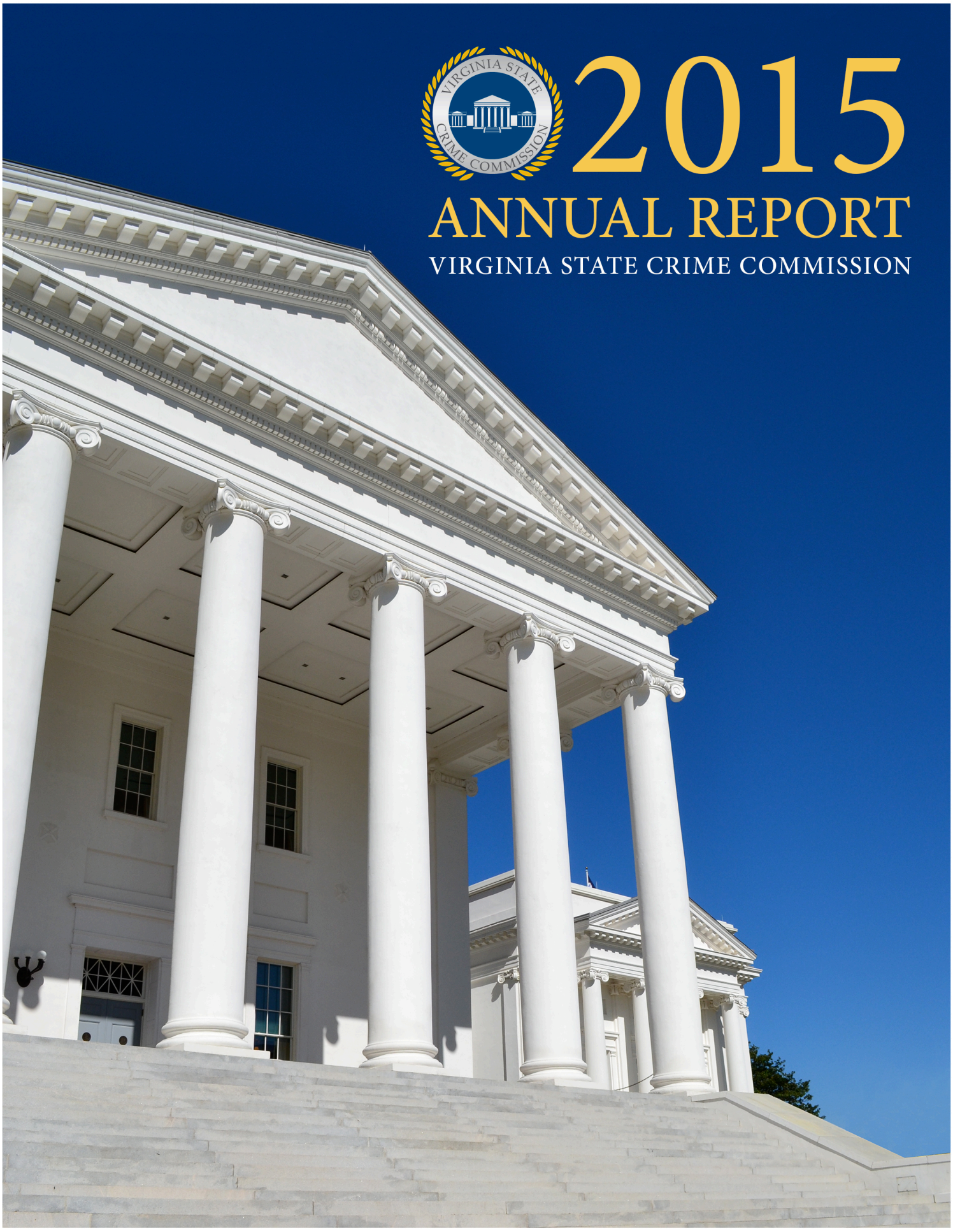
2015 ANNUAL REPORT

VIRGINIA STATE CRIME COMMISSION



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June 30, 2016

TO: The Honorable Terry McAuliffe, Governor of Virginia
The Honorable Members of the General Assembly of Virginia

Pursuant to the provisions of the Code of Virginia §§ 30-156 through 30-164 establishing the Virginia State Crime Commission and setting forth its purpose, I have the honor of submitting herewith the Commission's 2015 Annual Report.

Very truly yours,

Thomas K. Norment, Jr., Chair

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Authority of the Crime Commission

Established in 1966, the Virginia State Crime Commission is a legislative agency authorized by the Code of Virginia § 30-156 *et seq.* to study, report, and make recommendations on all areas of public safety and protection. In doing so, the Commission endeavors to ascertain the causes of crime and ways to reduce and prevent it, to explore and recommend methods of rehabilitation for convicted criminals, to study compensation of persons in law enforcement and related fields, and examine other related matters including apprehension, trial, and punishment of criminal offenders. The Commission makes such recommendations as it deems appropriate with respect to the foregoing matters, and coordinates the proposals and recommendations of all commissions and agencies as to legislation affecting crime, crime control, and public safety. The Commission cooperates with the executive branch of state government, the Attorney General's Office and the judiciary who are in turn encouraged to cooperate with the Commission. The Commission cooperates with governments and governmental agencies of other states and the United States. The Crime Commission is a criminal justice agency as defined in the Code of Virginia § 9.1-101.

