



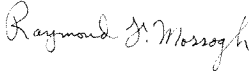
COMMONWEALTH of VIRGINIA

**FORENSIC SCIENCE BOARD
RAYMOND F. MORROGH, CHAIRMAN**

To: The Honorable Timothy M. Kaine
Governor of Virginia

Members of the Virginia General Assembly

Members of the Virginia State Crime Commission

From: Raymond F. Morrogh 
Commonwealth's Attorney, County of Fairfax
Chair, Forensic Science Board

Date: December 1, 2009

Re: Report on the Status of the Post-Conviction DNA Notification and Testing Program Pursuant to Chapter 172 of the 2009 Acts of Assembly (SB 1391)

Attached is the report of the Forensic Science Board required pursuant to Chapter 172 of the 2009 Acts of Assembly (Senate Bill No.1391). It addresses, among other things, the status of the Department of Forensic Science's Post-Conviction DNA Testing Program, the procedures utilized to notify persons convicted of crimes relating to cases in the testing programs, the number of individuals contacted, responses made by contacted individuals, and the resources utilized to date.

Please do not hesitate to contact me at (703) 246-2776 if you have any questions or require any additional information.

**REPORT OF THE FORENSIC SCIENCE BOARD PURSUANT TO
CHAPTER 172 OF THE 2009 ACTS OF ASSEMBLY (SB 1391)**

Notification Procedures Implemented Prior to Utilizing Pro Bono Attorneys

In 2005, Governor Mark R. Warner directed the Virginia Department of Forensic Science (“DFS”) to review archived forensic case files worked by serologists from 1973 to 1988, and to perform DNA testing of biological evidence found in certain of those files. Approximately 534,000 DFS case files from that period were individually reviewed to determine whether any portions of crime scene evidence were preserved in the files. The review at that time disclosed 2,167 cases that included human biological evidence and identified a known suspect. By 2007, efforts to confirm conviction information from Commonwealth’s Attorneys, courthouse records and other sources revealed that at least 770 of the case investigations resulted in the conviction of at least one suspect for a felony crime against a person.

In the 2008 Session, the General Assembly included, in the Appropriations Act, language requiring the Forensic Science Board (“Board”) to notify all individuals who were convicted due to criminal investigations, for which DFS case files for the years 1973 to 1988 were found to contain evidence possibly suitable for DNA testing, that such evidence exists and is available for DNA testing.

In August 2008, the Board, upon advice of counsel, approved a plan to send notification letters by both first class and certified US Mail to the then-identified 1,031 people required by the legislation to be notified. The plan included enclosing with the letter a postcard that the addressee was asked to return to indicate that they are the person for whom the letter was intended. The letter also included contact information for the Mid-Atlantic Innocence Project (“MAIP”) in case the individual desired free legal assistance.

The Virginia Department of Corrections (“DOC”) assisted in the notification effort by identifying those persons entitled to notification who were then in DOC custody or for whom the DOC had last known addresses. The Virginia State Police (“VSP”) also conducted a search of its records for best available addresses for the non-incarcerated persons requiring notification. In September and early October 2008, based upon the best-available addresses provided, DFS mailed letters to 556 persons on behalf of the Board. By the end of October 2008, 181 of the persons sent notification letters returned the enclosed postcards indicating they had received the notification letter intended for them. Twenty-one postcards were returned indicating the notification letter was sent to an incorrect person. Letters addressed to 159 persons were returned as undeliverable, but in 62 of these cases, only the certified letters were returned, not the first class mailings.

Information confirming convictions in various cases continued to be provided to DFS by Clerks of court. The State Police continued research of government records and other databases to locate current addresses for convicted persons whose addresses were not initially identified or whose addresses appeared to have been incorrect. Based principally on a review of state Vital Records, it also was confirmed that 206 of the convicted persons were by then deceased.

During the first week of December 2008, a second round of mailings was sent to newly-found or updated addresses for 528 of the 845 living persons then believed to be entitled to

notification. By early January 2009, the Board had a total of 317 confirmed notifications (including hand-delivery by DOC to 169 inmates, enclosed white postcard confirmations returned, or confirmation from the MAIP). A total of 528 notification letters from the two rounds of mailings were returned as “undeliverable,” and addresses for 58 persons remained undetermined at that time. Notification letters continued to be mailed throughout 2009, as confirmation of convictions and updated addresses were obtained.

