutions but do limit discovery battles and often encourage defendants to plead guilty because the evidence against them is transparent.

The ICVA believes that mandating disclosure of these types of materials will, as in other jurisdictions around the country, help the prosecution determine which cases should be tried and encourage guilty pleas rather than wasting scarce resources on needless trials. At the same time it imposes no additional burden on police, prosecutors, victims or witnesses, and assists in the prevention of future wrongful convictions.

In practice, approximately half of the Commonwealth's Attorneys surveyed by the ICVA already provide more discovery than is required by the United States Constitution – a practice that the ICVA applauds. Forty-one percent of the Commonwealth's Attorneys surveyed have already adopted "open file" discovery policies consistent with the ICVA's recommendations. Those prosecutors who practice open file discovery report that their policies do not hamper prosecutions but do limit discovery battles and often encourage defendants to plead guilty because the evidence against them is transparent. Because the open file discovery practices that already have been adopted by a substantial number of Virginia prosecutors not only streamline the administration of justice but also can prevent wrongful convictions, the ICVA recommends adoption of these procedures throughout the Commonwealth.

IV. Unwarranted Focus on Single Suspect or "Tunnel Vision"

A. Introduction

It is a basic premise of the criminal justice system that law enforcement officers operate in good faith and that when they target a suspect they genuinely believe that the suspect is the perpetrator. Most of the time the suspect is in fact truly guilty. However, as the cases reviewed by the ICVA illustrate, sometimes innocent people are mistakenly arrested, charged, and convicted.

Many cases of wrongful conviction involve high profile and heinous crimes, which can create intense pressure on the police to solve the crimes and to solve them quickly. In some cases the pressure to solve the crime quickly may have contributed to a police tendency to focus too narrowly on a single suspect even when the evidence was questionable and suggested the suspect's innocence.

The phenomenon in which the police too quickly jump to the conclusion that a particular suspect is guilty or focus solely on one person to the exclusion of other viable suspects is commonly referred to as "tunnel vision." [114] Police officers do not deliberately or knowingly engage in tunnel vision, but its existence leads officers to focus on, investigate, and gather evidence that supports the conclusion that the suspect is guilty and to disregard evidence that might lead to another suspect. As part of the tunnel vision process, the police may minimize or even sometimes ignore evidence that suggests the suspect is innocent, that might undermine the evidence of guilt against the suspect, or that indicates that another suspect may have committed the crime. Prosecutors and judges also can be susceptible to a form of tunnel vision. When prosecutors discount exculpatory evidence and when judges reject contrary evidence, the consequences are similar to those that flow from police tunnel vision.

B. Tunnel Vision in the Cases of Virginia Exonerees

Eight of the cases studied by the ICVA may have involved tunnel vision. Tunnel vision seems to be particularly problematic when the police focus on a suspect for reasons that seem due to chance. This does not mean to suggest that police officers should not follow their instincts or should not follow-up potentially remote leads. However, officers should be alert and sensitive to the dangers of tunnel vision in these situations.

1. Marvin Anderson

The only reason Marvin Anderson, who had no criminal record, became a suspect was because the rape victim said that her attacker was a black man who said he had a white girlfriend, and Anderson was the only black man the investigating police officer knew who dated a white woman. Yet, Marvin Anderson did not match the physical description of the assailant given by the rape victim; she described her attacker as 5'4" to 5'7" in height with a thin moustache, and she told police that she scratched her assailant. Marvin Anderson was 5'9" tall, had a dark complexion, did not wear a moustache, and had no scratches when he was interviewed by police shortly after the crime.

The only reason Marvin Anderson became a suspect was because the rape victim said that her attacker was a black man who said he had a white girlfriend, and Anderson was the only black man the officer knew who dated a white woman.

Moreover, soon after the rape occurred, rumors circulated in the community that Otis "Pop" Lincoln actually committed the crime. Lincoln had served jail time for a prior sexual attack and was awaiting trial on another sexual assault on a female college student at the time of this crime. Witnesses near the site of the rape, shortly before it occurred, saw Lincoln riding a bicycle, heard him make sexually suggestive comments to young girls walking by and comments suggesting he might sexually force women against their will, and then saw him ride toward the area where the rape occurred.

Nevertheless, the police apparently ruled out Lincoln as a suspect once the victim viewed a photograph of Anderson and identified him as her rapist. Anderson was promptly charged with the rape. Six years later, Lincoln testified in court during Anderson's *habeas* proceeding that he had robbed and raped the victim, but the prosecutors and the court rejected his confession. More than a decade later, DNA evidence proved that Lincoln committed the rape.

2. Julius Ruffin

Julius Ruffin became a police suspect because of a chance encounter that he had with the rape victim in an elevator. Like Marvin Anderson, Ruffin did not match the physical description given by the victim of the rapist in his case. Ruffin was 6'1" tall, weighed 170 pounds, is a light-skinned black man, has prominent gold front teeth, and had facial hair at the time of the attack. By contrast, the victim in his case described her attacker as a 5'6" tall, 150 pounds, dark-skinned black man, and did not describe gold teeth or facial hair.

3. David Vasquez

Two witnesses reported seeing David Vasquez in the area around the time of the murder and described him as someone who had acted strangely in the past. The police appropriately considered Vasquez as a possible suspect or at least as someone they should interview. The police interrogated Vasquez and obtained a confession from him, but his confession contained many clues that should have led police to be wary of it, since it contained few, if any, details of the crime and the details Vasquez gave did not match the known facts of the crime. Even after confessing, Vasquez continued to express confusion about how he could have gotten from his home in a different county to the victim's home. Moreover, Vasquez's blood type did not match the perpetrator's semen. Even though the police apparently recognized that Vasquez had neither the physical ability nor the intellectual capacity to commit the crime by himself, the police clung to the idea that Vasquez was involved even though no other evidence linked him to the crime other than his confession.

4. Earl Washington

Similarly, Earl Washington was charged with murder by the police based almost exclusively on his muddled confession a year after the crime occurred. Police very quickly eliminated Washington as a suspect in four other unrelated burglaries to which he confessed at the same time, but persisted in their investigation of him for the murder. Washington's confession in the murder case was riddled with inconsistencies and glaring errors – such as getting the race of the victim wrong – but the police discounted those mistakes and proceeded in charging him with the murder.

5. Russell Gray

In Russell Gray's case, there was certainly reason to focus on Gray early in the investigation: an eyewitness identified Gray as the shooter in the murder, and another witness picked out his picture as someone whom she saw in the area of the shooting. However, the police interviewed only three of the many witnesses who had information about the crime and never spoke with witnesses later identified by the defense as having critical and exculpatory information. Moreover, persistent rumors circulated in the neighborhood and apparently came to the attention of the police that Michael Harvey, the actual shooter, committed the murder. The prosecutor

who later helped exonerate Gray remarked that "[t]here were a ton of people who could have testified that didn't [testify]. . ." and as a result "we ended up trying a case with half the evidence and convicted the wrong man." [115]

6. Craig Bell

Craig Bell was accused and convicted of murdering his girlfriend principally because of purported inconsistencies among the several unrecorded statements he gave to the police, because his blood type matched the murderer's, and because he smoked the same type of cigarettes and had the same style of underwear as the actual murderer. However, a number of facts suggesting that Bell did not murder his girlfriend were apparently discounted by police and rejected by the jury. First, the police found a window screen knocked out and a lamp hanging outside a downstairs window, which suggested someone entered or fled the home through the window. A partial palm print on the window, which was later found to match the real killer, did not match Bell or anyone else who lived or visited the home. Finally, community members reported seeing a naked black man running through the neighborhood the night that Bell's girlfriend was murdered, and the real killer later told police that he was naked when he fled Bell's home.

7. Jeffrey Cox

Jeffrey Cox's photograph was included in photo arrays shown to the two eyewitnesses in his case because one of the original suspects, Steven Hood, told police that Cox was known to spend time with the other prime suspect, Billy Madison. The police originally focused on Madison and Hood because they believed the abduction and murder were drug-related, they knew that Madison had recently been beaten up by a drug dealer during a drug transaction, and they suspected that Madison and Hood were out for revenge in the neighborhood where the victim lived. However, when two witnesses tentatively selected Cox's photograph in a photo array as resembling the knife-wielding kidnapper, the police ended their investigation of Madison and Hood and focused exclusively on Cox. The work of an FBI agent [116] who became convinced of Cox's innocence, along with the efforts of Cox's new lawyers, led not only to Cox's exoneration, but also to Hood's arrest and conviction for this crime over a decade after it had occurred.

8. Arthur Whitfield

The police focused on Arthur Whitfield because he was a suspect in an attempted burglary that occurred on the same evening, around the same time, and in a nearby neighborhood as the rapes for which he was later charged, and the burglar, like the rapist, carried a knife. Certainly, the police had strong reasons to suspect that Whitfield was the rapist.

However, obvious evidence known by the police strongly suggested that Whitfield could not be the rapist. The second rape victim stated that her assailant was kissing and necking her during the sexual assault. She told the police that the rapist had no facial hair, a fact of which she was likely certain given the kissing and necking by the rapist. Whitfield, however, had a heavy moustache a week after the rapes when he appeared in a police lineup, and the police took photographs showing his moustache that same day.

C. Best Practices to Avoid Tunnel Vision

Several recent studies into wrongful convictions have concluded that police training is the key to help officers avoid tunnel vision during their investigations.[117] These studies suggest that the police should be trained to pursue all reasonable investigatory leads, even those that point away from the suspect, and that they should be trained to document all exculpatory evidence that indicates that a suspect may not be guilty of the crime being investigated, and to include all this information in their official police reports. Some commentators have recommended that case studies of wrongful convictions be used in order to highlight the dangers presented by tunnel vision.[118]

Several recent studies into wrongful convictions have concluded that police training is the key to help officers avoid tunnel vision during their investigations.

D. Recommendations for Reform in Virginia Concerning Tunnel Vision

1. **Tunnel vision, in which officers jump too quickly to the conclusion that a particular suspect is guilty or focus solely on one person to the exclusion of other viable suspects, is a special danger in law enforcement. Law enforcement agencies should train their officers to document all exculpatory, as well as inculpatory, evidence about a particular suspect/individual that they discover and to include this information in their official reports to ensure that all exculpatory information comes to the attention of prosecutors and subsequently to defense attorneys.**

2. **Law enforcement agencies should train their officers to pursue all reasonable lines of inquiry, whether they point toward or away from a particular suspect.**

3. **During the initial training of their officers and during refresher training for experienced officers, law enforcement agencies should present studies of wrongful convictions to highlight the pitfalls of "tunnel vision."**

V. Defense Counsel

A. Introduction

In five of the eleven wrongful convictions, defense lawyers failed to disclose serious conflicts of interest, failed to appreciate the appearance of a conflict of interest, failed at trial to use clearly exculpatory information in their possession, failed to vigorously challenge the government's evidence, and/or missed crucial deadlines.

Criminal defendants, like most laypeople, usually are ignorant of the complexities of the criminal justice system and thus depend upon their attorneys to protect their rights. When their lawyers fail to fulfill their obligations to capably and zealously defend them, it is the clients, not the lawyers, who usually suffer the consequences, which can be severe and long-lasting. When those clients are innocent of the crimes for which they have been charged, deficient lawyering can significantly contribute to their wrongful conviction and to their undeserved incarceration. It can even play a role in their being sentenced to death for crimes that they did not commit.

A number of studies have documented the role that bad lawyering has played in the conviction of innocent people. Of the first seventy people exonerated by DNA evidence, the Innocence Project at Yeshiva University's Cardozo School of Law found that poor or ineffective defense counsel contributed to their clients' wrongful conviction twenty-three times.[119] A Columbia University study of capital case appeals, "A Broken System: Error Rates in Capital Cases, 1973-1995," found that ineffective lawyering was the biggest contributing factor to the wrongful conviction or death sentence for criminal defendants in capital cases over a twenty-three year period.[120]

In Virginia, of the eleven cases of wrongful conviction studied by the ICVA, five involved instances in which the defense lawyers failed to disclose serious conflicts of interest, failed to appreciate the appearance of a conflict of interest, failed at trial to use clearly exculpatory information in their possession, failed to vigorously challenge the government's evidence, and/or missed crucial filing deadlines. On a broader level, the ICVA's survey results indicate that some defense counsel in Virginia fail to take

advantage of certain prosecutors' open file discovery policies and therefore do not review all the information available to them in representing their clients.

Virginia has taken important steps in the past two years to improve the quality of indigent defense. In 2003, the Commonwealth created a new team of public defenders in Northern Virginia to handle death penalty cases in an effort to improve the representation for poor defendants who face execution. In 2004, the Virginia General Assembly created the Indigent Defense Commission, which is responsible for overseeing the provision of legal counsel to indigent defendants in Virginia, including the training and certification of both private court-appointed attorneys and public defenders. However, the ICVA believes that additional improvements can and should be made.

B. Virginia Law on Conflicts of Interest and Effectiveness of Defense Counsel

1. Conflict of Interest

Loyalty is an essential element of lawyers' duties to their clients. A central ethical maxim is that attorneys must ensure that they do not have divided loyalties with respect to clients and former clients. In Virginia, if a lawyer reasonably believes that the representation of a client may be materially limited by the lawyer's responsibilities to another client or another person, the lawyer may not represent the client unless the potential conflict of interest is disclosed to the client and the client consents to the representation.[121] Thus, an attorney has an ethical obligation to clients to disclose actual or potential conflicts of interest.

The comments to the Virginia Rules of Professional Conduct clearly state that the potential conflict of interest in representing multiple defendants in a criminal case is "so grave that ordinarily a lawyer should decline to represent more than one co-defendant."[122] In a similar vein, the Virginia Court of Appeals has stated, in the context of a potential conflict between a lawyer's client and a witness represented by the lawyer, that:

> If [a] witness's testimony is expected to incriminate the witness but exculpate the defendant, the attorney must either assert the witness's right to remain free from self-incrimination

at the sacrifice of the defendant's best interest or allow the defendant to be exonerated at the risk of the witness incriminating himself. Again, a conflict of interest would exist.[123]

2. Ineffective Assistance of Counsel

Criminal defendants also have a right under the Sixth and Fourteenth Amendments to the United States Constitution to the effective assistance of counsel in criminal cases. The United States Supreme Court held in *Strickland v. Washington* [124] that in order to prove a violation of the right to effective representation, a criminal defendant must prove that defense counsel's performance fell below an objective standard of reasonableness, as measured by the prevailing professional norms, and that defense counsel's deficient representation prejudiced the defense.[125] Historically, the *Strickland* standard has created a very high hurdle for defendants to surmount in order to prevail on claims of ineffective assistance of counsel. For example, courts generally apply a presumption that decisions by defense counsel that are later challenged in a claim of ineffective assistance of counsel were the result of "sound trial strategy" rather than due to deficient representation.[126]

In many cases in which innocent defendants raised claims of ineffective assistance of counsel long before their exoneration, courts ruled that the attorneys' performance did not fall below an objective standard of reasonableness. Yet, further analysis in many of those cases, conducted after the exonerees' innocence had been proven, showed that mistakes, poor performance, or even, sometimes, egregious errors by the lawyers contributed to their clients' convictions for crimes that they did not commit.[127] Thus, it is important in examining the causes of wrongful convictions to consider the quality of the performance of defense counsel and the sufficiency of defense resources even when they do not fall below the level that courts currently recognize as a constitutional violation.

C. Ineffective Defense Counsel and Defense Counsel with Conflicts of Interest in the Cases of Virginia Exonerees

Lawyers who represented some of the inmates exonerated in Virginia were egregiously deficient, and some possessed serious conflicts of interest that undermined their ability to zealously represent their clients.