The Crime Commission consists of thirteen members that include nine legislative members, three non-legislative citizen members, and the Attorney General, as follows: six members of the House of Delegates to be appointed by the Speaker of the House of Delegates in accordance with the principles of proportional representation contained in the Rules of the House of Delegates; three members of the Senate to be appointed by the Senate Committee on Rules; three non-legislative citizen members to be appointed by the Governor; and the Attorney General or his designee.

Members of the Crime Commission

SENATE APPOINTMENTS

The Honorable Thomas K. Norment, Jr., Chair
The Honorable Janet D. Howell
The Honorable Bryce E. Reeves

HOUSE OF DELEGATE APPOINTMENTS

The Honorable Robert B. Bell, Vice-Chair
The Honorable Richard L. Anderson
The Honorable C. Todd Gilbert
The Honorable Charniele L. Herring
The Honorable G. Manoli Loupassi
The Honorable Jennifer L. McClellan

ATTORNEY GENERAL

Cynthia E. Hudson, Chief Deputy, Attorney General's Office, Designee for Attorney General Mark R. Herring

GOVERNOR'S APPOINTMENTS

The Honorable Michael R. Doucette, Commonwealth's Attorney, City of Lynchburg
Lori Hanky Haas, Virginia State Director, The Coalition to Stop Gun Violence
The Honorable Brian K. Roberts, Sheriff, Brunswick County

Crime Commission Staff

Kristen J. Howard, Executive Director
G. Stewart Petoe, Director of Legal Affairs

Christina Barnes Arrington, Ph.D., Senior Methodologist
Holly B. Boyle, Policy Analyst
Colin L. Drabert, Staff Attorney

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2015 Executive Summary of Activities

During the 2015 Session of the General Assembly, a total of five bill referrals, relating to three topics, were sent to the Commission and approved for review. These bill referrals dealt with the topics of asset forfeiture, statute of limitations in regards to certain misdemeanor sexual crimes against minors, and the crime of stalking. Additionally, the Commission approved staff completing the endorsed recommendations from its 2014 Missing Persons/Search and Rescue study and to continue to monitor the topic of illegal cigarette trafficking. The Commission continued to be involved in the Forensic Science Board's DNA Notification Project and staff ensured that the recommendations made by the Commission relating to the priority of testing and notification were carried out. In 2015, the Commission held three meetings: September 29, October 27, and December 3.

Throughout the year, staff researched three issues as a result of bill referrals to the Commission from the 2015 Session of the General Assembly. Senate Bill 684 and House Bill 1287 dealt with forfeiture of property used in connection with the commission of crimes. Staff completed a comprehensive review of all forfeiture statutes and related case law. A review of other states' forfeiture laws was also conducted. Staff also met with key stakeholders and surveyed all Virginia law enforcement agencies and Commonwealth's Attorneys' Offices. Several recommendations for improving the current asset forfeiture system in Virginia were made.

Senate Bill 1253 dealt with the statute of limitations for several misdemeanor sexual crimes against minors. Staff reviewed existing relevant statutes and whether extending the statute of limitations to one year after a victim reaches 18 years of age for misdemeanor violations of certain crimes was appropriate.

Senate Bill 1297 and House Bill 1453 dealt with the crime of stalking. Staff examined stalking statutes in Virginia and other states. In particular, staff reviewed any constitutional concerns potentially raised by adding an "emotional distress" element to the existing statutory crime.

Additionally, in order to fulfill the endorsed recommendations from the Commission's 2014 Missing Persons/Search and Rescue study, staff convened a work group in May 2015 that was comprised of over 30 representatives with specific knowledge or experience in search and rescue or missing persons. As a result of these efforts, three working documents relating to first responder search and rescue efforts, as well as a family resource guide, were developed. Staff presented and disseminated the working documents at the 2015 Virginia Association of Chiefs of Police's and Virginia Sheriffs' Association's annual conferences. The family resource guide was published by the Department of Criminal Justice Services in spring 2016. Finally, presentations on updates of the DNA Notification Project and Illegal Cigarette Trafficking studies were provided by staff at the December Crime Commission meeting.

Detailed study presentations can be found on the Commission's website at: http://vscc.virginia.gov.

As a result of the 2015 studies, a number of legislative proposals were endorsed by the Crime Commission and were presented for consideration during the 2016 Session of the General Assembly. The Commission's legislative package included bills dealing with asset forfeiture, stalking, and statute of limitations. All of these measures successfully passed during the 2016 legislative Session.

In addition to these studies, the Commission's Executive Director serves as a member of the Forensic Science Board pursuant to the Code of Virginia § 9.1-1109(A)(7). The Executive Director also acts as the Chair of the DNA Notification Subcommittee, which is charged with the oversight of notification to convicted persons that DNA evidence that may be suitable for testing exists within old Department of Forensic Science case files.

In accordance with the Code of Virginia § 19.2-163.02, the Commission's Executive Director also serves on the Virginia Indigent Defense Commission, and specifically as a member of the Budget Committee and the Personnel and Training Committee.