Prior to the 2009 Session of the General Assembly, the Virginia State Crime Commission (“VSCC”) reviewed the progress of the Board’s notification efforts. The VSCC recommended that there be legislation to allow the Board to utilize the services of pro bono attorneys and other volunteers to assist with the notification project. The legislation ultimately introduced by Senator Ken Stolle, Senate Bill No. 1391, was based largely on a consensus draft prepared at the Crime Commission’s request by representatives of the VSCC, DFS, VSP, and the Office of the Attorney General (“OAG”). SB 1391 was enacted as emergency legislation and signed into law by Governor Tim Kaine on March 23, 2009.

At its first meeting following the legislative session on May 13, 2009, the Board adopted a work plan for implementing the legislation and utilizing pro bono attorneys and other volunteers to assist in the notification project. The Executive Director of the Virginia State Crime Commission, who serves as a member of the Board, became chair of a Notification Subcommittee. The other members of the Subcommittee are the Superintendent of the VSP and a criminal defense attorney who also are members of the Board. The Subcommittee, with assistance from VSCC staff, has responsibility for coordinating the participation of pro bono volunteers. The Subcommittee met on July 9, 2009, to discuss and approve the work plan, training manual, OAG forms, and a memorandum of understanding with the MAIP, which accepted the task of developing and implementing a training program for the volunteers.

The Virginia State Bar approved the training manual for the notification project on July 21, 2009. The training received approval from Virginia CLE for two hours of continuing legal education credit on July 29, 2009. In order to publicize the training sessions, a flyer was distributed statewide by many individuals and organizations. Flyers were posted in courthouses, public libraries, and various other public and governmental buildings. Information about the training sessions was also publicized by website postings, listserv announcements, and various other media outlets, including newspapers, television, attorney publications, and press releases. Beginning in August 2009, a total of seven training sessions were conducted at various locations around the Commonwealth.

The OAG prepared the waiver of liability and confidentiality agreement forms required of participants under the new law. Upon receiving input from at least one of the law firms providing volunteer attorneys, the OAG revised the waiver of liability form, which was in final form by September 17, 2009. Volunteer attorneys must provide signed forms to the VSCC before accepting notification-related assignments.

To date, a total of 91 volunteers have completed the training and returned their signed waiver of liability and confidentiality agreement forms. Additional training sessions may be scheduled should they become necessary. In order to make it easier for attorneys to attend the required training, efforts are being made to offer training online or via CD-ROM.

DFS provided to the Notification Subcommittee Chair on June 12, 2009, its database records identifying cases in the testing program and all information in its possession pertaining to the identification of persons entitled to notification. Updated database records were provided to the Subcommittee Chair on September 2nd. The database has been and, as updated data is received, will be configured by VSCC staff in preparation for the assignment of cases to volunteers.

In anticipation of numerous pro bono attorneys visiting courthouses throughout the state, the Chair of the Subcommittee has been working with the Virginia Circuit Clerk’s Association (“Association”) to inform Clerks of Circuit Courts about this project. The Association offered its assistance and notified all Clerks of the project and distributed the training flyer so that it could be posted in courthouses around the Commonwealth. In addition, some Clerks have agreed to assist in the notification effort, offering to pull files ahead of time and/or reserving conference rooms so volunteer attorneys can privately review case files.

The first group of volunteer attorneys started their case assignments on September 24, 2009. Their work largely focused on reviewing court files in Richmond Circuit Court, seeking suspect conviction information and information that may assist in identifying current addresses. The volunteers reported the results of their notification efforts to the Chair of the Notification Subcommittee by October 1, 2009 and are currently completing their case review and preparing their reports. Their feedback may be useful in guiding the research efforts of subsequent volunteers. A report on the results of the notification project was prepared by the Chair of the Notification Subcommittee and provided to the Board members electronically on October 1st and at its October 14th meeting.

To date, all notifications that have been provided to affected persons have been sent by the Board by U.S. Mail. It is presently anticipated that, in the future, if volunteer attorneys identify additional persons entitled to notification and/or current addresses for persons entitled to notification, that hand-delivery of notification letters will be made by such volunteers.

As of the preparation of this report, 882 living persons have been identified as entitled to notification. Confirmed notification by the Board to 336 such persons has been accomplished.