1. Marvin Anderson

Marvin Anderson's trial lawyer had previously represented Otis Lincoln, the actual rapist, on an earlier attempted rape case. The lawyer was told by a police officer investigating the Anderson case that there was some evidence that Lincoln committed the rape for which Anderson was ultimately charged. The lawyer admitted that he suspected that Lincoln committed the rape, yet, despite this terrible conflict, the lawyer failed to disclose his prior representation, his suspicions, and his conflict of interest to Anderson, in violation of the Virginia Rules of Professional Conduct.[128]

This lawyer was egregiously deficient in other ways. Before trial, he never asked that the bicycle ridden by Lincoln on the day of the rape be fingerprinted or introduced into evidence even though the bicycle was in police custody and might have had the perpetrator's fingerprints on it. Further, he refused Anderson's mother's repeated pleas to call Lincoln as a witness. He also refused Mrs. Anderson's urging that he subpoena the two witnesses who had seen Lincoln accost two girls in the area of the rape shortly before it happened, who had heard Lincoln's threatening comments, and who had watched him ride toward the area of the rape immediately before it occurred. Anderson's trial lawyer presented none of this exculpatory evidence at trial, which lasted less than five hours, and the jury convicted Anderson and sentenced him to 210 years in jail.

After his conviction was affirmed by Virginia's appellate courts, Anderson filed a *habeas corpus* petition in state court alleging ineffective assistance of counsel. Lincoln testified under oath at a hearing on Anderson's *habeas* claims and admitted that he, and not Anderson, committed the rape and robbery for which Anderson had been convicted. The trial court nonetheless denied the *habeas* petition, the judge specifically stating that he did not believe Lincoln's testimony. Thirteen years later, Lincoln was identified as the rapist through the same DNA evidence that exonerated Anderson.

2. Jeffrey Cox

In the Jeffrey Cox case, his trial lawyer took time out of the middle of a two-week long trial in federal court to handle Cox's one-day trial. Possibly because he was distracted and overworked by his other ongoing case, the trial lawyer failed to thoroughly investigate the criminal backgrounds of the two eyewitnesses who identified Cox and failed to uncover the significant exculpatory evidence that could have undermined the witnesses' credibility.

His trial counsel also apparently failed to realize that the prosecution never turned over the crime laboratory serology reports from the victim's autopsy that turned out to contain exculpatory evidence. This later proved to be a damaging mistake when the jury specifically asked, in a note to the judge during its deliberations, why the analysis of the skin, hair, and fibers found under the victim's fingernails was not offered into evidence.

However, the trial lawyer was not the only counsel who committed serious errors in Cox's case. Cox's parents later approached an attorney to handle their son's appeal and learned that the attorney had previously represented Billy Madison, the initial and prime police suspect in the crime for which Cox was convicted. Assuring Cox's parents that the previous case had been an unrelated incident, the attorney persuaded them that he could effectively defend Cox. The attorney filed an appeal that was denied by the Virginia Court of Appeals but then failed to file a timely appeal before the Virginia Supreme Court. Then the attorney filed a petition for a writ of *habeas corpus* in which he argued that Cox should be entitled to file a belated appeal due to the attorney's error.

Cox successfully sought permission from the court to withdraw this *habeas* petition when he learned that he had only one opportunity to present all his possible arguments for *habeas corpus* relief in the Virginia courts and was in danger of waiving his opportunity to challenge his conviction on other grounds by pursuing the request for a belated appeal.[129] His conviction was later overturned and Cox was exonerated because of claims raised by his new counsel in a later-filed *habeas* petition – claims he would have never been able to present and would have waived if his appellate lawyer had wasted his one and only opportunity for a *habeas* petition.

3. Edward Honaker

Part of Edward Honaker's defense at trial was that he could not have raped the victim because the crime laboratory serologist found spermatozoa on the slides taken from the vaginal swabs of the rape victim. Honaker testified at trial that he had previously had a vasectomy and, therefore, could not ejaculate spermatozoa. Thus, Honaker rightly claimed that it was physically impossible for him to be the rapist. Yet Honaker's defense counsel never revealed to the Commonwealth serologist that Honaker had a vasectomy and could not produce sperm. The serologist later swore in an affidavit that had he been told by either the defense or the government about Honaker's vasectomy, he would have testified at trial that Honaker could not be the rapist. Nor did Honaker's trial lawyer present medical records or

medical testimony at trial to corroborate Honaker's otherwise unsubstantiated claim that he had a vasectomy before the rape occurred. Medical records corroborating Honaker's vasectomy did, in fact, exist and were presented to Governor George Allen as part of Honaker's clemency petition ten years later when DNA testing exonerated him.

Honaker's trial counsel also failed to rebut with defense expert testimony or in any other way challenge the trial testimony of the Commonwealth's crime laboratory technician that hairs found on the victim's shorts matched Honaker's hair samples. However, according to Dr. Paul Ferrara, the Director of the Virginia Division of Forensic Science, unlike DNA evidence or fingerprint evidence where an absolute match can be declared, the strongest legitimate statement that can be made concerning the microscopic comparison of two hairs is that they are consistent.[130]

Edward Honaker's defense counsel never revealed to the Commonwealth serologist that Honaker had a vasectomy and thus could not have been the perpetrator.

4. Earl Washington

Earl Washington's lawyer failed to present evidence that semen recovered from a blanket on the bed where the victim was raped came from a man with a blood type different from Washington's, evidence that strongly suggested Washington did not commit the crime. The jury that convicted Washington and sentenced him to death never heard this powerfully exculpatory evidence because of Washington's lawyer's neglect. Washington's lawyer also failed to introduce laboratory reports or expert testimony that proved that Washington's fingerprints and palm prints did not match unidentified prints found at the crime scene, so this evidence also was not heard by the jury. Although the police claimed that a shirt found at the crime scene belonged to Washington, his trial lawyer never established that the police specifically requested that the crime laboratory not compare the hair fragments found in the shirt pocket to samples of Washington's hair. Had this fact been established, counsel could have, but did not, argued that the police hesitancy to test this evidence demonstrated their doubts about the accuracy of their case against Washington.

Furthermore, Washington's trial lawyer never asked the victim's mother about her statements that the victim and her husband had been fighting the morning of the attack and that the victim wished to leave her husband and take their children. The trial lawyer failed to cross-examine the detective who took Washington's confession about major discrepancies and inconsistencies in the detective's testimony and major contradictions, mistakes, and inconsistencies in Washington's confession. Moreover, the trial lawyer presented no evidence during the guilt phase of Washington's

trial about his mental retardation and fact that those with mental retardation are susceptible to coercive interrogation tactics and sometimes agree with investigators in an effort to please them.

After Washington's direct appeal was denied, his new *pro bono* lawyers filed a massive petition for *habeas corpus* relief, first in state court and later in federal court. Washington's lawyers claimed, among other grounds, that Washington received ineffective assistance from his trial counsel based on many of the deficiencies described above. The Virginia state courts denied all of Washington's claims. Although the federal courts later concluded that Washington's lawyer was inadequate, the courts ruled that the lawyer's errors were not prejudicial, and affirmed Washington's conviction and death sentence.

5. Troy Webb

In Troy Webb's case, three separate occurrences showcase how the performance of defense counsel at trial could have affected the outcome of the case. First, defense counsel failed to cross-examine the victim regarding whether she changed her underwear or bathed between her last sexual encounter with her boyfriend, which could have helped counter the results of the serology test. After the rape, the police took the victim to the hospital where a Physical Evidence Recovery Kit ("PERK") was used to obtain, among other evidence, semen swabs from the victim. Blood samples taken by the police from Webb showed that he was a non-secretor, meaning someone whose blood type is not identifiable from his semen samples. However, the semen samples from the PERK kit were identified as blood type A. This happened to be the same blood type as the victim's live-in boyfriend. For this reason, the crime laboratory technician testified at trial that semen from someone with blood type A could have masked a second person's semen from a non-secretor. Thus the technician concluded that Webb could neither be conclusively identified nor conclusively ruled out as the perpetrator based on this evidence. Defense counsel never tried to determine at trial whether the victim changed her underwear or bathed between her last sexual encounter with her boyfriend and the rape, which could have helped counter the technician's testimony. Had the victim done either of these, the chance that the boyfriend's sperm masked that of the perpetrator's would have been rebutted. In turn, the blood evidence would have been exculpatory.

Second, Webb's counsel did not present a defense. Several jurors remarked after the trial that this fact made it seem as though Webb was guilty because

he did not present a "case for himself." Third, defense counsel made insensitive comments about the victim during the trial, including suggesting that the victim's dress "'appeal[ed] to somebody's sexual interest.' These comments may well have negatively affected the jury's view of the lawyer and his client, too." [131]

D. Recommendations for Reform in Virginia Concerning Quality of Defense Counsel

In recent years, a number of organizations with significant staff and resources have focused specific attention on the state of indigent defense delivery systems and the quality of indigent defense in both capital and non-capital cases nationwide.[132] Recent studies have specifically and thoroughly examined the provision of indigent defense services in Virginia.[133] The Virginia legislative and executive branches also have frequently studied the Commonwealth's indigent defense system and its needs.[134] Many of these studies have proposed urgent reforms to improve the quality of justice in the Commonwealth with respect to the defense function. The current President of the Virginia Bar Association has recently echoed these calls by urging policy makers in Virginia to eliminate the current extremely low caps on fees paid to court-appointed lawyers, to enact reforms to reduce caseloads of lawyers representing indigent defendants, to establish appropriate standards for indigent defense representation, and to provide training and resources so that indigent defenders can adequately represent their clients.[135]

By far the most comprehensive review of the indigent defense system in Virginia was the January 2004 Spangenberg Group report. At the conclusion of its review, which raised significant concerns about the quality of indigent defense services in the Commonwealth, the Spangenberg Group made a series of recommendations to improve these services. Specifically, the Spangenberg report recommended:

The Virginia General Assembly should fund indigent defense services in cases requiring appointment of counsel at a level that assures that all indigent defendants receive effective and meaningful representation.

- The state should establish a professionally independent indigent defense commission to organize, supervise, and assume overall responsibility of Virginia's indigent defense system.

- The newly created commission on indigent defense should have broad power and responsibility for the delivery of indigent defense services.

- The indigent defense commission should adopt performance and qualification standards for both private assigned counsel and public defenders. The standards should address workload limits, training requirements, professional independence and other areas to ensure effective and meaningful representation.

- A comprehensive data collection system designed to provide an accurate picture of the provision of indigent criminal services in Virginia should be established and implemented by the statewide commission.

Virginia still does not have a state-wide public defense system, which studies have shown is the most cost-effective, efficient, and expert approach for the representation of indigent defendants.

In 2004, the Virginia General Assembly responded to some of the concerns raised by the Spangenberg Group report, specifically those concerning the lack of an effective oversight system for indigent defense services in Virginia and the lack of any monitoring of the system of private, court-appointed counsel. The General Assembly adopted one of the Spangenberg Group's recommendations and created the new Indigent Defense Commission, which is responsible for overseeing the provision of legal counsel to indigent defendants in Virginia. The organization is charged with overseeing the training and certification of both private court-appointed attorneys and public defenders. However, Virginia still does not have a state-wide public defense system, which studies have shown is the most cost-effective, efficient, and expert approach for the representation of indigent defendants.[136]

The Spangenberg Group and others who have studied the quality of defense counsel services in Virginia have concluded that a lack of resources and insufficient oversight have led to systemic problems in the representation of indigent criminal defendants. The problems identified in these reports exist in the representation provided by both Virginia's public defenders and court-appointed private counsel and have spurred calls for substantial increases in the resources devoted to indigent defense, significant improvements in the standards for indigent defense in the Commonwealth, and other important reforms.

The concerns raised by these reports are particularly relevant when viewed in the context of the wrongful conviction of innocent defendants. In five of the cases investigated by the ICVA, the defense counsel had serious conflicts of interest that compromised their zealous advocacy for their clients, made significant mistakes in judgment, and/or simply performed poorly. As the ICVA's case reports make clear, these errors played significant roles in the wrongful conviction of these five men. In order to

improve the quality of representation of indigent defendants in the Commonwealth, the ICVA recommends that Virginia adopt the remaining reforms outlined by the Spangenberg Group.

Although the General Assembly created a new Indigent Defense Commission in March 2004 that requires training and certification for lawyers defending indigent clients and sets caseload limits for public defender offices, the following important issues remain:

1. **The General Assembly should fund indigent defense services in cases requiring appointment of counsel at a level that ensures that all indigent defendants receive effective and meaningful representation.**

2. **The Indigent Defense Commission should adopt performance and qualification standards for both private, assigned counsel and public defenders. The standards should address workload limits, training requirements, professional independence and other areas to ensure effective and meaningful representation.**

3. **The Indigent Defense Commission should implement a comprehensive data collection system to provide an accurate picture of the provision of indigent criminal services in Virginia.**

VI. Scientific Evidence

A. Introduction

Physical evidence often can show a strong link between a suspect and the crime he is charged with committing. Usually, a scientific expert explains the significance of the physical evidence at trial to the judge or jury by describing whether and how it matches samples obtained from the suspect. This forensic expert frequently then offers an opinion about the likelihood that someone other than the defendant is the source of the physical evidence.

Before DNA evidence became widely used in criminal cases to identify or exclude suspects, other, less precise techniques often were employed to link defendants to crimes. Crime laboratory scientists used hair comparison analysis, blood-typing serology methods, and other techniques to examine physical evidence.

Thorough national examinations of the wrongful conviction of innocent people have demonstrated that, all too often, forensic evidence supposedly linking the defendants to the crimes was wrong.[137] Sometimes, the scientific evidence used in the cases was questionable or unreliable.[138] Other times, experts offered opinions slanted in favor of the prosecution that were unsupported by generally recognized scientific principles, were misstated, or even fabricated.[139]

But often, the scientific evidence was simply non-specific, meaning that it placed the innocent defendants into a broader group within the population that could have provided the same physical evidence.[140] When added to other evidence in these cases, the scientific evidence was enough to convict the wrong people. Finally, in some of the cases, evidence was not properly preserved, creating significant barriers to later DNA testing that proved innocence.

In at least six of the eleven cases studied by the ICVA, forensic evidence purportedly linking exonerees to the crimes played a factor in their convictions.

The ICVA's investigation into wrongful convictions in Virginia is consistent with the findings in other jurisdictions in which non-specific, faulty, or misused scientific evidence played a role in the conviction of innocent people. In at least six of the eleven cases studied by the ICVA, forensic evidence purportedly linking exonerees to the crimes played a factor in their convictions. In at least four of the cases, the police or crime labs destroyed physical evidence samples that would have proven the inmates did not commit these crimes and, in one case, the samples were too degraded to be subjected to DNA testing only five years after the crime. The ICVA's research has identified a number of reforms that can help remedy these problems in the future and that will help ensure that evidence needed to prove the innocence of others will be remain available.

B. Virginia Law and Practice Related to Scientific Evidence

1. Access to Defense Experts

When prosecutors seek to use expert testimony about scientific evidence against a criminal defendant, it is vital that the defense have the opportunity to challenge or rebut the findings and conclusions of the government's experts. The ABA Standards for Criminal Justice state that the availability of necessary expert services is essential to effective representation in many cases.[141] More importantly, the United States Supreme Court has long contemplated separate defense experts, along with the opportunity to cross-examine government experts, as necessary to protect constitutional rights.[142]

In Virginia, however, the courts rarely authorize independent defense experts in indigent criminal cases.[143] Apparently, many court-appointed lawyers and public defenders do not even bother to request court permission to retain defense experts because their experience shows the courts will likely not grant approval.[144] Thus, in Virginia, it appears that criminal defendants must rely upon court rulings concerning the admissibility of scientific evidence and the cross examination by defense lawyers when challenging scientific evidence.

2. Admissibility of Scientific Evidence

For much of the twentieth century, the predominant test used by federal courts to govern the admissibility of scientific evidence in the United States – known as the *Frye* rule – required scientific testimony to have gained general acceptance in the relevant scientific community before it could be admitted in court.[145] However, in 1993, the United States Supreme Court announced a new rule governing the admissibility of scientific evidence in the federal courts. The more flexible *Daubert* rule, as it has come to be known, requires the trial judge to consider, in a gate-keeping role, a variety of factors in determining whether expert scientific testimony rests on a reliable foundation and is relevant to the issue in the case.[146] Since the U.S. Supreme Court created this rule, over half the states have adopted the *Daubert* standard.