The Executive Director also serves on the newly created Advisory Committee on Sexual and Domestic Violence as a designee for the Chair of the Commission pursuant to the Code of Virginia § 9.1-116.2.

Asset Forfeiture

Executive Summary

Senate Bill 684, patroned by Senator Charles Carrico, and House Bill 1287, patroned by Delegate Mark Cole, were introduced during the Regular Session of the 2015 General Assembly. Both bills were identical as introduced; however, House Bill 1287 was slightly amended in the House Courts of Justice Committee. Both bills would have required that any forfeiture actions related to criminal activity (pursuant to Va. Code § 19.2-386.1 *et seq*.) be stayed until there had been a criminal conviction for a qualifying offense, and the exhaustion of all appeals. If no judgment of conviction for a qualifying offense was entered, the seized property would then be released. The amended version of House Bill 1287 provided two exceptions, which permitted an action of forfeiture to proceed even though no final judgement of conviction had been entered. Those exceptions applied when: (i) the forfeiture was ordered by a court pursuant to a lawful plea agreement; or (ii) the owner of the property did not submit a written demand for return of the property within one year from the date of seizure, in which case the forfeiture case could proceed.

Both bills were passed by in the Senate Finance Committee and a letter was sent to the Crime Commission requesting that the subject matter of the bills be reviewed. While the bills' foci were somewhat narrow in scope, the Executive Committee of the Crime Commission authorized a broad review of asset forfeiture in Virginia. Crime Commission staff undertook a number of activities to thoroughly examine the topic, including: a review of Virginia and other states' statutes, collection of relevant data and literature, a survey of all law enforcement agencies and Commonwealth's Attorneys' Offices, a review of law enforcement agencies' policies/general orders pertaining to asset forfeiture, and numerous meetings with involved agencies, organizations and individuals.

For purposes of this study, asset forfeiture can be defined as a civil lawsuit, initiated by the government, to seize the instrumentalities and profits of criminal activity. Broadly speaking, forfeiture of assets related to criminal activity serves a number of public policy goals, such as removing contraband and dangerous items from the public, recompensing the government for lost income, recompensing the government for the expenses of a criminal prosecution and investigation, preventing unjust enrichment by criminals, helping directly fund law enforcement efforts to keep society safe, and thwarting and deterring criminal activity.

Overall, staff found that Virginia's current statutes and practices balance the interests of property owners and the Commonwealth. While additional protections for citizens could be implemented in Virginia, no direct evidence was found of systemic abuse of the asset forfeiture process by law enforcement or prosecutors under Virginia's asset forfeiture laws.

The statutory forfeiture scheme in Virginia is substantially similar to most of the other states and the federal government. A majority of the states and the federal government are analogous to Virginia in the following ways: a criminal conviction is not required as a prerequisite to forfeiture, the burden of proof required to establish forfeiture is preponderance of the evidence or a similar evidentiary standard, and the claimant bears the burden of proving an "innocent owner" exception after the government has proven the property is subject to forfeiture. The main distinction between Virginia and other jurisdictions is that Virginia is in the minority of jurisdictions that mandate reimbursement of attorney fees to a claimant that prevails in a forfeiture proceeding.

In Virginia, law enforcement and prosecutors can participate in the Virginia Department of Criminal Justice Services' (DCJS) Forfeited Asset Sharing Program, the federal Department of Justice's Asset Forfeiture Program, the federal Treasury Forfeiture Fund managed by the U.S. Department of the Treasury, or all three programs. Most, however, participate in the state program only. In Fiscal Year 2014 (FY14), Virginia received a combined total of approximately $10.8 million in disbursals from the U.S. Department of Justice and state asset forfeiture programs. Specifically, $6,641,267 was disbursed from the federal program and $4,185,594 was disbursed from the state program (as of September 8, 2015). The total number of agencies participating and the amount of monies disbursed has remained fairly consistent over the past five years from these two asset forfeiture programs. Virginia also receives disbursals from the Treasury Forfeiture Fund managed by the U.S. Department of the Treasury; however, an anomaly exists in the amount disbursed during recent years due to the Abbott Laboratories settlement where Virginia was awarded over $115 million. Disbursals for this settlement have been distributed over the course of FY13-FY16, rather than in one lump sum. The Abbott settlement accounts for the vast majority of disbursals received from the Fund during this time frame, representing an anomaly to totals typically received in prior years.

Staff focused the majority of their analysis on data from Virginia's Forfeited Asset Sharing Program. It was found that excellent data is maintained for this program. Since 1991, DCJS has managed the tracking and reimbursement of all state drug-related forfeitures valued at $500 or more. All proceeds from state non-drug related forfeitures, which are not tracked by DCJS, are sent directly to the Literary Fund by law enforcement agencies. Non-drug related forfeitures include offenses relating to child pornography, cigarette trafficking, computer crimes, felony DUI's, gambling, money laundering, moonshining/bootlegging, prostitution and transportation of stolen goods.