Number of Persons Entitled to Notification and Notified

Convicted Suspects Eligible to be Notified Under 2008 Budget Language	1,089
Number of Convicted Suspects Determined to be Deceased	207
Living Convicted Suspects Entitled to Notification	882¹
Confirmed Notification Received	336²
Undelivered and Unconfirmed Notifications	546

¹ 195 suspects entitled to notification were believed to have been incarcerated when notified. No current address has been identified for 86 persons entitled to notification.

² Hand-delivery of notification letters was made to 173 incarcerated persons. Confirmation of correct notification was received from 164 persons via returned post cards or by confirmation from the MAIP. Certified mail return receipts signed by the addressee were received from an additional 106 persons but not regarded as confirmation of notification.

DNA Testing Program Update

From February 2007 to June 2008, \$1,422,000 in funding from the Governor’s Economic Contingency Fund was utilized to support the initial testing of biological evidence found in approximately 300 old case files by an independent contract laboratory. A federal grant from the National Institute of Justice (“NIJ”), awarded to DFS in the summer of 2008, provided a major boost to the testing program, providing \$4.5 million for the DNA testing of biological evidence found in old case files associated with convictions for the crimes of murder, forcible rape or non-negligent manslaughter. With this funding, cases eligible for testing under the NIJ grant have been prioritized for testing ahead of cases associated with convictions that do not fit the NIJ grant criteria (*i.e.*, “state-eligible cases”). Within this prioritization, cases associated with persons currently incarcerated are being tested before cases associated with convicted persons not currently incarcerated.

The testing continues to be performed by the contract laboratory, with test results examined and certificates of analysis issued by DFS forensic scientists. Data pertaining to the testing program, as of October 14, 2009, were as follows:

Number of Case Files found with Evidence Suitable for DNA Testing	3,052
Cases with Evidence <u>and</u> Named Suspect	2,208
Cases with Evidence & Suspect known to have been Convicted	800
Cases for Contractor Testing	829
Cases Sent for Testing meeting NIJ grant criteria	638
Cases Sent for Testing meeting state criteria or conviction status unknown	191
Final Completed Case Results Returned	288
Cases in Which Certificates of Analysis Issued, as of 10/14/09	182

The DNA testing program proceeds independently of the Notification project. Although notification letters have informed recipients that evidence in their case files was either “Being Tested” or “Not Being Tested” at the time of notification, it is the intention of DFS to test eventually all of the evidence associated with cases in which a suspect was convicted of a crime. It is not incumbent upon any convicted person, whether notified or not, to request that evidence be tested, so long as the case fits the criteria for the Post-Conviction Testing Program and the notification criteria specified by the General Assembly – that is, that the case file was found to contain evidence suitable for DNA testing and that a suspect in the case was convicted of a crime.

Communication of DNA Test Results to Notified Persons

To date, DFS has issued Certificates of Analysis, reflecting post-conviction testing of evidence found in the old case files, to investigating agencies and Commonwealth’s Attorneys in 207 cases. Each person convicted of a crime in connection with the offense investigated in each case file is eligible to receive a copy of each certificate reporting the results of DNA testing of

the evidence in that case. If DFS, as a result of notification efforts, has a confirmed address for a person eligible to receive a report of the DNA testing in a case and has received a request from such person for the DNA test results, DFS mails a copy of the Certificate of Analysis to the person and/or the person's attorney, if requested, when the certificate is issued to the investigating agency and Commonwealth's Attorney.

If DFS, as a result of notification efforts, has a confirmed address for a person eligible to receive a report of the DNA testing in a case but has not received a request from such person for the DNA test results, DFS mails a letter to the person advising that testing has been performed and that he/she may obtain a copy of the Certificate of Analysis upon request to DFS.

If DFS has a last-known mailing address³ for a person eligible to receive a report of the DNA testing in a case but has not received a confirmation of receipt of the notification letter, DFS mails a letter to the person at the last-known address advising the person that testing has been performed and encloses a copy of the notification letter previously sent. The person is further informed that he/she may obtain a copy of the DNA test results upon request, provided the request is accompanied by confirmation that he/she is the person for whom the notification letter was intended.

To date, DFS has sent 104 letters to notified persons, advising that DNA testing of case evidence has been performed and that they may request and obtain those test results. Thus far, 53 Certificates of Analysis reflecting DNA testing of evidence found in old case files have been provided upon request. In addition, six certificates have been provided upon request to attorneys representing persons who had been convicted.

³ The mailing address utilized for a person in this group is the address to which the person's notification letter was sent, provided the notification letter was not returned to DFS as undeliverable.