Many court-appointed lawyers and public defenders apparently do not even bother to request court permission to retain defense experts because their experience shows the courts will likely not grant approval.

The Virginia courts have never adopted either the *Frye* or *Daubert* standards to govern the admissibility of scientific testimony or evidence.[147] Instead, when scientific evidence is offered in Virginia, the trial judge must make:

> a threshold finding of fact with respect to the reliability of the scientific method offered, unless it is of a kind so familiar and accepted as to require no foundation to establish the fundamental reliability of the system, such as fingerprint analysis, or unless it is so unreliable that the considerations requiring its exclusion have ripened into rules of law, such as "lie detector" tests, or unless its admission is regulated by statute, such as blood-alcohol test results.[148]

Virginia trial courts rely on expert testimony in making the threshold finding of fact, and, if supported by credible evidence, trial judges' rulings will not be disturbed on appeal. Even where the reliability of scientific evidence is disputed, the trial judge can admit the disputed evidence with a cautionary instruction to the jury if the court finds that there is a sufficient foundation for the evidence to warrant its admission.[149]

3. Preservation of Evidence in Virginia

Prior to 2001, no Virginia statute governed the preservation of biological evidence. However, Virginia law now requires that the Commonwealth retain biological evidence in capital murder cases until the execution of the defendant and in felonies upon petition by an inmate for at least fifteen years.[150] In some jurisdictions in Virginia, the Circuit Court clerks are beginning to retain forensic evidence in all felony cases whether court ordered or not.[151]

C. Questionable Scientific Evidence

In recent years, some traditional forensic techniques have come under scrutiny, in part due to DNA exonerations that proved the evidence did not actually link the defendants to their supposed crimes. One example is the microscopic analysis of hair samples found at crime scenes and the comparison of the samples to known samples taken from suspects. Although hair comparison evidence has been admitted against criminal defendants for decades and the overwhelming majority of courts have found that it meets both the *Frye* and *Daubert* standards, recent studies raise serious questions about the reliability of hair comparison testing, questions that are only heightened given the numerous cases of wrongful conviction that included erroneous hair comparisons.[152]

For example, the Law Enforcement Assistance Administration Laboratory Proficiency Testing Program, involving over 235 crime laboratories throughout the United States, found hair comparison analysis to be the weakest of all forensic laboratory techniques tested, with error rates as high as sixty-seven percent on individual samples and the majority of laboratories reaching incorrect results on four out of five hair samples analyzed.[153] Another study found that hair comparison error rates dropped from thirty to four percent when common hair comparison methods – which compare a questioned hair to the hair samples of a suspect – were changed to a "lineup" method, in which examiners compare a hair sample from the crime scene to samples from five potential suspects.[154] Just as in eyewitness identification, errors and unconscious bias exist in the identification of hair samples.

Traditional serology testing, while not suffering from the reliability problems associated with hair comparison analysis, has contributed to the wrongful conviction of innocent people.[155] Although serology testing does not specifically identify suspects, it often substantially narrows the field of

possibilities to include the suspect when his or her blood or other bodily fluids match the characteristics of those found at the crime scene.[156] As an expert explains:

> There is no question that the impact of statistical calculations on the probability of an innocent match in blood analysis has a great impact on the jury. If a serologist testifies that the blood sample taken from a defendant's clothing matches that of the victim's blood, and that the probability of these same characteristics occurring in the blood of human beings is only one in 20,000, then, in the mind of the fact finder, identity has been established with as much definitiveness as science can muster. Surely, considering that viable suspects of the crime must often be limited to a smaller population group than the statistics allow for, the reasonable juror may be led to believe there is no possibility of error. Yet, exactly the opposite seems to be coming to light in the retesting, by DNA analysis, of the evidence in cases where persons had been previously convicted on eyewitness testimony or on traditional serology testimony. What may be gathered from the mounting evidence is that the statistical inferences drawn from serological "identifications" of the defendant as the perpetrator appear to have been accepted as proof of a uniqueness that is simply not warranted.[157]

D. Scientific Evidence Issues in the Cases of Virginia Exonerees

1. Earl Washington

Questions over scientific evidence in Earl Washington's case concern post-conviction testing that was initially ordered by Governor Douglas Wilder in anticipation of Washington's scheduled execution date. DNA tests excluded Washington as the source of the semen stain on a blue blanket recovered from the victim's apartment. But the lab analyst who conducted the DNA tests said that he could not eliminate Washington as a potential source of semen from a separate vaginal swab from the victim. Based on these results, Governor Wilder commuted Washington's sentence to life in prison in January 1994, nine days before his scheduled execution, saying the test results raised a "substantial question" about Washington's guilt. Governor Wilder did not pardon Washington altogether because the Governor said that the DNA tests did not erase all doubt about Washington's involvement in the crime.

Six years later, Governor James Gilmore ordered another series of even more sophisticated DNA tests on the evidence. The tests were performed by Jeffrey Ban, a top DNA expert in the Virginia lab, a member of a panel of scientists that set national DNA standards, and the same crime lab expert who conducted the testing ordered by Governor Wilder. The tests revealed

a genetic profile on the blue blanket that did not belong to Washington but that matched the genetic profile of Kenneth Tinsley, a convicted rapist whose DNA profile was contained in Virginia's DNA database.

The remaining DNA tests ordered by Governor Gilmore produced results that raised questions about the Virginia crime lab's analysis in the Washington case. As the *Chicago Tribune* explained in a recent series called "Forensic Science Under the Microscope":

> [Jeffrey] Ban further reported that he was unable to obtain a genetic profile from a slide made from the vaginal swab--although at Washington's trial, a medical examiner had testified there was an abundance of sperm on the slide. Even more puzzling were the results of his tests on a second, similar slide. Not only did Ban exclude Washington, but he excluded Tinsley and, according to his report, turned up two additional unidentified genetic profiles.
>
> The exclusion of Washington was enough for Gilmore to grant him a pardon--just as Ban's earlier test was enough to prompt Wilder to commute his death sentence. After 17 years in prison, more than nine of them on Death Row, he was set free. That did not settle the matter, though. Tinsley's DNA was detected by the lab on the blanket. But because Ban said he did not find it on the slides, authorities did not prosecute Tinsley, leaving the case open. The test results prompted some police officers to continue saying they believed Washington was involved.
>
> Duplicate slides were sent to Dr. Ed Blake, a DNA expert, who was working for Washington's attorneys. His tests isolated only Tinsley's genetic profile, he said, and conclusively eliminated Washington. . . . Three other DNA experts, at the request of a Virginia newspaper, reviewed Ban's reports. They all agreed that his work was troubling and warranted further scrutiny. . . .
>
> In an interview with the Tribune, [Dr. Paul Ferrara, the Director of the Virginia Division of Forensic Science] said it is possible for two scientists to come up with different test results because no two samples are alike--although Ban and Blake tested slides created from the same swab. "As far as we're concerned, there is no error at all except in the minds of [critics]...," Ferrara said. [158]

In the wake of controversy concerning the Washington case, Governor Mark Warner recently ordered an independent audit of the crime lab's operation and findings in the Washington matter. Said a spokesman for Warner, "The governor believes that an outside investigation will help maintain the lab's reputation . . . and help maintain confidence in our criminal justice system." [159]

2. Edward Honaker

As noted earlier, the laboratory technician in Edward Honaker's case significantly overstated the significance of the hair comparison he performed and consequently misled the jury. Based on his comparison of hairs found on the victim's shorts to Honaker's hair samples and his claim that they matched, the technician testified that in his opinion it "is unlikely that the hair would match anyone other than the defendant; but it is possible." When DNA evidence later proved that Honaker was not the rapist, the Director of the Virginia Division of Forensic Science provided an affidavit debunking the technician's false testimony. Moreover, when one of the world's leading experts on hair comparison later reexamined the hair analysis, he concluded that in his opinion, the hairs were not comparable.[160] Honaker's lawyer did not retain an expert to refute the Commonwealth's expert's opinion.

When DNA evidence eventually proved that Edward Honaker was not the rapist, the Director of the Virginia Division of Forensic Science provided an affidavit debunking the technician's previously false testimony.

Other evidence in Honaker's case could have strongly suggested his innocence, had proper forensic testing been done. The police found cigarette butts at the location where the rape had occurred, and the victim told police that the rapist smoked cigarettes during the assault. Saliva samples found on the cigarette butts seized by the police revealed that the person who smoked the cigarette had blood type O, whereas Honaker had blood type B. However, the same laboratory technician who misrepresented the hair analysis failed to determine if the victim, who also had blood type O, was a secretor and could possibly have left her saliva on the cigarette butts.[161]

3. David Vasquez

The laboratory technician in David Vasquez's case concluded that pubic hair samples taken from Vasquez shared characteristics and were consistent with hair recovered from the victim's body. His lawyers found the expert's opinion convincing, or at least felt that a jury would, and did not retain an independent expert to review and potentially refute these findings despite other evidence in the case that suggested strongly that Vasquez was not involved. Vasquez's blood type did not match the blood type of the semen found in the victim or on her bathrobe. Moreover, none of the shoe impressions found outside of the broken basement window where the murderer entered the home matched any of Vasquez's shoes that were seized by the police.

4. Jeffrey Cox

In Jeffrey Cox's case, the police and prosecutors never turned over to the defense potentially helpful hair analysis. The laboratory technician reported finding two "very fine white Caucasian hairs" among the trace evidence collected from the victim's body that were not "suitable for comparison with a known sample." While not conclusively establishing Cox's innocence, the hairs were inconsistent with the Commonwealth's case because Cox had brown hair, not white hair.

5. Craig Bell

In Craig Bell's case, the jury convicted Bell despite significant forensic evidence suggesting that he did not commit the crime. A laboratory technician testified that three hairs recovered from shorts left at the scene by the murderer matched neither Bell's pubic hair samples nor those of the victim. Semen stains on those shorts produced inconclusive results, neither implicating nor exonerating Bell. A partial palm print lifted from the window ledge where investigators found a screen knocked out – which later proved to be the real murderer's point of entry – did not match Bell, the victim, or any family members known to visit the couple. However, blood evidence could not exclude Bell as a suspect without the use of DNA technology. Type O blood belonging to the murderer was found at the crime scene, and a serologist testified at trial that thirty-six percent of the population has type O blood, as does Bell. Because this evidence was non-controversial, Bell's lawyers did not retain an independent expert to review the government expert's analysis. Bell's lawyers instead focused their resources on retaining a private investigator and consulting with a leading forensic expert to opine on the blood splatter left in the apartment.

6. Troy Webb

The serology evidence in Troy Webb's case was more complicated, but nevertheless the Commonwealth's expert identified Webb as a possible source of the semen from the rapist. Testing showed that Webb was a non-secretor. The swabs from the victim's PERK kit showed blood type A. The victim's boyfriend happened to have blood type A as well, and the technician testified that semen from recent intercourse with the boyfriend could have masked the blood type from the semen of a non-secretor like Troy Webb. While not conclusively identifying Webb as the rapist, the expert testified that Webb could not be ruled out as the perpetrator but

Webb's lawyers did not present a defense expert to analyze or refute the Commonwealth expert's work. Post-conviction DNA testing later proved that Webb did not commit the rape.

In four of the cases studied by the ICVA, the police destroyed critical biological evidence that would have – or in one case could have – proven the exonerees' innocence. Despite the fact that witnesses saw two kidnappers abduct the victim in Jeffrey Cox's case, the police inexplicably destroyed physical evidence three months after his conviction – before his appeal had even been heard and even though the second perpetrator had neither been identified nor arrested. The physical evidence destroyed by the police in the Cox case included the PERK kit recovered from the victim, which contained hairs foreign to the victim, swabs positive for saliva from her breasts, and fingernail scrapings.

In four of the cases studied by the ICVA, the police destroyed critical biological evidence that would have – or in one case could have – proven the exonerees' innocence.

In three of the cases – Marvin Anderson, Julius Ruffin, and Arthur Lee Whitfield – the Commonwealth's crime laboratory returned the swabs and samples from the rape or PERK kits to the police departments after testing the samples, and the police destroyed the kits once the exonerees were convicted. All three were later exonerated by DNA evidence only because Mary Jane Burton, the technician who performed the testing in their cases, fortuitously ignored the then Division of Forensic Science policy by taping slides containing portions of the samples she tested to her personal files which she retained in each case.

E. Recommendations for Reform in Virginia for Scientific Evidence

1. The Virginia General Assembly should require that all biological evidence in serious felony cases be preserved to ensure it is available for post-conviction DNA testing.

The Marvin Anderson, Julius Ruffin, and Arthur Lee Whitfield cases all illustrate how vital it is to preserve biological evidence that could be subjected to DNA testing and that could prove dispositive in establishing an inmate's innocence as long as an inmate is incarcerated. Indeed, in Whitfield's case it took more than three years after the General Assembly provided a statutory vehicle for testing biological evidence – and nearly twenty-two years after Whitfield was convicted – before authorities found the evidence that exonerated him.

As his and other cases identified by the ICVA show, it is crucial to develop a protocol for cataloguing and preserving genetic evidence in crimes of this

nature. To do so, the General Assembly should amend current law to require the preservation in all serious felony cases of human biological evidence that could be subjected to DNA testing.

2. **The Commonwealth should continue and expand its latest initiative to examine and test biological evidence from old cases using DNA.**

Virginia Governor Mark R. Warner has recently ordered DNA testing in about forty old criminal cases from the 1970s and 1980s in which standard serology testing was used. These cases were culled from a review of approximately ten percent of the cases on file in state archives.[162] The ICVA urges that authorities continue to review the remaining files in state archives and expand the testing to include all cases of inmates where biological evidence could lead to an exoneration. Mary Jane Burton's old files alone may hold the key to exoneration for many other wrongfully incarcerated inmates, and the ICVA urges that authorities devote particular attention to the review of these records.

3. **The Virginia General Assembly and the courts should provide sufficient resources so that indigent criminal defendants can obtain the services of expert witnesses to evaluate the scientific evidence offered against them and to testify, where appropriate, at trial on behalf of defendants.**

When highly complex scientific evidence is offered by the prosecution against an accused, the defense must have the ability to both challenge the admissibility of that evidence and confront and counter the significance of that evidence before the trier of fact. In many cases, these efforts require the defense to rely upon an independent expert for assistance. However, as stated earlier, the overwhelming majority of indigent defendants in Virginia are unable to access the services of an expert.

The ICVA's investigation shows that in a number of exonerations in Virginia, the defense either did not seek to retain or did not gain approval from the courts for the appointment of independent defense experts that could have rebutted misleading government expert testimony or could have challenged or clarified questionable scientific evidence. For these reasons, the ICVA recommends that the Virginia General Assembly provide sufficient resources to public defenders and court-appointed counsel for indigent defendants so that necessary defense experts can be retained in

appropriate cases. The ICVA also urges the Virginia courts to approve the appointment of independent expert witnesses when appropriate requests are made by counsel for indigent defendants.

4. The Virginia Supreme Court should adopt more stringent rules governing the admissibility of scientific evidence in criminal cases.

The Virginia Supreme Court has never adopted either the *Frye* or the *Daubert* standards for evaluating scientific evidence. While the current standard requires Virginia courts to make a threshold finding of the reliability of scientific evidence, the Virginia Supreme Court has placed great discretion in the trial courts to admit scientific evidence even when the reliability of that evidence has been called into question. Significantly, the Commonwealth's highest court has said that trial court rulings will rarely be overturned on appeal.

When the scientific techniques that are used in criminal cases themselves are of at least questionable validity, the fairness and accuracy of the justice system can be negatively affected.