The Department of Criminal Justice Services has distributed over $106 million dollars to Virginia's law enforcement and Commonwealth's Attorneys' Offices since 1991. In general (for drug-related cases), DCJS retains 10% of the proceeds from each forfeited item. The remaining proceeds are distributed based on sharing agreements between law enforcement and Commonwealth's Attorneys' Offices. Staff found that since 2010, the value of items seized, as well as the total amounts disbursed, has remained stable with approximately $10 to $11 million in items seized and $4 to $5 million disbursed back to agencies each year. Most seizures involve currency and vehicles. Examining case dispositions, staff found that approximately 75% resulted in forfeiture and 25% resulted in the item being returned to the owner or a lienholder. Taking a closer look at cases resulting in forfeiture, staff found that most asset forfeitures are a result of default

judgement or some type of plea agreement or settlement. Very few cases appear to go to trial. Participating agencies in the state forfeiture program are held accountable through detailed annual certification reports to DCJS. Further, nearly all participating agencies reported having annual audits conducted internally, by DCJS, or by other independent entities.

There were, however, some data limitations identified by staff. Unlike data for drug-related asset forfeitures, non-drug related forfeiture data is not captured in a reliable, transparent manner. Nor is data readily captured to connect any related criminal charges and convictions with civil forfeiture proceedings. Data is also not readily available to ascertain how many civil asset forfeiture trials involve a verdict in favor of the defendant. Staff accordingly made recommendations to help close this gap in available data.

Staff surveyed all Virginia law enforcement agencies and Commonwealth's Attorneys. There was a high response rate with 87% (118 of 135) of primary law enforcement and 83% (99 of 120) of Commonwealth's Attorneys responding. All survey respondents indicated that they participated in state asset forfeiture proceedings. The majority of survey respondents reported that they had a designated person(s) to handle these types of cases for their agency or office. The most common type of crimes involved in asset forfeiture cases, according to all survey respondents, were felony drug offenses. Responding prosecutors reported that 90% or more of the informations they filed in FY14 were for drug-related cases. However, both prosecutors and law enforcement also reported handling other eligible offenses relating to child pornography, cigarette trafficking, computer crimes, felony DUIs, gambling, money laundering, moonshining/bootlegging, prostitution and transportation of stolen goods. Survey respondents were also asked to designate their level of support or opposition for the following three proposed options: (1) Requirement to stay a civil asset forfeiture case until any related criminal charges are resolved; (2) Requirement for a criminal charge before the related civil asset forfeiture case can proceed; and, (3) Requirement for a criminal conviction before the related civil asset forfeiture case can proceed. The level of support from law enforcement and prosecutors was very mixed for the first two proposed options. However, there was strong opposition by both law enforcement and prosecutors to require a criminal conviction before the related civil asset forfeiture case could proceed.

The Crime Commission reviewed study findings at its October meeting and directed staff to draft legislation for several key issues, as well as provide a list of additional policy options to consider relating to the requirement of a criminal conviction prior to a civil forfeiture proceeding, burden of proof levels, and stays in relation to forfeiture proceedings.

There were seven staff recommendations presented for the Crime Commission's consideration at its December meeting. Staff recommendations, which were based upon the key findings of the study, focused on transparency of the forfeiture process in Virginia, preventing potential for abuses, as well as automation and efficiencies. The Crime Commission unanimously endorsed all seven staff recommendations at its December meeting:

Recommendation 1: The use of "waivers" by law enforcement, whereby the declared owners or lawful possessors of property "waive" their rights to contest forfeiture, should be prohibited.

Recommendation 2: The Virginia Department of Criminal Justice Services should be required to prepare an annual report to the Governor and General Assembly regarding information on all drug and non-drug asset seizures and forfeitures.

Recommendation 3: The word "warrant" should be added to Va. Code § 19.2-386.10(B), so that a forfeiture proceeding may be stayed if it is also related to a warrant.

Recommendation 4: The Virginia Department of Criminal Justice Services should require participating agencies to submit information on all state law enforcement seizures and state forfeiture actions *stemming from any criminal activity*, not just those related to drug offenses.

Recommendation 5: The Virginia Department of Criminal Justice Services should collect additional data related to asset forfeitures for criminal charges and convictions that may accompany drug and non-drug related civil asset forfeitures.

Recommendation 6: The Virginia Department of Criminal Justice Services should consider further automating Virginia's Forfeited Asset Sharing Program so participating agencies have the ability to upload all forms, annual certification reports, and supporting documentation. It was also recommended that Commonwealth's Attorneys be permitted to notify the Commissioner of the Va. Department of Motor Vehicles electronically, as opposed to using certified mail, which is the current requirement, whenever a vehicle has been seized in anticipation of a forfeiture proceeding per Va. Code § 19.2-386.2:1.

Recommendation 7: Crime Commission staff should work with law enforcement and prosecutors to help implement training that can be readily accessible online to new asset forfeiture coordinators.

