

A Report from the Innocence Commission for Virginia

Jointly sponsored by the Mid-Atlantic Innocence Project, the Administration of Justice Program at George Mason University, and the Constitution Project

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.

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. 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.

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.

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 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. 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 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.

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's 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.

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.