The ICVA's investigation shows that non-specific scientific evidence, purportedly linking a person to a crime scene by placing the suspect in a group of the population who match the characteristics of crime scene evidence, often can be mistaken. Moreover, overstated or even false expert testimony linking a suspect to physical evidence found at the crime scene can be very damaging and can contribute significantly to wrongful convictions. When the scientific techniques that are used in criminal cases themselves are of at least questionable validity, the fairness and accuracy of the justice system can be negatively affected.

The ICVA recommends that the Virginia Supreme Court revise the current standard that the Virginia courts use for evaluating and ruling on the admissibility of expert testimony. The *Daubert* rule adopted by the United States Supreme Court outlines a host of factors that trial and appellate courts should consider in determining the admissibility of scientific evidence while making none of the factors dispositive. Although the *Daubert* rule places significant authority in the trial courts to serve a gate-keeping function for scientific evidence, the rule also contemplates an important role for the appellate courts in reviewing the decisions of the trial courts.

The ICVA recommends that the Court adopt either the *Daubert* rule or a similar standard that will ensure the reliability, accuracy, and fairness of any scientific evidence that is used in criminal cases against defendants. Finally, the ICVA recommends that the Virginia courts be receptive to challenges to scientific techniques that have been considered reliable and

admissible in the past, but where new questions have arisen about their reliability, and apply the same level of scrutiny to novel scientific techniques as they are developed and offered into evidence.

5. The Commonwealth should diligently pursue the audit of the Washington case.

The ICVA recognizes the excellent reputation of the Virginia crime laboratory, which has been described as "the gold standard for crime labs."[163] Virginia has been a leader among states in utilizing DNA testing in criminal cases. Indeed, the issues raised by the disputed findings in the Earl Washington case pale in comparison with the problems found in other states and jurisdictions where analysts have fabricated evidence or lied under oath. On the other hand, the Washington case raises sobering questions about the quality of testing and analysis done in this matter – as well as deeper issues about the limits of scientific evidence and DNA interpretation in general. In the interests of maintaining the crime laboratory's fine standards, the ICVA applauds the Governor's decision to pursue the Washington audit diligently. The ICVA also commends Governor Warner's recent $2.6 million proposal to hire twenty new scientists for Virginia's forensic lab and to help expand the regional crime lab in Norfolk.

The ICVA recognizes the excellent reputation of the Virginia crime laboratory, which has been described as "the gold standard for crime labs." Virginia has been a leader among states in utilizing DNA testing in criminal cases.

On December 16, 2004, the State Crime Commission considered a recommendation to establish an advisory board of scientists that would review testing procedures and establish an audit process to be used when errors occur. If such a measure were approved by the General Assembly, Virginia would become only the second state crime lab in the country, along with New York's, to have a scientific review panel. The Virginia Division of Forensic Science was the first state crime lab to provide DNA testing in 1989 and is considered a national leader in the field.

The ICVA urges the Commonwealth to carefully consider the findings of the outside evaluation, as well as the recommendations of the State Crime Commission, and, if appropriate, to implement any recommended changes or reforms.

VII. Post-Conviction Remedies

A. Introduction

As an ABA Committee on Innocence and the Integrity of the Criminal Justice System has explained, "it is unlikely that any refinements in the police and prosecutor practices, improved rules at trial, or better defense representation will ever completely eliminate convictions of all who are factually innocent." [164] Yet, since we know that wrongful convictions can and do occur in Virginia, and that the cost of wrongful convictions – to society, to victims, and to the wrongfully convicted – is high, it is essential that the Commonwealth have in place adequate post-conviction remedies to ensure that errors can be corrected.

Crafting post-conviction remedies requires a careful balance between the prisoner's strong interest in access to a forum to test the fundamental correctness of his conviction and the Commonwealth's interest in the finality of its criminal justice proceedings. As the Supreme Court stated in *Kuhlmann v. Wilson*,[165] "[e]ven where, as here, the many judges who have reviewed the prisoner's claims . . . have determined that his trial was free from constitutional error, a prisoner retains a powerful and legitimate interest in obtaining his release from custody if he is innocent of the charge for which he was incarcerated." However, the prisoner's interest in access to a forum to test the fundamental correctness of his conviction must be balanced against the Commonwealth's interest in the finality of its criminal justice proceedings. Availability of unlimited appeals would frustrate the Commonwealth's legitimate law enforcement interests, as the Supreme Court has explained:

> [T]he deterrent force of penal laws is diminished to the extent that persons contemplating criminal activity believe there is a possibility that they will escape punishment through repetitive collateral attacks. Similarly, finality serves the State's goal of rehabilitating those who commit crimes because "[r]ehabilitation demands that the convicted defendant realize that 'he is justly subject to sanction, that he stands in need of rehabilitation.'" Finality also serves the State's legitimate punitive interests. When a prisoner is freed on a successive petition, often many years after his crime, the State may be unable successfully to retry him. This result is unacceptable if the State must forgo conviction of a guilty defendant through the "erosion of memory" and "dispersion of witnesses" that occur with the passage of time that invariably attends collateral attack.[166]

Over the past two years, Virginia has taken important steps towards establishing post-conviction remedies that fairly balance the innocent prisoner's interests with those of society. However, the ICVA respectfully submits that Virginia can and should take additional steps to expand the availability of post-conviction remedies to certain categories of prisoners who, under current law, have no access to the courts to litigate post-conviction claims of innocence. Specifically, the ICVA makes the following recommendations:

Over the past two years, Virginia has made tremendous progress in terms of expanding the scope of judicial remedies to the wrongfully convicted. However, even the newly enacted remedies would not have been available to most of the exonerees whose cases were examined by the ICVA.

1. **The writ of innocence should be available to prisoners who entered a plea other than not guilty.**

2. **The writ of innocence should be available to prisoners whose evidence of innocence was not presented at trial due to ineffective assistance of counsel.**

3. **Absolute limits on the number of petitions that a prisoner can file are not appropriate.**

These recommendations are consistent with HB 1805, which was introduced in the Virginia General Assembly on January 5, 2005, by Robert G. Marshall (R-District 13).

B. Post-Conviction Remedies in Virginia

In Virginia, a conviction may be collaterally attacked in the courts by filing a petition for a writ of *habeas corpus*, a motion for a new trial, or a petition for a writ of innocence. However, due to the numerous substantive and procedural limitations on the availability of these remedies, judicial findings of actual innocence are extremely rare. Nine of the eleven Virginia exonerees whose cases the ICVA reviewed were freed as a result of intervention by Virginia governors or the Parole Board, not the Virginia courts. Twice the courts have vacated convictions on grounds of actual innocence, but those proceedings were not contested. In fact, none of the exonerations that the ICVA studied resulted from contested proceedings in the Virginia courts.

Over the past two years, Virginia has made tremendous progress in terms of expanding the scope of judicial remedies to the wrongfully convicted. However, even the newly enacted remedies would not have been available to most of the exonerees whose cases were examined by the ICVA. Thus, even today, those who are wrongfully convicted in Virginia remain largely

dependent upon the good graces of the very prosecutors who put them in jail, or upon the Governor or the Parole Board, to secure their release. Relief from the Parole Board is increasingly rare because Virginia abolished parole in 1994; therefore, parole is not available to prisoners who were wrongfully convicted after that date. Additional work should be done to create judicial remedies for the wrongfully convicted in Virginia, and to remove these cases from uncertainty of the political process.

1. Petition for a Writ of *Habeas Corpus*

Under Virginia law, any prisoner may file a petition for a writ of *habeas corpus* to challenge the legality of his conviction. The court must grant the petition if the prisoner can show that he is being detained without lawful authority.[167] However, the Virginia Supreme Court has made clear that, "an assertion of actual innocence is outside the scope of *habeas corpus* review, which concerns only the legality of the petitioner's detention." [168]

In order to secure a writ of *habeas corpus*, the prisoner must show that constitutional or other legal error occurred at trial. However, we know that, through honest human mistake, error-free trials can still result in wrongful convictions. For example, Julius Ruffin was released 21 years after his original arrest, the Governor having issued Ruffin a pardon in March 2003. The victim has written Ruffin expressing her "sorrow and devastation" at his conviction, but in issuing a pardon, Governor Warner said, "I find no fault with the verdict of the jury based upon the evidence available to it at the time of trial, nor with the actions of the attorneys for the Commonwealth or the court at trial." [169]

Five of the exonerees whose cases were examined by the ICVA filed petitions for writs of *habeas corpus* with the Virginia courts; however, only one succeeded in obtaining release through that mechanism. Even in the one case where a petition for a writ of *habeas corpus* was granted, the prisoner, Jeffrey Cox, was only released after the Commonwealth's Attorney consented to an order vacating the original conviction. Because Virginia's *habeas corpus* process is focused upon the existence of legal error and not upon actual innocence, and is subject to strict procedural rules such as the one-year statute of limitations, it has not been an effective tool in securing the release of wrongfully convicted prisoners in the Commonwealth.

2. Motion for a New Trial

Under Virginia Supreme Court Rule 1:1, a prisoner may file a motion for a new trial based upon newly discovered evidence. However, the motion must be filed not later than 21 days after the date of the order of conviction. After 21 days, the trial court loses jurisdiction, and has no authority to act on a prisoner's motion.[170]

All of the exonerations that were examined by the ICVA proceeded on the basis of evidence that became available significantly more than 21 days after the date of the original conviction. In the case of Russell Gray, another man confessed more than 21 days after the original conviction, meaning that a motion for a new trial could not be filed. Similarly, many of the cases relied upon DNA testing techniques that did not become available until many years after the convictions were handed down.

All of the exonerations that were examined by the ICVA proceeded on the basis of evidence that became available significantly more than 21 days after the date of the original conviction.

A November 19, 2003 report of the "21 Day Rule Task Force" of the Virginia Crime Commission concluded that Virginia's 21-day rule was the most restrictive such rule in the nation. While most states initially appeared to have a finite time limit in which to present newly discovered evidence, the Virginia Crime Commission concluded that court rules, case law, and other rules of procedure frequently provided exceptions. Based on conversations with Assistant Attorneys General in all 50 states and legal analysis of statutes and rules, the Virginia Crime Commission concluded that 38 states had no time limit, one state had a three-year time limit, seven states had a two-year time limit, and four states had time limits of one year or less. No state had a limit as restrictive as Virginia's.

3. Petition for a Writ of Actual Innocence

Virginia has recently taken important steps to address the harsh results that can be produced by strict application of the 21-day rule. In 2002, the Commonwealth created a new judicial remedy - the "Writ of Actual Innocence" - for prisoners who could meet the following strict requirements:

1. The conviction was upon a plea of not guilty, or the person was convicted of (a) a Class 1 felony, (b) a Class 2 felony, (c) or any felony for which the maximum penalty is life imprisonment;

2. The prisoner is actually innocent, and no rational trier of fact could find proof of guilt beyond a reasonable doubt;

3. The prisoner's innocence is supported by human biological evidence;

4. The human biological evidence that supports the prisoner's claim of innocence was not known or available to the prisoner or his trial attorney of record at the time the conviction became final in the Circuit Court or, if known, the reason that the evidence was not subject to the scientific testing is set forth in the petition; and

5. The petition is filed within 60 days of obtaining the results of the tests on the human biological evidence.[171]

In 2004, the Commonwealth acted to expand availability of the Writ to prisoners who lack human biological evidence to support their claims, but nevertheless can meet the following requirements:

1. The conviction was upon a plea of not guilty;

2. The prisoner is actually innocent, and no rational trier of fact could find proof of guilt beyond a reasonable doubt; and

3. The evidence that supports the prisoner's claim of innocence was not known or available to the prisoner or his trial attorney of record at the time the conviction became final in the Circuit Court, and the evidence could not, by the exercise of due diligence, have been discovered or obtained before expiration of the 21-day rule.[172]

These legislative developments are to be commended. However, it is important to recognize that even with the new laws, some wrongfully convicted prisoners will remain ineligible. For these individuals, clemency, with its attendant political pressures, will remain the only available option. The ICVA therefore recommends that the General Assembly continue on the salutary path it has begun and expand the availability of the writ of innocence to ensure that all individuals with compelling claims of innocence can have their claims considered by a court.

The cases the ICVA studied provide the clearest examples of why this expansion is necessary. For example, although the Writ had not yet been established at the time David Vasquez was exonerated, he would not have been eligible for relief under it because he entered a plea of guilty to avoid a

possible death sentence, and his claim of innocence was not based upon human biological evidence. Conversely, the writ of innocence had been established at the time Marvin Anderson was exonerated; however, he was not able to apply for relief pursuant to its provisions because he was on parole, and not incarcerated, at the time human biological evidence of his innocence became available. Craig Bell could not have demonstrated that the human biological evidence that supported his claim of innocence was not known or available to the prisoner or his trial attorney of record at the time his conviction became final in the Circuit Court.

Fingerprints, hair, and clothing found at the scene were tested prior to Bell's trial and they did not implicate him in the crime, but he was convicted anyway. Only when those pieces of evidence were later linked to the true perpetrator who confessed to the crime was Bell exculpated. Jeffrey Cox also would have had difficulty proving that his "newly discovered" evidence of innocence - including evidence that prosecution witnesses lied about their criminal records and that prosecution witnesses made prior statements inconsistent with their trial testimony - was not available to him or his trial attorney of record at the time the conviction became final in the Circuit Court, and that the evidence could not, by the exercise of due diligence, have been discovered or obtained before the conviction became final. In short, in at least four of the eleven exonerations that the ICVA studied, the new laws, while certainly a step in the right direction, either would not have applied, or might have been construed by a court to deny any possibility of relief.

In at least four of the eleven exonerations that the ICVA studied, the new Writ of innocence laws, while certainly a step in the right direction, either would not have applied, or might have been construed by a court to deny any possibility of relief.

4. Clemency [173]

Article V, Section 12 of the Virginia Constitution gives the Governor the power to grant reprieves and pardons.[174] The constitutional power of the governor to grant pardons and reprieves or to commute capital punishment also is authorized by statute.[175] A pardon is defined as a remission of guilt and reaches both the punishment prescribed for the offense and the guilt of the offender. When the pardon is full, it relieves the punishment and blots out the guilt, so that in the eyes of the law the offender is as innocent as if he had never been convicted.

Clemency has many purposes: to ensure that justice is administered with mercy, to correct errors, and to allow the governor to assess the situation anew outside the rigid confines of the judicial decision-making process. A governor can look to the overall fairness of the situation and is not constrained by rules of procedure or evidence. He can make decisions based on factors beyond the law.

Clemency is a matter of the grace and discretion of the executive granting it. The Governor of Virginia is not required to review or accept for submission any clemency petition, even if the applicant presents compelling evidence of actual innocence.[176] If a petition for clemency is denied, there is no right of appeal. The governor's discretion for clemency decisions is high and usually unquestioned.[177]

Courts have stated that clemency proceedings are not an integral part of adjudicating the guilt or innocence of an accused.[178] Nevertheless, until recently, clemency was considered the only forum to pursue claims of actual innocence based on newly discovered evidence in Virginia.[179] It remains the only forum for some defendants who pled guilty to crimes that they did not commit, and to defendants whose evidence of actual innocence was not presented at trial due to ineffective assistance of counsel. Eight of the eleven exonerees whose claims were examined by the ICVA obtained relief through the clemency process, and not through the courts.

Clemency is an imperfect tool for addressing claims of actual innocence, largely because of its discretionary nature and because it is perceived as presenting political risks to incumbent governors.

The ICVA's view is that clemency is an imperfect tool for addressing claims of actual innocence, largely because of its discretionary nature and because it is perceived as presenting political risks to incumbent governors. Moreover, the clemency process is neither an evidentiary nor an adversarial proceeding. An inmate seeking clemency is not entitled to a hearing before the governor or the governor's designee. While an inmate is permitted to submit a clemency petition and supporting documentation to the governor, the ICVA believes that the clemency process is not well-suited to resolve contested claims of factual innocence. These claims typically involve credibility determinations that often cannot be decided on paper but instead require a hearing. These hearings are exactly the types of proceedings over which the courts are best suited to preside.