Recommendations 1, 2, 3, and a portion of Recommendation 6 were combined into an omnibus bill. Specifically, the omnibus bill prohibits law enforcement from requesting a "waiver" until after an information is filed, permits electronic notification to the Virginia Department of Motor Vehicles (DMV) of seized vehicles, removes the requirement that DMV certify to the Commonwealth's Attorney the amount of any lien on a vehicle, allows for the stay of a civil forfeiture proceeding related to a warrant, and requires that DCJS prepare an annual report to the Governor and General Assembly that details all funds forfeited to the Commonwealth as a result of civil asset forfeiture proceedings. The bill does not represent an overhaul of the asset forfeiture process in Virginia, but rather improvements to the functionality and transparency of the present system. The omnibus bill was introduced during the 2016 Regular Session of the Virginia General

Assembly in both the Virginia Senate and House of Delegates: Senators Janet Howell and Thomas Norment introduced Senate Bill 423 and Delegate C. Todd Gilbert introduced House Bill 771. Both bills passed the legislature, and were signed into law by the governor; House Bill 771 was signed on March 1, 2016, and Senate Bill 423 was signed on March 11, 2016.

Recommendations 4 and 5 were handled via a letter request from the Crime Commission to DCJS. In response, DCJS indicated that they would request that agencies include information on non-drug asset seizures and forfeitures in their annual reports filed with the agency and that they would modify reporting documents to request information about criminal charges and convictions related to all forfeiture cases. Recommendation 6 was handled by both a letter request to DCJS and a legislative component to address changes to Va. Code § 19.2-386.2:1. This legislative component was included in the two omnibus bills, discussed above, that were signed into law by the governor. Staff will ensure that Recommendation 7 is implemented by meeting with all involved parties in 2016.

There were five policy options presented for the Crime Commission's consideration at its December meeting. None of the Policy Options were endorsed by the Crime Commission; motions for Policy Options 1, 2, and 3 failed to pass and no motions were made for Policy Options 4 or 5.

Policy Option 1: Should criminal convictions be required, and the conclusion of all appeals, before any civil forfeiture could be ordered? Should additional exceptions be included to what was proposed in SB 684/HB 1287?

Policy Option 2: Should a criminal conviction be required before any civil forfeiture could be ordered?

Policy Option 3: Should the burden of proof on the Commonwealth be increased from "preponderance of the evidence" to "clear and convincing evidence"?

Policy Option 4: Should defendants be entitled to have forfeiture proceedings heard prior to the resolution of any related pending criminal cases, even if the Commonwealth wants to stay the forfeiture cases?

Policy Option 5: Should defendants be entitled to a mandatory stay until the resolution of any related pending criminal cases?

Background

Senate Bill 684, patroned by Senator Charles Carrico, and House Bill 1287, patroned by Delegate Mark Cole, were introduced during the Regular Session of the 2015 General Assembly. Both bills were identical as introduced; however, House Bill 1287 was slightly amended in the House Courts of Justice Committee. Both bills would have required that any forfeiture actions related to criminal activity (pursuant to Va. Code

§ 19.2-386.1 et seq.) be stayed until there had been a criminal conviction for a qualifying offense and all appeals had been exhausted. If no judgment of conviction for a qualifying offense was entered, the seized property would then be released. The amended version of House Bill 1287 provided two exceptions, which permitted an action of forfeiture to proceed even though no final judgement of conviction had been entered. Those exceptions applied when: (i) the forfeiture was ordered by a court pursuant to a lawful plea agreement; or (ii) the owner of the property did not submit a written demand for return of the property within one year from the date of seizure, in which case the forfeiture case could proceed.

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For purposes of this study, asset forfeiture can be defined as a civil lawsuit, initiated by the government, to seize the instrumentalities and profits of criminal activity. Broadly speaking, forfeiture of assets related to criminal activity serves a number of public policy goals, such as removing contraband and dangerous items from the public, recompensing the government for lost income, recompensing the government for the expenses of a criminal prosecution and investigation, preventing unjust enrichment by criminals, helping directly fund law enforcement efforts to keep society safe, and thwarting and deterring criminal activity.

There are early legal precedents for this type of action. In Colonial times, smuggled goods could be seized and sold to ensure applicable customs duties were received by the government. This was separate from any criminal action against individuals who were involved in the smuggling. At an early date, forfeiture also became a tool used to combat and deter criminal activity, as evidenced by this 19th century Virginia statute:

> *"All monies actually staked or betted whatsoever, shall be liable to seizure…under a warrant from a magistrate…and be paid into the treasury of the Commonwealth, for the use and benefit of the literary fund, deducting thereout fifty percent upon all monies seized, to be paid to the person or persons making the said seizure."*[1]

Forfeiture became more prominent during Prohibition, and then expanded dramatically once again in the 1970's and 1980's, as governments across the country sought ways to combat the enormous profits generated by the sales of drugs.[2] Deterring and combatting ongoing criminal activity is especially relevant when dealing with an organized criminal enterprise, such as the distribution of drugs. Directly funding law enforcement efforts is also especially important when it comes to combatting organized criminal enterprises. Law enforcement must handle the logistics, lengthy investigations

and criminals who might have enormous resources at their disposal. For instance, law enforcement may need to pay for confidential informants, set up controlled buys, create fictitious businesses and transaction sites, as well as purchase and maintain expensive surveillance equipment.

On the other hand, direct funding of law enforcement through asset forfeiture can lead to inappropriate seizures and purchases if not properly overseen or monitored. Recently, there have been numerous stories in the press highlighting instances where cash or property was seized by law enforcement in a manner that indicates abuse of the system.[3] Many of these egregious cases occurred in other states. Although some cases did take place in Virginia, they appear to have been handled via the federal asset forfeiture program, rather than Virginia's state asset forfeiture program.

Until 1991, the Virginia Constitution required that all forfeited property accrued by the Commonwealth, as well as fines for offenses committed against the Commonwealth, be paid into the Literary Fund, which is used to fund Virginia schools.[4] Over the past five years, the net revenue of the Literary Fund from all sources has remained stable as seen in Table 1.

Table 1: Virginia Literary Fund Net Revenue, FY11-FY15

FY	Total Literary Fund Revenue
2011	$ 89,465,124
2012	$ 89,668,006
2013	$ 91,973,522
2014	$ 86,144,047
2015	$ 89,108,012

Source: Va. Department of Accounts, Literary Fund Data, CARS System.

There are numerous funding streams into the Literary Fund in addition to proceeds from the forfeiture of items connected to non-drug criminal offenses, including proceeds from unclaimed lottery prizes, "fines/penalties/forfeited recognizances", as well as interest stemming from fines, forfeitures and other sources. Proceeds from the forfeiture of items connected to non-drug related criminal offenses are included within the "forfeited/confiscated property and funds" category seen highlighted in Table 2. Unfortunately, the data was unable to be broken down to determine exactly how much of the $339,964 was from non-drug related forfeitures versus other types of forfeited or confiscated property and funds.

Table 2: Net Revenue from Individual Literary Fund Source, FY15

Literary Fund Source	FY15 Net Revenue
Fines, Penalties & Forfeited Recognizances	$60,598,703
Proceeds from Unclaimed Lottery Prizes	$12,421,426
Interest on Fines and Forfeitures	$6,633,262
Interest on Literary Loans	$4,275,160
Fines Imposed by the State Corporation Commission	$2,912,604
Interest from Other Sources	$1,657,132
Regulatory Board Monetary Penalty & Late Fees	$525,818
Forfeited/Confiscated Property and Funds	**$339,964**
Fines, Fort, Court Fees, Costs, Penalties & Escheat	$2,000
Criminal History Fee	$32
Private Donations, Gifts & Grants	$10
Pay to Circuit Court for Commissions	-$212,113
Refund- Misc. Disbursements Made Prior Years	-$45,586
Property Escheated by Appointed Escheater	-$400
TOTAL	**$89,108,012**

Source: Va. Department of Accounts, Literary Fund Data, CARS System.

A very significant change to how funds from forfeited property were handled occurred in 1991. The Constitution of Virginia was amended to permit the General Assembly to allow for "the proceeds from the sale of all property seized and forfeited to the Commonwealth for a violation of the criminal laws… proscribing the manufacture, sale, or distribution of a controlled substance or marijuana" to "be distributed by law for the purpose of promoting law enforcement." Therefore, current law designates proceeds from the forfeiture of items connected to drug-related criminal offenses go to purposes of promoting law enforcement; whereas, forfeiture of items connected to non-drug criminal offenses still go to the Literary Fund.

Legal Overview

Constitutional Law Background

Although the due process requirements for asset forfeitures are less than what exist for criminal trials, certain constitutional safeguards must still be observed. The Eighth Amendment does apply, and in theory, would prohibit an excessive forfeiture for minor wrongdoing.[5] In practice, however, forfeitures are almost never found to have violated the Eighth Amendment.

Because asset forfeiture involves the seizure of an individual's property, there are additional limitations placed on the government's actions. The Fourth Amendment does

apply to forfeiture proceedings, so no seizures can be made that are unreasonable.[6] In general, a probable cause standard, or something beyond mere suspicion, must be used. The Fifth Amendment's due process requirements also apply to forfeitures.[7] In general, there must be prior notice and the opportunity for a hearing prior to the order of forfeiture being entered by a court. This is similar to the Virginia Supreme Court's holding that the statutory requirements of Va. Code § 19.2-386.3 are mandatory and jurisdictional, such that failure to file an information within 90 days of seizure must result in the release of the property.[8]

However, as noted, due process requirements are less stringent than in a criminal case. For example, there is no requirement that an "innocent owner" defense be granted to the co-owner of an automobile that is forfeited, and no requirement that the innocent owner be granted compensation from the state.[9] Similarly, failure to file a notice of seizure within 21 days, as required by Va. Code § 19.2-386.3, is not jurisdictional, and will not prevent the forfeiture.[10] Unlike the filing of the information, the filing of the notice is "directory and not mandatory," and does not define any basic rights.[11]

Virginia Law and Criminal Related Asset Forfeitures

In Virginia, there are various means of accruing forfeited property to include criminal drug and non-drug related forfeitures, bail bondsman forfeitures, peace bonds, appeal bonds, debtor's bonds/forthcoming bonds,[12] as well as various forfeitures relating to permit holders (mine, junkyard, waterworks operators, etc.). However, this report will focus solely upon forfeitures related to criminal activity.