C. Research on Post-Conviction Remedies in Other Jurisdictions

Unlike Virginia, most jurisdictions rely primarily upon courts, and not upon clemency procedures, to provide a remedy in cases involving wrongful convictions. The ICVA reviewed information concerning 102 DNA exonerations nationwide that occurred between 1989 and 2004. Judicial remedies were provided in 90 cases (or approximately 88 percent of the time), and discretionary remedies (clemency, pardon, or parole) were provided in 12 cases (or approximately 12 percent of the time). Of the 12 cases in which discretionary procedures were used, seven cases (or approximately 58 percent) were from a single state - Virginia. These data

are consistent with a conclusion that most jurisdictions rely upon judicial remedies, rather than discretionary remedies, in cases involving wrongful convictions.

The ICVA also investigated the extent to which post-conviction remedies in other jurisdictions are made available to prisoners who entered pleas of guilty. In May 2003, the Virginia State Crime Commission conducted a 50 state analysis of post-conviction relief mechanisms. The ICVA started with the Virginia State Crime Commission's list of the post-conviction relief mechanisms in each jurisdiction, and conducted an independent review of those mechanisms to determine whether they were available to prisoners who entered pleas of guilty. The results of this research are summarized and available on-line at the ICVA's website, http://www.icva.us. The research shows that a majority of the states provide a mechanism for relief in the courts for prisoners who entered pleas of guilty. Only three states limit the availability of post-conviction remedies to such prisoners.

A majority of the states provide a mechanism for relief in the courts for prisoners who entered pleas of guilty. Only three states limit the availability of post-conviction remedies to such prisoners.

Finally, the ICVA investigated the extent to which prisoners are permitted to file multiple petitions for post-conviction relief. Again starting with the Virginia State Crime Commission's list of the post-conviction relief mechanisms in each jurisdiction, the ICVA conducted an independent review of those mechanisms to determine whether prisoners are permitted to file multiple petitions for post-conviction relief. The results of this research are summarized and are also available on-line. The research shows that most states do not limit the number of petitions for post-conviction relief that a prisoner can file. Only five states limit the number of petitions.

D. Recommendations for Reform in Virginia Regarding Post-Conviction Remedies

The ICVA recommends that Virginia continue its present course and, as described below, further expand the available judicial remedies to the wrongfully convicted. This will ensure that innocent individuals will be able to prove their innocence, and equally as important, will alert the authorities that the true perpetrator may still be at large, allowing them to reopen their investigation.

1. **The Virginia General Assembly should extend the availability of the writ of innocence to prisoners who entered a plea other than not guilty.**

Under current Virginia law, the writ of innocence is not available to some defendants who entered a plea other than not guilty, and who rely upon non-biological evidence to support their claim of innocence.[180] This limitation presumably proceeds from an assumption that one who is actually innocent would be unlikely to enter a plea of guilty. But, as demonstrated by the exonerations studied by the ICVA, and by other research, the facts are otherwise.

In 2001, the Washington Post ran an in-depth series on the pressures that can cause innocent men and women to confess to crimes that they did not commit. The series exposed numerous false confessions in Prince George's County, Maryland.[181] On December 22, 2002, the Miami Herald ran an in-depth story uncovering at least thirty-eight false confessions in Broward County, Florida, over a twelve year period.[182] False confessions captured national headlines again in 2003 when DNA exonerated five teens who were imprisoned for the notorious 1989 rape of the Central Park jogger in New York. Nationwide, 33 of the first 123 DNA exonerations - over 25 percent - involved false confessions or admissions of guilt.

False confessions can and do occur in Virginia, as well. Of the cases investigated by the ICVA, two involved false confessions. David Vasquez entered a plea of guilty to rape and murder and served five years in prison but was released in 1989 when the prosecution joined with defense attorneys to secure a pardon. Earl Washington confessed to a number of crimes and was convicted and sentenced to death for one of them. DNA later proved him innocent. He was pardoned and released in 2000. In a third case, in 1982, Arthur Lee Whitfield pled guilty to a rape that he did not commit and was sentenced to eighteen years. In 2004, DNA proved his innocence.

Not all of the men and women who falsely confess enter pleas of guilty. Nor do all of the men and women who enter pleas of guilty falsely confess. However, the problems presented by the two situations are very similar. Faced with seemingly overwhelming odds against them, innocent people charged with serious crimes may indeed plead guilty out of hopelessness, fear, or confusion, or as part of a rational decision to avoid more severe penalties, including the death penalty. These innocent prisoners should be provided a legal remedy when evidence demonstrating their innocence later emerges.

Not all of those who falsely confess enter pleas of guilty. Nor do all who enter pleas of guilty falsely confess. With seemingly overwhelming odds against them, innocent people charged with serious crimes may plead guilty out of hopelessness, fear, or confusion, or as part of a rational decision to avoid more severe penalties, including the death penalty.

Under current Virginia law, a prisoner who entered a plea of guilty is nonetheless eligible for a writ of innocence if he (1) can present *biological* evidence of innocence, or (2) is sentenced to death or convicted of a Class 1 felony, a Class 2 felony, or any felony for which the maximum term is life in prison.[183] However, prisoners who pled guilty are not eligible for a writ of innocence if the evidence that demonstrates their innocence is non-biological. This is true even for a death penalty case.

This distinction between prisoners who rely upon biological and non-biological evidence presumably proceeds from an assumption that prisoners who plead guilty should be required to meet a higher burden to support their claim for a Writ of Innocence, by providing biological evidence. While it may be appropriate to hold such prisoners to a higher burden of proof, they should not be required to provide biological evidence. Biological evidence simply is not available in many cases. Biological evidence is particularly unlikely to be available in cases involving female defendants. The ICVA examined 153 DNA exonerations and found that all of them involved male, and not female, defendants.

Moreover, non-biological evidence can provide compelling proof of innocence. On April 19, 2004, University of Michigan Professors Gross, Jacoby, Matheson, Montgomery and Patil released a new report on exonerations in the United States.[184] Their report identifies 328 exonerations during 1989 through 2003. Of those, 145 were based upon DNA, and 183 were based upon other types of evidence. They reported 18 non-DNA exonerations in 2000, and an average of 22 non-DNA exonerations per year since 2001. In Virginia, four of the exonerations that were examined by the ICVA were based upon non-biological evidence.

The ICVA has reviewed the laws of other jurisdictions to determine whether Virginia's restriction on the availability of post-conviction remedies to prisoners who entered pleas of guilty is consistent with national practice. Our findings show that, a majority of the states provide a mechanism for relief in the courts for prisoners who entered such pleas. Only three states limit the availability of post-conviction remedies to prisoners who pled guilty.

The ICVA urges Virginia to make the writ of innocence available to men and women who, for any number of reasons, succumb to the enormous pressure of a criminal prosecution by pleading guilty to crimes that they did

not commit. The writ of innocence should be available to such prisoners even if the only evidence supporting their claim of innocence is non-biological, and regardless of the crime for which they were convicted.[185]

2. The Virginia General Assembly should extend the availability of the writ of innocence to prisoners whose evidence of innocence was not presented at trial due to ineffective assistance of counsel.

Under current law, a writ of innocence is available only if the evidence that supports the prisoner's claim "was not known or available to the prisoner or his trial attorney of record at the time the conviction became final in the Circuit Court." [186] In addition, if the prisoner's claim is based upon non biological evidence, the prisoner must show that the evidence could not, by the exercise of due diligence, have been discovered or obtained before expiration of the 21-day rule.[187] Thus, if evidence of actual innocence was available but was not presented at trial due to the incompetence of trial counsel, the writ of innocence will not be issued.

As detailed in Part Four, Section (V)(C) of this report, attorney error played a significant role in five of the eleven cases that the ICVA reviewed. There does not seem to be any logical reason to deny post conviction relief to prisoners who are innocent, and, but for attorney error, would never have been convicted in the first place. Although, theoretically, such individuals may be eligible for a writ of *habeas corpus*, based upon violation of their Sixth Amendment right to the effective assistance of counsel, as a practical matter, *habeas corpus* relief may be denied on procedural grounds, such as a prisoner's failure to adhere to strict, statutory deadlines. Particularly at the federal level, complex procedural requirements have made the writ of *habeas corpus* increasingly difficult to obtain, especially for prisoners who attempt to proceed *pro se*. In several cases reviewed by the ICVA, both Virginia and federal courts concluded that the attorney's errors were not sufficient to mandate a new trial. Yet, the ICVA's investigation showed these errors played a significant role in the wrongful conviction of innocent men.

Therefore, the ICVA recommends that the General Assembly revise Virginia law to make the writ of innocence available to prisoners whose evidence of innocence was not presented at trial due to ineffective assistance of counsel.

3. The Virginia General Assembly should eliminate the limitation on the number of petitions for a writ of innocence that a prisoner who relies on non-biological evidence may file.

Prisoners who can present non-biological evidence of innocence may file only one Petition for a writ of innocence.[188] This provision, known as the "one bite at the apple" rule, was opposed by Governor Mark Warner, whose office issued the following statement on April 15, 2004:

> This bill represents an extraordinary, and long overdue, step forward for the Commonwealth, and I commend the patron and the Crime Commission for their work. As passed by the General Assembly, the bill limits a petitioner to one claim of innocence on any conviction. This provision was not included in the Crime Commission's proposed bill, and I oppose it. It makes no sense to eliminate one arbitrary deadline on justice - a 21 day limit - and impose yet another - a limit of one petition per conviction.

Virginia's "one bite" rule is extremely problematic because the wrongfully convicted cannot control the timing of the discovery of "previously unknown or unavailable" evidence that would support a writ of innocence.

Unfortunately, the House voted to reject the Governor's recommendation to strike the "one bite" rule, and the Governor signed the bill as presented on May 21, 2004.

The ICVA concurs with the Governor's recommendation and urges Virginia lawmakers to reconsider the "one bite" limitation. This provision is not consistent with the Commonwealth's treatment of prisoners who can present biological evidence of innocence. Va. Code § 19.2-327.2, relating to biological evidence of innocence, does not limit the number of petitions that a prisoner can bring. Moreover, our research shows that most states do not limit the number of petitions that prisoners can bring under newly enacted innocence protection laws.[189]

Virginia's "one bite" rule is extremely problematic because the wrongfully convicted cannot control the timing of the discovery of "previously unknown or unavailable" evidence that would support a writ of innocence. Thus, it is not unusual for prisoners to file multiple proceedings, as further evidence of their innocence emerges. Earl Washington, for example, presented two clemency petitions, one in 1994 and another in 2000, before he finally won his freedom. Marvin Anderson presented the confession of the actual perpetrator to a state *habeas* court in 1988, but he was not exonerated until 2002, when he was able to tie the actual perpetrator to the crime through biological evidence, as well. Russell Gray presented substantial evidence of innocence in a state court proceeding alleging fraud on the court. However, it was not the court, but the governor, who

eventually granted him relief. In each of these cases, it was the accumulation of evidence, through multiple proceedings and over a number of years, that eventually produced the desired result.

While it may be reasonable to impose a higher burden of proof on successor petitions, as is done in federal *habeas* proceedings, or to limit the number of petitions that can be brought in a given time period, as is done in Virginia clemency proceedings, the ICVA believes that absolute limits on the number of petitions that a prisoner can bring for a writ of innocence are not appropriate.

PART FIVE
CONCLUSION

Every time a crime occurs and the justice system convicts the wrong person, the truly guilty person remains at large, free to inflict more damage on the community.

The costs and consequences of erroneous convictions of innocent people are enormous, and affect all of society, not just those who are incarcerated for crimes that they did not commit. The upheaval that occurs when an innocent person is exonerated, often years or even decades after conviction, extends to victims and the wrongly convicted alike, as well as to their families and communities. The conviction of an innocent person has broad implications for the criminal justice system. Every time a crime occurs and the justice system convicts the wrong person, the truly guilty person remains at large, free to inflict more damage on the community. Victims, who have a right to see their victimizers punished, suffer when the criminal justice system convicts the innocent, and suffer again if the true perpetrator is apprehended and the victims must relive the crime through another trial. The public may come to doubt the competency of justice professionals and the legitimacy of the justice process. The unnecessary costs of wrongful incarceration, appeals, and retrials, are a tremendous strain on the public as well.

And, of course, the innocent individual suffers a devastating loss of freedom and other civil rights. For the exonerated defendant, release from prison does not immediately or necessarily begin the process of healing. Although programs exist to help guilty inmates transition back to society with housing, counseling, employment and other support, the innocent are more often simply released back into the community with no help, and inadequate or no compensation for the wrong inflicted upon them.

For the exonerated defendant, release from prison does not immediately or necessarily begin the process of healing.

To avoid these costs and consequences, it is essential that society, policy makers, and others involved in the criminal justice system, make every effort to avoid wrongful convictions, and to provide relief where wrongful convictions occur. At the very least, they should support the recommendations contained in this report, which will significantly contribute to the reliability of criminal justice proceedings in Virginia.

APPENDIX A

HISTORY AND IMPORTANCE OF INNOCENCE COMMISSIONS IN OTHER JURISDICTIONS

Innocence commissions constitute an effective and constructive mechanism to evaluate criminal justice system errors objectively and dispassionately. They assist all involved to identify weaknesses in the criminal justice system and to propose reasonable and workable improvements. Most importantly, they protect society by enhancing the accuracy of criminal investigations and prosecutions, helping to ensure that actual perpetrators are expeditiously identified, arrested, and brought to account in the future. Innocence commissions can also help save precious taxpayer money in the long run, eliminating the time and funds spent to investigate, prosecute, incarcerate, and eventually exonerate wrongfully convicted individuals. Retrying the case if the actual perpetrator is then apprehended is yet another significant resource, and the emotional burden on the crime victims who must then relive the crime is enormous.

In their influential and best-selling book, Actual Innocence, Jim Dwyer, Peter Neufeld, and Barry Scheck urged the creation of "state and federal institutions . . . to investigate wrongful convictions." [190] Scheck and Neufeld expanded on this recommendation in a 2002 article, arguing that "innocence commissions should be automatically assigned to review the causes of any officially acknowledged cases of wrongful conviction, whether the conviction was reversed with post-conviction DNA tests or through some other new evidence of innocence, and recommend remedies to prevent such miscarriages of justice from happening again." [191] The American Bar Association also has recommended that jurisdictions consider ongoing councils that include "the major stakeholders in the criminal justice system to identify and suggest policy in problem areas." [192] Finally, a new national project, "Strengthening Justice System Processes to Help Prevent the Conviction of Innocent Persons," is bringing together officials from "courts and other justice system institutions and agencies" in various states to "develop effective practices and procedures that will help prevent the conviction of innocent persons and will improve the reliability and integrity of criminal justice processes."[193] The project, which is sponsored by the Open Society Institute, has an advisory board that includes judges, prosecutors, law enforcement officials, policymakers, researchers, and academicians.

Several states have undertaken formal investigations of known frailties in their criminal justice systems, with a view toward preventing wrongful convictions. Perhaps the most notable was in Illinois where, in 2000, Governor Ryan established a bipartisan commission to consider the state's system of capital prosecution. Governor Ryan acted, he said, out of concern that more individuals had been mistakenly sentenced to death by Illinois than had actually been executed since the reinstatement of the death penalty in 1973.[194] Chaired by a former prosecutor, federal judge, and former U.S. Senator, the fourteen-member commission returned a comprehensive report recommending 85 changes to Illinois' system of criminal justice and especially its investigation and prosecution of capital cases. In response to the commission's work, the state legislature passed a reform bill in November 2003 that included more than 20 of the recommendations.[195]

Although the Illinois Commission was not designed specifically as an innocence commission, much of its work was in this vein, as members conducted their own "intensive examination of the cases involving the thirteen men released from death row."[196] Recently, four other states have formally established public innocence commissions. In 2002, North Carolina's Chief Justice I. Beverly Lake invited key representatives from the criminal justice system and legal academic community to meet with him to discuss the issue of the wrongful conviction of the innocent.[197] From that meeting, Justice Lake established the North Carolina Actual Innocence Commission which meets to "identify the most common causations of conviction of the innocent, both nationally and in North Carolina," and to issue interim reports addressing problems contributing to wrongful convictions." [198] In October 2003, the Commission released its first report recommending measures to improve eyewitness identification procedures.[199] In Connecticut, Texas, and California, innocence commissions have recently been established but have yet to begin their work.

Some of America's closest allies, including Canada and Great Britain, have maintained innocence commissions for years. In Canada, the Royal Commissions of Inquiry were formed over a century ago to permit governments to "conduct independent, nongovernment-affiliated investigations regarding the conduct of public businesses of the fair administration of justice." [200] These commissions formed the basis for public inquiries into two celebrated post-conviction exonerations involving Guy Paul Morin and Thomas Sophonow. In both inquiries the commissions "held hearings, recruited, when necessary, government laboratories or

independent experts, and issued reports that dealt with the specific causes of these wrongful convictions and made policy recommendations about remedies to prevent wrongful convictions in the future." [201]

In the United Kingdom, the Criminal Case Review Commission (CCRC) of Great Britain exists as "an independent, open, thorough, impartial and accountable body investigating suspected miscarriages of justice in England, Wales, and Northern Ireland." [202] Initiated in 1997, the CCRC has an independent staff and may engage experts to screen and investigate erroneous convictions or unjust sentences. Should the CCRC become convinced of a miscarriage of justice, it may refer the case back to the appellate courts or recommend a royal pardon.

All Americans, regardless of their background or ideology, agree that erroneous convictions should be avoided and that our criminal justice system fails when an innocent person is sent to prison and the true perpetrator remains free to prey on society. We must examine the system's errors, to analyze and learn from these mistakes, and institute improvements. Otherwise, it is inevitable that we will repeat, if not compound, those mistakes.

APPENDIX B

SURVEY METHODOLOGY

As part of the investigation, the ICVA's researchers surveyed law enforcement agencies and prosecutors' offices in Virginia to learn more about their practices involving eyewitness identification, custodial interrogation, and discovery. The surveys focused on three primary questions – how often and under what circumstances do law enforcement agencies conduct eyewitness identifications; how often such agencies perform custodial interrogations and under what circumstances; and to what extent do prosecutors share information from their investigations with defendants and defense counsel.

1. Law Enforcement Agencies

The ICVA contacted two hundred seventy-six law enforcement agencies in Virginia to participate in a survey, which was submitted to agencies by electronic and traditional mail and by facsimile. An accompanying letter asked the head of each agency to choose a "supervisor or other individual with knowledge of these subjects" to complete and return the survey. One hundred twenty-seven agencies participated in the survey, representing a forty-six percent response rate and a number higher than the percentage of agencies that responded to a similar survey conducted by the Virginia State Crime Commission in 2004. Surveys were sent to police departments and sheriff's offices, recognizing that some sheriff's offices are primarily responsible for law enforcement in their jurisdictions; some share such duties with police departments; and others are primarily responsible only for corrections and court security. Eighty-five percent of responding agencies have law enforcement duties. These one hundred eight agencies formed the basis of discussion later in the report.

Surveys asked whether agencies are involved in taking or obtaining the confessions of criminal suspects. Respondents answering this question in the affirmative were then asked which methods they use to record the custodial interrogation of suspects, as well as the reasons for using these methods. Law enforcement agencies also were queried about the practices they use for eyewitness identification, including "show-ups" (or field identifications), lineups, photo arrays, and single photos, and their reasons for using particular techniques.

The survey read as follows:

Survey of Law Enforcement Best Practices

This short survey will help the Innocence Commission for Virginia to understand the best practices used by law enforcement agencies in the Commonwealth. It is being asked of all police departments and sheriff's agencies in Virginia to determine a) which organizations have law enforcement responsibilities and b) the procedures they use in obtaining suspects' confessions or identifications. Responses are purely for research purposes and will remain anonymous. No agency or jurisdiction will be identified in the results.

The survey should take less than 15 minutes to complete. Please have a supervisor or other individual with knowledge of these subjects complete the survey. When finished please fax the survey to the Commission at 202-785-7555. You may also mail the survey to our address, P.O. Box 10240 Arlington, VA 22210. Because the Commission is operating on a short deadline, we ask that you respond by February 13th if possible. If you have any questions – or if you would prefer to respond more informally – please call Commission Chair Jon Gould at 703-993-8481 or email him at innocencecommission@yahoo.com. Thank you for your assistance on this important project.

Please circle or fill-in all responses as appropriate:

1. How is your agency best described?

    A. Police department
    B. Sheriff's office
    C. Other (please describe)

2. Does your agency have law enforcement responsibilities?

    A. Yes
    B. No

    IF NO, PLEASE STOP THE SURVEY AND RETURN IT.
    THANK YOU FOR YOUR ASSISTANCE.

    IF YES, PLEASE CONTINUE TO THE NEXT QUESTION.

3. How is your jurisdiction best described?

    A. City or municipality
    B. County
    C. City/municipality and County
    D. Other (please describe)

4. How would you describe the surrounding area you serve? (Please circle all that apply)

    A. City
    B. Suburb
    C. Rural

5. Approximately how many sworn officers does your agency employ?
   _____

<u>The following five questions pertain to criminal confessions</u>

6. Is your agency involved in taking or obtaining the confessions of criminal suspects?

    A. Yes
    B. No

    IF NO, PLEASE SKIP AHEAD TO QUESTION 11
    IF YES, PLEASE CONTINUE WITH QUESTION 7

7. Which methods do you use to record the custodial interrogation of suspects? (Please circle all that apply.)

    A. Have the suspect write out a statement
    B. Have an officer record the statement in writing
    C. Audiotape the statement
    D. Videotape the statement
    E. Other (please describe)

8. How often do you use videotape to record the custodial interrogation of suspects?

    A. Never
    B. Rarely
    C. Occasionally
    D. Mostly
    E. Always

9. If you use videotape to record the custodial interrogation of suspects, in what types of cases do you employ the technology?

    A. All kinds of cases
    B. Felonies only
    C. Serious felonies only
    D. Capital cases only
    E. Other (please explain)
    F. Not Applicable (don't use videotape)

10. If you do not use videotape to record the custodial interrogation of suspects, what is the reason? (Please circle all that apply.)

    A. Expense of videotaping interrogations
    B. Difficult to operate/requires additional technical staff
    C. Hinders or interferes with interrogation process or officers' rapport with suspect
    D. Had not considered videotape before
    E. Other (please explain)
    F. Not Applicable (already use videotape)

<u>The following seven questions pertain to eyewitness identification</u>

11. Which out-of-court identification methods do you use with eyewitnesses? (Please circle all that apply.)

    A. Show-up in the field
    B. In-person line-up
    C. Photographic array or photographic spread
    D. Presentation of a single photograph to a witness

12. If you use a photographic array or photographic spread, how do you show eyewitnesses the photographs?

    A. In a group of photographs that the eyewitness can view simultaneously
    B. One photograph at a time
    C. Either method A or B at the investigating officer's discretion
    D. Not Applicable (don't use photographic arrays or photographic spreads)

13. If you use an in-person line-up, how are the suspects shown to the eyewitnesses?

    A. In a group so that the witnesses can view the line-up participants simultaneously
    B. One line-up participant at a time
    C. Either method A or B at the investigating officer's discretion
    D. Not Applicable (don't use in-person line-ups)

14. If you use a show-up, line-up or photo array, are eyewitnesses told that a suspect is likely among those to be viewed?

    A. Never
    B. Rarely
    C. Occasionally
    D. Mostly
    E. Always
    F. Not Applicable (don't use any of these procedures)

15. If you use a show-up, line-up or photo array, are eyewitnesses told that they do not have to identify anyone during the procedure if they do not see the suspect?

    A. Never
    B. Rarely
    C. Occasionally
    D. Mostly
    E. Always
    F. Not Applicable (don't use any of these procedures)

16. If you use a show-up, line-up or photo array, do you videotape the eyewitness identification procedures and the comments of the eyewitnesses?

    A. Never
    B. Rarely
    C. Occasionally
    D. Mostly
    E. Always
    F. Not Applicable (don't use any of these procedures)

17. If you use a show-up, line-up or photo array, does the officer interacting with the witness know who the likely suspect is?

    A. Never
    B. Rarely
    C. Occasionally
    D. Mostly
    E. Always
    F. Not Applicable (don't use any of these procedures)

The following question is your opportunity to elaborate

17. Is there anything else we have not asked about these subjects that we should know? (Please explain below.)

When completed, please fax the survey to the Commission at 202-785-7555. You may also mail the survey to our address, P.O. Box 10240 Arlington, VA 22210. All responses are anonymous and will remain confidential. If you have any questions, please phone Commission Chair Jon Gould at 703-993-8481 or email him at innocencecommission@yahoo.com.

Thank you for your assistance. We very much appreciate your time.

2. Commonwealth's Attorneys

The ICVA contacted one hundred twenty Commonwealth's Attorneys' offices in Virginia to participate in the survey, of which twenty-six responded. The response rate, approximately twenty-two percent, may at first seem somewhat low, but it tracks the response rates from other voluntary surveys of criminal justice processes. Although a higher rate would have been preferable, the findings are nonetheless instructive.[203]

The survey queried prosecutors about their discovery practices, seeking to understand under what circumstances they shared information from a criminal case with the defendant and/or defense counsel. Surveys focused particularly on partial-open-files and open-files policies and probed the prosecutors' reasons for their particular approaches. Like the surveys of law enforcement agencies, questions employed a mix of structured and open-ended responses.

The survey appeared as follows:

Survey of Discovery Practices

This short survey will help the Innocence Commission for Virginia to understand the best practices used by prosecutors in the Commonwealth. It is being asked of all Commonwealth's Attorney's Offices in Virginia to determine the methods and procedures they use for discovery in criminal cases. Responses are purely for research purposes and will remain anonymous. No agency or jurisdiction will be identified in the results.

The survey should take less than 15 minutes to complete. Please have a supervisor or other individual with knowledge of these subjects complete the survey. When finished, please fax the survey to the Commission at 202-785-7555. You may also mail the survey to our address, P.O. Box 10240 Arlington, VA 22210. Because the Commission is operating on a short deadline, we ask that you respond by February 13th if possible. If you have any questions – or if you would prefer to respond more informally – please call Commission Chair Jon Gould at 703-993-8481 or email him at innocencecommission@yahoo.com. Thank you for your assistance on this important project.

Please circle or fill-in all responses as appropriate:

1. What is the best description of your office's jurisdiction?

    A. City or municipality
    B. County
    C. City/municipality and County
    D. Other (please describe)

2. How would you describe the surrounding area you serve? (Please circle all that apply.)

    A. City
    B. Suburb
    C. Rural

3. Approximately how many attorneys does your office employ?

    _____

4. How many of these attorneys handle criminal trials?

    _____

5. What is the average annual caseload for trial attorneys in your office?

    _____

The following questions concern discovery practices in criminal cases

6. What is your office's practice for providing investigative materials to the defense in criminal cases? (Please circle all that apply.)

    A. Provide only the discovery required by the Rules of the Supreme Court of Virginia and the obligations under the relevant case law to provide exculpatory evidence to the defense.
    B. Provide investigative reports prepared by law enforcement officers.
    C. Provide summaries of opinions and conclusions of laboratory or forensic experts or specialists if no written reports are prepared.
    D. Provide written statements taken by law enforcement officers from witnesses, copies of audio or

videotaped witness statements, or summaries of witness oral statements made by law enforcement officers.

E. Provide field notes made by law enforcement officers concerning their overall investigation and notes of their interrogation or questioning of the defendant.

F. Provide bench notes or laboratory notes of any laboratory or forensic experts or specialists.

G. Identify the names and addresses of Commonwealth witnesses who will testify at motions hearings or at trial.

H. Provide copies of photographs, charts or other demonstrative evidence and permit the review of physical evidence that will be introduced at trial.

I. Permit the defense to review but not copy all non-privileged material in law enforcement or Commonwealth's Attorney files. (Partial "open files" discovery policy.)

J. Permit the defense to copy all non-privileged material in the law enforcement files or Commonwealth's Attorney file. (“Open files” discovery policy.)

IF YOU DID NOT CIRCLE “I” or "J" IN QUESTION 6, PLEASE SKIP AHEAD TO QUESTION 9.

IF YOU CIRCLED “I” or "J" IN QUESTION 6, PLEASE CONTINUE WITH QUESTIONS 7 and 8.

7. Are there any cases in which you do not permit the defense to review and copy non-privileged material in the case file? Who makes these decisions? Please explain

8. What is your office’s reason for an “open files” practice? What are its advantages and disadvantages? Please explain.

<u>The last question is for all respondents.</u>

9. Is there anything else we have not asked about these subjects that we should know? Please explain below or on the back.

When completed, please fax the survey to the Commission at 202-785-7555. You may also mail the survey to our address, P.O. Box 10240 Arlington, VA 22210. All responses are anonymous and will remain confidential. If you have any questions, please phone Commission Chair Jon Gould at 703-993-8481 or email him at innocencecommission@yahoo.com.

Thank you for your assistance. We very much appreciate your time. The results of the surveys are discussed throughout the report, but one point warrants extra mention. It is imperative that Virginia and other states regularly survey their own criminal justice agencies to assess the investigative and prosecutorial practices employed and to learn what training or resources these offices seek. Indeed, one of the most striking findings from the ICVA's surveys is the number of respondents who expressed interest in further training and resources to adopt "best practices" employed by other jurisdictions, whether in Virginia or nationwide.

END NOTES

[1] Court TV, *Stories of the Innocence Project: Marvin Anderson's Nightmare*, (first aired Jan. 29, 2004); Taryn Simon, Peter Neufeld, and Barry Scheck, The Innocents, (Umbrage Editions 2003).

[2] The Spangenberg Group, *A Comprehensive Review of Indigent Defense in Virginia*, On Behalf of the American Bar Association Standing Committee on Legal Aid and Indigent Defense (2004); American Civil Liberties Union, *Broken Justice: The Death Penalty in Virginia* (2004).

[3] Based on extensive legal research and empirical study, the Crime Commission, in January 2005, issued six recommendations to: 1. "Amend the *Code of Virginia* to require local police and sheriff's departments to have a written policy for conducting in-person and photographic lineups." 2. "Request the Department of Criminal Justice Services (DCJS), in cooperation with the Virginia State Crime Commission, to establish a workgroup to develop a model policy for conducting in-person and photographic lineups." 3. "Request DCJS, through regulation, to amend the entry level and in-service training requirements regarding lineups to include only use of the sequential method, by October 1, 2005." 4. "Request DCJS to work with the Virginia Law Enforcement Professional Standards Commission to include the sequential method for conducting lineups as part of the accreditation process for law enforcement agencies." 5. "Require DCJS, in conjunction with the Crime Commission, work with the Virginia Sheriff's Association and the Virginia Chiefs of Police Association to assist members in using and understanding the benefits of the sequential method of lineups; presentation to each association's annual meetings will occur." 6. "Amend the *Code of* Virginia to designate the Virginia State Police, through their oversight of the Central Criminal Records Exchange, as the repository for all mug shots and queries for photographic lineups." (Virginia State Crime Commission, *HJR 79: Mistaken Eyewitness Identification. Report of the Virginia State Crime Commission to the Governor and General Assembly of Virginia* (2005) (hereinafter "Crime Commission").

[4] Adrian Grounds, *Psychological Consequences of Wrongful Conviction and Imprisonment*, 46 Canadian J. of Criminology and Crim. Just. 165 (Jan. 2004, Special Issue).

[5] *Monroe v. Angelone*, 323 F.3d 286 (4th Cir. 2003).

[6] Please go to the Innocence Commission for Virginia's website at http://www.icva.us to access all of the supplemental research and individual case reports.

[7] Gray was later convicted of an unrelated murder on Aug. 29, 1990 in the Circuit Court for Richmond, Virginia.