The Virginia General Assembly has specified which criminal offenses can lead to civil forfeiture actions:

- All vehicles, weapons, and equipment connected with the illegal manufacture of alcoholic beverages;[13]
- All money or property, real or personal, together with any interest or profits derived from the investment of such money, used in substantial connection with any act of terrorism;[14]
- Any vehicle used by the owner, or with his knowledge:
  - (i) During the commission of a second or subsequent prostitution offense;[15]
  - (ii) To transport stolen property worth $200 or more;[16]
  - (iii) To transport stolen property of any value that was taken in a robbery;[17]
  - (iv) During an abduction (including a misdemeanor parental abduction);[18] or,
  - (v) A first offense of pimping, if the prostitute is a minor.[19]
- All moneys and other income, including proceeds earned but not yet received from a third party, as a result of computer crimes, as well as the computer equipment, software, and all personal property;[20]
- Any unlawful electronic communication device possessed or sold in violation of Article 5.1 of Chapter 6 of the Code of Virginia;[21]
- Any money, or personal or real property used in substantial connection with money laundering;[22]
- Any fixtures, equipment, materials and personal property used in substantial connection with cigarette trafficking or counterfeit cigarettes;[23]

- All money, equipment, motor vehicles, and all other personal and real property used in connection with drug distribution or manufacture, or the distribution of more than half an ounce of marijuana;[24]
- Any weapons that were unlawfully possessed or carried concealed, or were used in the commission of a criminal offense;[25]
- Any money, gambling devices, and other equipment and personal property used in connection with an illegal gambling transaction;[26]
- Any audio and visual equipment, electronic equipment, and other personal property used in connection with child pornography, or the solicitation of a minor using a communications device in violation of Va. Code § 18.2-374.3;[27]
- All moneys and other property, real and personal, used to further the abduction of a child;[28]
- Any money or other thing of value improperly derived or obtained by a state or local government employee in violation Va. Code §§ 2.2-3103 through 2.2-3112 (i.e., improper acceptance of gifts, bribes, etc.);[29]
- Any vehicle solely owned and operated by a person convicted of felony DUI;[30] and,
- Any money, equipment, motor vehicles, and other personal and real property of any kind, that was used in connection with abduction, extortion, prostitution, or illegal wage withholding.[31]

The authorizing statutes for asset forfeiture have been developed piecemeal. Different crimes allow for different types of property to be forfeited. For example, real property can be forfeited if connected with terrorism, drug distribution, money laundering, prostitution or illegal wage withholding;[32] however, it cannot be forfeited if connected with gambling, the manufacture of child pornography, or cigarette trafficking.[33] Slightly different procedures and limitations can be involved, depending on the statute, even for the same type of property. For example, depending on which Code section is violated, a vehicle may be forfeited with or without a conviction. Under Va. Code § 19.2-386.16, a vehicle can be forfeited, without a conviction, if it is used to transport stolen property worth more than $200, used to transport property obtained in a robbery (regardless of value), used for a second offense involving prostitution (including misdemeanor solicitation), used for a first offense of pimping if the victim is a juvenile, or used for abduction in violation of Va. Code § 18.2-48. However, under Va. Code § 19.2-386.34, a conviction is required to forfeit a vehicle for a felony violation of drunk driving under Va. Code § 18.2-266.

Currently, there are several statutes that require a conviction for the forfeiture to proceed, including weapons unlawfully carried or used in the commission of a felony,[34] forfeiture of property used in connection with child pornography,[35] forfeiture of property used in connection with child abduction,[36] felony DUI,[37] and, prostitution, abduction, and extortion.[38]

Virginia Law and the Asset Forfeiture Process

The process for most civil forfeiture actions in Virginia is governed by Chapter 22.1 of Title 19.2 of the Code of Virginia. Per Va. Code § 19.2-386.1, the forfeiture action is commenced when the Commonwealth's Attorney files an information with the circuit

court clerk. There is a strict requirement that the information be filed "within three years of the date of actual discovery by the Commonwealth of the last act giving rise to the forfeiture."

However, most items are initially seized by law enforcement in the course of investigations or arrests. In those instances, law enforcement notifies the Commonwealth's Attorney "forthwith" in writing of the seizure, per Va. Code § 19.2-386.3(A). Law enforcement must also conduct an inventory of the seized property and "as soon as practicable" provide a copy to the owner. However, Va. Code § 19.2-386.2(C) does specify that "failure to provide a copy of the inventory shall not invalidate any forfeiture."

Once the Commonwealth's Attorney receives notice of the seizure from law enforcement, he shall, within 21 days, file a "notice of seizure for forfeiture" with the circuit court. The notice will state the property seized, the grounds for and date of the seizure, and all owners and lien holders then known, as outlined in Va. Code § 19.2-386.3(A).[39] The clerk of court then mails "forthwith" by first-class mail notice of seizure for forfeiture to the last known address of all identified owners and lienholders as required by Va. Code § 19.2-386.3(A).

If the property seized is a motor vehicle, a special procedure is required pursuant to Va. Code § 19.2-386.2:1. First, the Commonwealth's Attorney shall notify the Commissioner of the Virginia Department of Motor Vehicles (DMV) of the seizure of the vehicle, by certified mail. Next, the Commissioner then "promptly certifies" to the Commonwealth's Attorney the name and address of the person to whom the vehicle is registered, together with the name and address of any lien holders. Finally, the Commissioner also notifies the owners and lien holders in writing of the seizure and where it occurred.