[8] It is important to recognize the possibility that not every wrongful conviction has resulted in an exoneration officially recognized by the Commonwealth. While the ICVA's recommendations are based upon the eleven official exonerations that are described more fully herein, the potential exists for wrongful convictions to occur under circumstances where actual innocence cannot be conclusively established. In a substantial majority of the exonerations that the ICVA reviewed (7 of 11), the eventual proof of innocence was the result of the development of DNA testing. However, DNA evidence is unavailable in the vast majority of serious crimes. A Department of Justice study of rape cases submitted to the FBI Crime Lab for DNA analysis suggested that in as many as 25% of the cases the wrong man had become the primary suspect, usually because of a mistaken identification. There is no reason to believe that any fewer mistakes are made in the vast majority of cases where DNA evidence is unavailable. Thus, although the ICVA has identified only eleven cases of wrongful conviction since 1982, it seems probable that the need for reform in Virginia exists on a broader scale.

[9] Gary L. Wells & Elizabeth A. Olson, *Eyewitness Testimony*, 54 Ann. Rev. Psychol. 277, 278 (2003).

[10] *Neil v. Biggers*, 409 U.S. 188, 199-200 (1972).

[11] *Id.* at 197 (quoting *Simmons v. U.S.*, 390 U.S. 377, 384 (1968)).

[12] *McCary v. Commonwealth*, 228 Va. 219 (1984).

[13] *Id.*

[14] *Hairston v. Commonwealth*, 1995 Va. App. 173 (Va. App. 1995); *Chambers v. Commonwealth*, 1995 Va. App. Lexis 761 (Va. App. 1995).

[15] *Curtis v. Commonwealth*, 396 S.E.2d 386 (Va. App. 1990).

[16] *Rodriguez v. Commonwealth*, 20 Va App. 122, 128 (Va. App. 1995).

[17] *Wise v. Commonwealth*, 6 Va. App. 178, 189 (Va. App. 1988); *see also Graham v. Commonwealth*, 250 Va. 79 (Va. App. 1995).

[18] *See* Crime Commission.

[19] Gary L. Wells, *What is Wrong with the* Manson v. Braithwaite *Test of Eyewitness Identification Accuracy*, (2003) (unpublished manuscript, on file with author) (hereinafter "Identification Accuracy").

[20] *See, e.g.*, Daniel Yarmey, *Eyewitness Identification: Guidelines and Recommendations for Identification Procedures in the United States and Canada*, 44 Can. Psychol. 181, 181 (2003) (citing Brian L. Cutler & Steven D. Penrod, *Mistaken Identification: The Eyewitness, Psychology, and the Law* (Cambridge University Press 1995)).

[21] Gary L. Wells & Donna M. Murray, *What Can Psychology Say about the* Neils vs. Biggers *Criteria for Judging Eyewitness Identification Accuracy*? 68 J. Applied Psychol. 347 (1983) (hereinafter "Wells & Murray").

[22] Richard E. Nisbett & Timothy D. Wilson, Telling More Than We Can Know: Verbal Reports on Mental Processes, 84 Psychol. Rev. 231 (1977).

[23] *See* Identification Accuracy.

[24] *See* Wells & Murray.

[25] *See* Identification Accuracy.

[26] *Id.; see also* Gary L. Wells, *Verbal Descriptions of Faces From Memory: Are They Diagnostic of Identification Accuracy?*, 70 J. Applied Psychol. 619 (1985)

[27] *See* Identification Accuracy.

[28] *See* Gary L. Wells & Amy L. Bradfield, *Good, You Identified the Suspect: Feedback to Eyewitnesses Distorts Their Reports of the Witnessing Experience*, 83 J. Applied Psychol. 360 (1998) (hereinafter "Wells & Bradfield"); *see also* Gary L. Wells & Amy L. Bradfield, *Distortions in Eyewitnesses' Recollections: Can the Postidentification-Feedback Effect Be Moderated?*, 10 Psychol. Sci. 138 (1999) (hereinafter "Distortions").

[29] *Id.* at 363.

[30] *Id.* at 366-367.

[31] *Id.* at 367.

[32] Identification Accuracy.

[33] *See, e.g.,* Wells & Bradfield at 366-367.

[34] Identification Accuracy.

[35] Wells & Bradfield at 363.

[36] See Gary L. Wells, *Mistaken Eyewitness Identification: Scientific Findings and the Case For Improvements in How Lineups are Conducted,* Statement Before the Senate Judiciary Committee, at 3, available at http://www.psychology.iastate.edu/faculty/gwells/Statement1.pdf (last visited Feb. 6, 2004) (hereinafter "Statement"); Gary L. Wells, *The Psychology of Lineup Identifications*, 14 J. Applied Psychol. 89 (1984).

[37] *See* Statement at 3.

[38] Nancy M. Steblay, et al., *Eyewitness Accuracy Rates in Sequential and Simultaneous Lineup Presentations: A Meta-Analytical Comparison*, 25 L. and Hum. Behav. 459 (2001).

[39] *See* Virginia State Crime Commission.

[40] Barry Scheck, Peter Neufeld & Jim Dwyer, *Actual Innocence: Five Days to Execution and Other Dispatches from the Wrongly Convicted*, (Doubleday 2000) (hereinafter "Scheck, Neufeld & Dwyer"); Samuel R. Gross, et al., *Exonerations in the United States 1989 through 2003*, April 2004 (unpublished, on file with the author) (hereinafter "Gross").

[41] Gross, at 7-8. (106 of 120 rape exonerations involved misidentifications).

[42] C.A. Meissner & J.C. Brigham, *Thirty Years of Investigating Own-Race Bias in Memory for Faces: a Meta-Analysis*, 7 Psychol., Pub. Policy and L. 3 (2001).

[43] Under Virginia law, "a witness other than the defendant, who has been hypnotized prior to trial is, as a matter of law, incompetent to testify as to those facts or circumstances which the witness recalled for the first time during, or subsequent to, hypnosis." *Hall v. Commonwealth*, 12 Va. App. 198, 210 (Va. App. 1991).

[44] National Institute of Justice, *Eyewitness Evidence: A Guide for Law Enforcement* (1999). These guidelines were developed by a Technical Working Group for Eyewitness Identification made up of representative law enforcement, prosecutors, defense attorneys, and social scientists and were published by the National Institute of Justice, an agency of the U.S. Department of Justice.

[45] In Illinois, some of the new procedures are part of a pilot project in which three police departments are instituting the sequential, double-blind procedures, and will report back to the Governor and Legislature, which will study the effectiveness of the procedures and determine whether to implement them state-wide.

[46] This procedure is only required in Illinois in the police departments participating in the pilot project.

[47] Roy S. Malpass, & Patricia G. Devine, *Eyewitness Identification: Lineup Instructions and the Absence of the Offender*, 66 J. of Applied Psychol. 482-489 (1981); Nancy M. Steblay, *Social Influence in Eyewitness Recall: A Meta-Analytic Review of Lineup Instruction Effects*, 21 L. and Hum. Behav. 283 (1977).

[48] *Id.*

[49] *See* Wells & Bradfield.

[50] *See* Crime Commission.

[51] *Id.*

[52] Expert testimony is admissible if the area of expertise to which the expert will testify is not within the range of the common experience of the jury. *Coppola v. Commonwealth*, 220 Va. 243, 252 (1979), cert. denied, 444 U.S. 1103 (1980).

[53] These miscarriage of justice studies examined cases where people were exonerated both before trial and after they were convicted.

[54] Hugo Adams Bedau & Michael L. Radelet, *Miscarriages of Justice in Potentially Capital Cases*, 40 Stan. L. Rev. (1987); Edward Connors, et al., *Convicted by Juries, Exonerated by Science: Case Studies in the Use of DNA Evidence to Establish Innocence After Trial*, U.S. Dept. of Justice Research Report (1996); Scheck, Neufeld & Dwyer, at 262 (2000); Innocence Project, Case Profiles, at http://www.innocenceproject.org/case (last visited Feb. 7, 2005).

[55] Saul Kassin & Katherine Neumann, *On the Power of Confession Evidence: An Experimental Test of the Fundamental Difference Hypothesis*, 21 L. & Hum. Behav. 469, 482 (1997).

[56] Thomas P. Sullivan, *Police Experiences with Recording Custodial Interrogations*, A Special Report Presented by Northwestern University School of Law, Center on Wrongful Convictions, Summer 2004, available at http://www.jenner.com/policestudy (last visited Feb. 7, 2005); a short version of the report is also available in the December 2004 edition of *The Champion*, the magazine of the National Association of Criminal Defense Lawyers (hereinafter "Police Experiences").

[57] *Flanary v. Commonwealth*, 113 Va. 775 (1912); *Walton v. City of Roanoke*, 204 Va. 678 (1963).

[58] *Brown v. Mississippi*, 297 U.S. 278 (1936).

[59] *Miranda v. Arizona*, 384 U.S. 436 (1966)(police must also advise suspects that anything they say may be used against them in court and that they have a right to appointed counsel if they cannot afford to pay counsel); *see also Dickerson v. United States*, 530 U.S. 428, 435 (2000)(affirming constitutional basis of *Miranda* rule).

[60] See the factors cited in *Withrow v. Williams*, 507 U.S. 680, 693-94 (1993).

[61] *Id.*

[62] *See, e.g., Stephan v. State*, 711 P.2d. 1156, 1159 n.6 (Alaska 1985) (quoting *Harris v. State*, 678 P.2d 397, 414 (Alaska App. 1984)); and *Davis v. State*, 438 P.2d 185, 194 (Wash. 1968); *see also, Ashcraft v. Tennessee*, 322 U.S. 143, 152-53 (1944).

[63] *Jackson v. Commonwealth*, 266 Va. 423, 438 (2003).

[64] Stephen A. Drizin & Richard A. Leo, *The Problem of False Confessions in the Post-DNA World*, 82 N.C.L. Rev. 891, 907-909 (2004) (hereinafter "Drizin & Leo").

[65] *See* Cathy Young, *Miranda Morass*, Reason, at http://reason.com/0004/fe.cy.miranda.shtml (last visited Feb. 7, 2005).

[66] Drizin & Leo, at 917-918.

[67] Drizin & Leo (citing Nathan Gordon & William Fleisher, *Effective Interviewing & Interrogation Techniques*, 27-36 (C. Donald Weinberg ed., Academic Press 2002); Fred E. Inbau, et al., *Criminal Interrogation and Confession* 209-347 (4th ed. Aspen Publishers 2001); Richard J. Ofshe & Richard A. Leo, *Decision to Confess Falsely: Rational Choice and Irrational Action*, 74 Den. L. Rev. 979, 1002-1006 (1997) (hereinafter "Ofshe & Leo").

[68] Ofshe & Leo, at 985-986 (footnote omitted).

[69] *See* Gisli H. Gudjonsson, *The Psychology of Interrogations and Confessions: A Handbook* 285 (John Wiley & Sons, Ltd. 2003) (hereinafter "Gudjonsson"); See Paul Hourihan, *Earl Washington's Confession: Mental Retardation and the Law of Confessions*, 81 Va. L. Rev. 1471, 1491-94 (1995).

[70] Gudjonsson, at 57-74.

[71] See http://www.innocenceproject.org/causes.

[72] Samuel Gross, et al., *Exonerations in the United States*, 1989 Through 2003, at http://www.law.umich.edu/newsandinfo/exonerations-in-us.pdf (last visited April 2004).

[73] The police claimed that Washington admitted leaving a shirt behind at the crime scene, and the police found a shirt in the victim's home. However, the jury never learned that police showed Washington the shirt during the interrogation and held it up while he "described" the shirt that he left at the scene.

[74] The police apparently attempted to videotape one of these interrogations, but the equipment malfunctioned and no audio was recorded of the questioning.

[75] "Interrogation still takes place in privacy. Privacy results in secrecy and this in turn results in a gap in our knowledge as to what in fact goes on in the interrogation room." *Miranda v. Arizona*, 384 U.S. 436, 448 (1966).

[76] *See* note 62.

[77] *See Mallot v. State*, 608 P.2d 737 (Alaska 1980) and *State v. Scales*, 518 N.W.2d 587 (Minn. 1994).

[78] 705 I.L.C.S. § 405/5-401.5.

[79] 725 I.L.C.S. § 5/103-2.1.

[80] *See D.C. City Council*, "Electronic Recording Procedures and Penalties Temporary Act of 2005."

[81] *See* Police Experiences.

[82] *See* April Witt, *Prince George's Police to Install Video Cameras: Interrogation Tapings to Begin by Mar. 31*, The Washington Post, Feb. 1, 2002, at B4.

[83] *See* Wanda DeMarzo & Daniel de Vise, *Ft. Lauderdale to Tape All Homicide Interrogations*, Miami Herald, at A1, available at 2003 WL 2573774; Paula McMahon & Ardy Friedberg, *Sheriff to Tape Felony Inquiries*, Sun-Sentinel (Ft. Lauderdale, Fl), Feb. 11, 2003, at A1, available at 2003 WL 11555119; and Wanda DeMarzo & Daniel de Vise, *Miami Police Plan to Videotape Interrogations*, Miami Herald, Feb. 13, 2002, at B1 available at 2003 WL 13342381.

[84] Amy Klobuchar, *Eye on Interrogations: How Videotaping Serves the Cause of Justice*, The Washington Post, June 10, 2002.

[85] *State v. Conger*, 652 N.W.2d 704, 707 (Minn. 2002).

[86] *Id.* at 708. *See also, Commonwealth v. DiGiambattista*, 442 Mass. 423, 440-449 (2004) and *State v. Cook*, 179 N.J. 533 (2004).

[87] Police Experiences.

[88] *Id* at 6.

[89] Policy and Procedures Manual of Broward County Sheriff's Department, Interrogation of Suspects with Developmental Disabilities, General Order 01-33, para. 13.2.15 *et seq.*

[90] Videotaping refers to either analog or digital video technologies.

[91] Va. Code Ann. § 19.2-62.

[92] Wanda J. DeMarzo & Daniel de Vise, *Experts Tape Police Interrogations*, The Miami Herald (Dec. 24, 2002).

[93] For those law enforcement agencies that do not presently have videotape capabilities, identical sanctions should apply when police fail to audiotape custodial interrogations.

[94] *See, e.g. Stephan v. State*, at 1162; *State v. Schroeder*, 560 N.W.2d 739, 740-41 (Minn. Ct. App. 1997); *State v. Miller*, 573 N.W.2d 661, 674-75 (Minn. 1998); *George v. State*, 836 P.2d 960, 962 (Alaska Ct. App. 1992); *Bodnar v. Anchorage*, No. A-7763, 2001 WL 1477922, at *2 (Alaska Ct. App. Nov. 21, 2001).

[95] *See Spencer v. Commonwealth*, 385 S.E.2d 850 (Va. 1989), *cert. denied*, 493 U.S. 1093 (1990).

[96] Rule 3A:11(b), Rules of the Virginia Supreme Court.

[97] *Stover v. Commonwealth*, 211 Va. 789, 795 (1971)(citing *Brady v. Maryland*, 373 U.S. 83 (1963)); *Harrison v. Commonwealth*, 405 S.E.2d 854, 857 (Va. App. 1991).

[98] *Watkins v. Commonwealth*, 331 S.E.2d 422 (Va. 1985), *cert. denied*, 475 U.S. 1099 (1986), *Lowe v. Commonwealth*, 239 S.E.2d 112 (Va. 1977), cert. denied, 435 U.S. 930 (1978). However, the Virginia rules require prosecutors to file witness subpoenas in the court file, but do not provide sanctions for failure to do so. Va. Code Ann. § 19.2-267.

[99] *Currie v. Commonwealth*, 391 S.E.2d 79 (1990); *See also Spencer v. Commonwealth*, No. 2207-0102, 2002 Va. App. LEXIS 604 (Va. App. Oct. 8, 2002) (accused not entitled to reports, interview documentation and internal documents of Child Protective Services in case where defendant was alleged to have sexually abused a minor).

[100] *See, e.g., Commonwealth v. Sellers*, 11 Va. Cir. 113, 1987 Va. Cir. LEXIS 171, *1 (Oct. 20, 1987).

[101] *See Bellfield v. Commonwealth*, 208 S.E.2d 771, 774 (Va. 1974).

[102] *See Spangenberg* Report.

[103] *Id.* at 70-71.

[104] For example, over half of the first seventy DNA exonerations analyzed by the Innocence Project involved police or prosecutorial misconduct. In over one-third of those cases, the government failed to disclose exculpatory evidence to the defense. Innocence Project, Causes and Remedies, at http://www.innocenceproject.org/case/index.php (hereinafter "Causes and Remedies") (last visited Feb. 7, 2005).

[105] *See Hall v. Commonwealth*, 12 Va. App. at 210.

[106] Criminal Justice Standards, Criminal Justice Section of the American Bar Association (1968).

[107] *Id.*

[108] The Second Edition of the Standards can be found at http://www.abanet.org/crimjust/standards (last visited Feb. 7, 2005).

[109] *Id.*

[110] Alaska; Arizona; Connecticut; Hawaii; Idaho; Illinois; Maryland; Michigan; Minnesota; Missouri; New Hampshire; New Jersey; New Mexico; Ohio; Oklahoma; Oregon; Oklahoma; Pennsylvania; Rhode Island; Vermont; and Washington. See the ICVA Discovery Practices Chart on-line at http://www.icva.us.

[111] In addition to the states listed in previous footnote, *see also* California; Florida; Maine; Montana; North Dakota; and Wisconsin.

[112] Kansas, Kentucky, and Texas.

[113] See ICVA Discovery Practices Chart on-line at http://www.icva.us.

[114] Social scientists refer to this concept as "confirmatory bias," which is the tendency of researchers to seek out or selectively pay attention to information which confirms what they already know or believe to be the case, while ignoring or dismissing information that contradicts the researchers' theory." See Randy Borum *et. al., Improving Clinical Judgment and Decision Making in Forensic Evaluation*, 21 J. Psychiatry & L. 3, 47-48 (1993).

[115] *Wrong Man Behind Bars, Wilder told*, Richmond Times-Dispatch, April 11, 1990, at A-6 (quoting Commonwealth's Attorney Learned Barry).

[116] Frank Stokes, the F.B.I. agent who helped exonerate Jeffrey Cox, is an advisory board member of the Innocence Commission for Virginia.

[117] *See, The Inquiry Regarding Thomas Sophonow*, prepared by the Province of Manitoba, Canada, available at http://www.gov.mb.ca/justice/sophonow (last visited Feb. 7, 2005); See Hon. Fred Kaufman, *The Commission on Proceedings Involving Guy Paul Morin* (Ontario Ministry of the Attorney General, 1998), *available at* http://www.attorneygeneral.jus.gov.on.ca/english/about/pubs/morin (last visited Feb. 8, 2005); Governor's Commission on Capital Punishment, *Report of the Governor's Commission on Capital Punishment* (April 15, 2002), available at http://www.idoc.state.il.us/ccp (last visited Feb. 8, 2005).

[118] Kent Roach, *Wrongful Convictions and Criminal Procedure*, 42 Brandeis L. J. (Winter 2003-04).

[119] See data at http://www.innocenceproject.org/causes/index.php.

[120] James S. Liebman & Jeffrey Fagan, *A Broken System: Error Rates in Capital Cases, 1973-1995*, Columbia Law School, June 12, 2000, available at http://www2.law.columbia.edu/instructionalservices/liebman (last visited Feb. 7, 2005).

[121] Rule 1.7. Conflict of Interest, Virginia Rules of Professional Conduct, Sup. Ct. R. pt. 6, sec. II, 1.7 (2004).

[122] *Id.* at Note 7.

[123] *Dowell v. Commonwealth*, 3 Va. App. 555, 560 (1987)(decided under Former Disciplinary Rule 5-105).

[124] 466 U.S. 668 (1984)

[125] *Id.*; see also, *Lovitt v. Warden*, 266 Va. 216 (2003)

[126] *See, e.g., Lovitt*, at 249 (2003)(citing *Strickland*, 466 U.S. at 689).

[127] *See, e.g.,* Causes and Remedies.

[128] Rule 1.7 states: "A lawyer shall not represent a client if the representation of that client may be materially limited by the lawyer's responsibilities to another client or to a third person . . . unless . . . the client consents after consultation . . . ."

[129] A *habeas* petition must contain all allegations of fact known to the inmate at the time of filing and no writ shall be granted based on any allegation of fact that the inmate had knowledge of at the time of filing any previous petition. Va. Code Ann. § 8.01-654(B)(2); *see also, Dorsey v. Angelone*, 261 Va. 601 (2001). For further information about the common problem of inmates using up their opportunity for *habeas* corpus relief when their attorneys miss appellate deadlines and then file limited *habeas corpus* petitions that only seek the right to file a belated appeal, see *Inexcusable Delay*, The Washington Post, at A-16 (July 5, 2004).

[130] Frank Green, *Hair Analysis Use Faulted: Critics Say It's a Bad Way to Make Identifications*, Richmond Times-Dispatch, Oct. 19, 2002.

[131] The lawyer implied during cross-examination that it was improper for the victim to allow her thirteen-year-old nephew to baby-sit her infant child while the victim worked as a cocktail waitress. He described the waitress outfit worn by the victim, including a short mini skirt, as weird and said it might appeal to somebody's sexual interest, implying that the victim was somehow at fault for being attacked. Finally, he belittled the victim in his closing argument because she had a tenth grade education and had dropped out of high school, and several times conceded that his arguments might be considered "obnoxious" and "insulting" by the jury.

[132] *See, e.g., Ten Principles of a Public Defense Delivery System*, American Bar Association Standing Committee on Legal Aid and Indigent Defendants (Feb. 2002); *Mandatory Justice: Eighteen Reforms to the Death Penalty*, The Constitution Project (2001).

[133] *See* the Spangenberg Report; see also ACLU of Virginia, et al., *Broken Justice: The Death Penalty in Virginia*, 31-36 (Nov. 2003)(focusing on quality of counsel issues in capital cases).

[134] *See, e.g.*, Summary of Reports, Studies, Legislative Action and Other Actions Regarding Indigent Defense in Virginia, Appendix A to the Spangenberg Report.

[135] E. Tazewell Ellett, *Justice Denied: Innocence Ignored; Innocents Imprisoned*, 30 VBA News Journal, (August 2004).

[136] *See* West Virginia Indigent Defense Task Force Report (2000) available at http://www.wvpds.org (last visited Oct. 29, 2004); FY02 North Carolina Office of the Appellate Defender and Private Counsel Cost-Benefit Analysis (2003) available at http://www.aoc.state.nc.us/www/ids (last visited Oct. 29, 2004); and see http://www.georgiacourts.org/aoc/press/idc/idc.html (last visited Nov. 3, 2004).

[137] *See, e.g.,* Edward Connors et. al., *Convicted by Juries, Exonerated by Science: Case Studies in the Use of DNA Evidence to Establish Innocence After Trial*, Research Report of the U.S. Department of Justice, Office of Justice Programs, National Institute of Justice (June 1996) (hereinafter "Connors"); *see also*, http://www.innocenceproject.org/causes/index.php.

[138] *Id.* at 25.

[139] *Id.* at 15, 18.

[140] *Id.* at 15.

[141] ABA Standards for Criminal Justice, Providing Defense Services (3rd ed. 1992).

[142] *See, e.g., United States v. Wade*, 388 U.S. 218, 227-28 (1967); *Barefoot v. Estelle*, 463 U.S. 880, 898-99 (1983).

[143] The Spangenberg Report at 62 (non-mental health defense experts were authorized by the courts in less than one percent of the felony cases in fiscal year 2002)(no data exists on the use of defense experts in privately retained cases in Virginia).

[144] *Id.* at 64.

[145] *Frye v. United States*, 293 F. 1013 (D.C. Cir. 1923). The *Frye* standard, while originally governing on evidence in federal courts, became the controlling rule in 45 states. Note, 40 Ohio St. L. J. 757, 769 (1979).

[146] *Daubert v. Merrell Dow Pharms., Inc.*, 509 U.S. 579 (1993).

[147] *O'Dell v. Commonwealth*, 234 Va. 672, 695-97 (1988)(declining to adopt *Frye* standard); *John v. Im*, 263 Va. 315 (2002)(leaving question of whether to apply Daubert analysis to future consideration).

[148] *Spencer v. Commonwealth*, 240 Va. 78 (1990).

[149] *Id.* at 97.

[150] Va. Code § 19.2-270.4:1.

[151] Tim McGlone, *Destroyed Evidence Still Crucial Years Later; Missing Lab Samples Slow Felons' Appeals*, The Virginian-Pilot (Norfolk, VA), Jan. 2, 2003, at B1 (Norfolk and Virginia Beach Circuit Court Clerks have adopted this policy).

[152] *See, e.g.*, L.S. Miller, *Procedural Bias in Forensic Science Examinations of Human Hair*, 11 L. & Hum. Behav. 157, 157-58 (1987); E. Imwinkelried, *Forensic Hair Analysis: The Case Against the Underemployment of Scientific Evidence*, 39 Wash. & Lee L. Rev. 41, 41-44 (1982).

[153] J. Peterson et al., *Crime Laboratory Proficiency Testing Research Program* (L.E.A.A. Oct. 1978); *see also*, E. Imwinkelried, at 44 (incorrect results involved those where the wrong result was reached and those where technicians provided incorrect analysis or explanations).

[154] Miller, at 160-61.

[155] *See* Connors at 15.

[156] *Id.*

[157] Andre A. Moenssens, *Symposium on Scientific Evidence: Foreword: Novel Scientific Evidence in Criminal Cases: Some Words of Caution*, 84 J. Crim. L. & Criminology 1, 13-14 (1993) (footnote omitted.)

[158] Maurice Possley, Steve Mills, and Flynn McRoberts, *Scandal Touches Even Elite Labs*, Chicago Tribune, October 21, 2004, at A1.

[159] *Id.*

[160] John C. Tucker, *May God Have Mercy: A True Story of Crime and Punishment*, 345 (Dell Publishing 1997).

[161] A secretor is someone whose blood type can be identified from other bodily fluids, for example semen or vaginal fluid. A non-secretor is someone whose blood type cannot be determined from other bodily fluids.

[162] Maria Glod and Michael D. Shear, *Testing Ordered on Old Va. Cases: DNA Work Affects Dozens of Inmates*, The Washington Post, Oct. 1, 2004, at B1.

[163] *Id.*

[164] ABA, *Report of the Post Conviction and Systematic Issues Subcommittee of the ABA Criminal Justice Section's Committee on Innocence and the Integrity of the Criminal Justice Process*, 1, 2 (draft 2003).

[165] *Kuhlmann v. Wilson*, 477 U.S. 436, 452 (1986).

[166] *Id*. at 452-53 (footnotes and citations omitted).

[167] Va. Code Ann. § 8.01-654.

[168] *Lovitt v. Warden*, 585 S.E.2d 801, 827 (Va. 2003)

[169] Moreover, a petition for a writ of *habeas corpus* must be filed with the Virginia courts within one year of the date the conviction became final. Va. Stat. § 8.01-543(A)(2). Often, through no fault of the prisoner, evidence of innocence does not become available for more than a year. In most of the cases that the ICVA reviewed, biological evidence of innocence became available more than a decade after the original conviction became final. In David Vasquez's case, several years elapsed between the date of

his conviction and the date the actual perpetrator committed a similar crime that investigators were able to link to the crime for which Mr. Vasquez was imprisoned. In the four cases the ICVA investigated that did not contain biological evidence of innocence – Craig Bell, Jeffrey Cox, Russell Gray, and David Vasquez – only in Bell's case was evidence of his innocence discovered within one year after his conviction became final.

[170] In Craig Bell's case, the trial court vacated the conviction notwithstanding the fact that it arguably had no jurisdiction to do so under Va. Sup. Ct. Rule 1:1. In *Department of Corrections*, 222 Va. 454 (1981), the court held that a trial court had no jurisdiction to vacate a sentence more than 21 days after the date of the original order, and that the Commonwealth's acquiescence could not re-confer jurisdiction.

[171] *See* Va. Code Ann. § 19.2-327.3

[172] Va. Code Ann. § 19.2-327.10

[173] For a more detailed discussion of clemency procedures in Virginia, see the March 14, 2005 Memorandum from R. Derek Trunkey to Donald Salzman, provided on-line at http://www.icva.us.

[174] *See* Va. Const. Art. V § 12.

[175] *See* Va. Code Ann. § 53.1-229.

[176] *Cherrix v. Braxton*, 131 F. Supp. 2d 756, 768 (E.D. Va. 2001).

[177] *Ohio Adult Parole Auth. v. Woodard*, 523 U.S. 272, 275 (1998).

[178] *Id.* at 285.

[179] *Royal v. Taylor*, 188 F.3d 239, 243 (4th Cir. 1999); *Cherrix v. Braxton*, 131 F. Supp. 2d 756, 767 (E.D. Va. 2001); Michie's Jurisprudence of Virginia and West Virginia, Pardon, Probation, and Parole, § 2.

[180] In some circumstances, the writ of innocence also is unavailable to prisoners who entered a plea of guilty and who rely upon biological evidence. See Va. Code § 19.2-327.1.

[181] See Washington Post series *False Confessions*, http://www.washingtonpost.com/wp-dyn/metro/md/princegeorges/government/police/confess (last visited Feb. 7, 2005).

[182] Wanda J. DeMarzo and Daniel de Vise, *Spotlight on False Confessions*, Miami Herald (Dec. 22, 2002).

[183] Va. Code Ann. § 19.2-327.2 makes the Writ of Innocence available to "a person incarcerated who was convicted of a felony upon a plea of not guilty, or for any person, *regardless of the plea*, sentenced to death, or convicted of (i) a Class 1 felony, (ii) a Class 2 felony or (iii) any felony for which the maximum penalty is imprisonment for life." (Emphasis added).

[184] Gross et al.

[185] *See* the ICVA's website at http://www.icva.us.

[186] *See* Va. Code Ann. § 19.2-327.3

[187] Va. Code Ann. § 19.2-327.10

[188] Va. Code Ann. § 19.2-327.10.

[189] *See* the ICVA's website at http://www.icva.us.

[190] Scheck, Neufeld & Dwyer, at 260.

[191] Barry C. Scheck and Peter J. Neufeld, *Toward the Formation of 'Innocence Commissions,'* 86 Judicature 98 (2002) (hereinafter "Scheck & Neufeld").

[192] Report, *Post-Conviction and Systemic Issues Subcommittee of the ABA Ad Hoc Committee on Innocence and Ensuring the Integrity of the Criminal Justice System* (2003).

[193] Strengthening Justice System Processes to Help Prevent the Conviction of Innocent Persons, *Project Overview* (2004).

[194] The Maryland legislature also appointed a commission to consider its system of capital punishment.

[195] Illinois General Assembly, SB 472, which was vetoed by Governor Blagojevich, but his veto was overridden by the General Assembly and finally was codified in November 2003. Additionally, SB 15, which required videotaping of interrogations, passed both chambers and was signed by the Governor in July 2003.

[196] *Id.*

[197] Mission of the North Carolina Actual Innocence Commission, available at http://www.innocenceproject.org/docs/NC_Innocence_Commission_Mission.html (last visited Feb. 7, 2005).

[198] *Id.*

[199] North Carolina Actual Innocence Commission, *Recommendations for Eyewitness Identification*, (October 2003).

[200] Scheck & Neufeld, at 100; Watson Sellar, *A Century of Commissions of Inquiry*, 25 Canadian Bar Rev. 1 (1947).

[201] Scheck & Neufeld, at 100.

[202] Criminal Cases Review Commission, at http://www.ccrc.gov.uk (last visited Feb. 7, 2005).

[203] Interestingly, smaller officers were more likely to respond than were larger offices. Despite these patterns, the data discussed in this section are statistically significant.