The Commonwealth's Attorney must file an information in the circuit court within 90 days of the seizure, or the property shall be released to the owner of lien holder according to Va. Code § 19.2-386.3(A). All parties defendant must then be served a copy of the information and a notice to appear. Per Va. Code § 19.2-386.3(B), the notice "shall contain a statement warning the party defendant that his interest in the property shall be subject to forfeiture…unless within 30 days after service, an answer under oath is filed."

If the information is filed before the property is seized, either the clerk of court or a judge of the court, upon a motion by the Commonwealth's Attorney, shall issue a warrant to law enforcement authorized to serve criminal process in the jurisdiction where the property is located to seize the property under Va. Code § 19.2-386.2(A). If the property is real property, a notice of *lis pendens* shall be filed with the clerk of the circuit court where the property is located in accordance with Va. Code § 19.2-386.2(B).

At any time prior to the filing of an information, the Commonwealth's Attorney may, "upon payment of costs incident to the custody of the seized property, return the seized property to an owner or lien holder" per Va. Code § 19.2-386.5. The owner or lien holder of seized property also has the right, under Va. Code § 19.2-386.6, to request the

clerk of court appraise the value of the property. The owner can then post a bond for its fair cash value, plus court costs and the costs of the appraisal, and have the property returned. If the property is "perishable or liable to deterioration, decay, or injury by being detained in custody pending the proceedings," the circuit court may order the property sold, and hold the proceeds of the sale pending final disposition of the case per Va. Code § 19.2-386.7.

Under Va. Code § 19.2-386.9, a party defendant "may appear at any time within thirty days after service on him," and answer under oath "the nature of the defendant's claim," the title or interest in the property, and "the reason, cause, exemption or defense he may have against the forfeiture of the property." Further, if an owner or lien holder has not received actual or constructive notice of the action, he may appear at any time prior to final judgment and may be made a party.

If a party defendant fails to appear, he shall be in default. However, within 21 days after the entry of judgment, a party defendant may petition the Department of Criminal Justice Services (DCJS) "for remission of his interest in the forfeited property."[40] For good cause shown and upon proof of the defendant's valid exemption, DCJS shall grant the petition and direct the state treasury to either remit to the defendant an amount not exceeding his interest in the property, or convey clear and absolute title to the forfeited property under Va. Code § 19.2-386.10.

If a party defendant appears, the case proceeds to trial. Trial by jury can be demanded by either the Commonwealth or the party defendant. The Commonwealth has the burden of proving the property is subject to forfeiture. Upon such a showing, the "claimant" has the burden of proving his interest in the property is "exempt" under subdivision 2, 3, or 4 of Va. Code § 19.2-386.8. Per Va. Code § 19.2-386.10(A), the proof of all issues shall be by a preponderance of the evidence. It should be noted that, under Va. Code § 19.2-386.10(B), the forfeiture action "shall be independent of any criminal proceeding against any party or other person for violation of law. However, upon motion and for good cause shown, the court may stay a forfeiture proceeding that is related to any indictment or information."

As discussed above, there are several exemptions a defendant can assert for seized property pursuant to Va. Code § 19.2-386.8:

(i) A conveyance used by a common carrier, unless the owner was a consenting party or knew of the illegal conduct;
(ii) A conveyance used by a criminal, not the owner, who was in unlawful possession of the conveyance;
(iii) Any property if the owner did not know and had no reason to know of the illegal conduct;
(iv) A bona fide purchaser for value without notice;
(v) The illegal conduct occurred without the owner's "connivance or consent, express or implied;" or,
(vi) The illegal conduct was committed by a tenant, and the landlord did not know or have reason to know of the tenant's conduct.

The exemptions of a defendant who is a lien holder are similar:

(i) The lien holder did not know of the illegal conduct at the time the lien was granted;
(ii) The lien holder held a bona fide lien that was perfected prior to the seizure of the property; and,
(iii) The illegal conduct occurred without his "connivance or consent, express or implied."

In the event there is a sale of the property to a bona fide purchaser for the value in order to avoid the consequences of a forfeiture, "the Commonwealth shall have a right of action against the seller of the property for the proceeds of the sale" under Va. Code § 19.2-386.9.

Once the property has been forfeited, it is either sold, returned to a law enforcement agency, or destroyed if the value of the property "is of such minimal value that the sale would not be in the best interest of the Commonwealth," per Va. Code § 19.2-386.11(A). Under Va. Code § 19.2-386.11(C), contraband and weapons may be ordered destroyed by the court. Any sale of forfeited property, according to Va. Code § 19.2-386.12(A), "shall be made for cash, after due advertisement…by public sale or other commercially feasible means."

Any costs, including sales commission and costs for the storage and maintenance of the property, shall be paid out of the net proceeds from the sale of the property. If there are no net proceeds, the costs and expenses shall be paid by the Commonwealth from the Criminal Fund per Va. Code § 19.2-386.12(B). Additionally, parties in interest to any forfeiture "shall be entitled to reasonable attorneys' fees and costs if the forfeiture proceeding is terminated in [their] favor." The total amount of these expenses disbursed by the Criminal Fund has varied each year as seen in Table 3.

Table 3: Expenses Paid by Criminal Fund Pursuant to Va. Code § 19.2-386.12, FY12-FY15

FY	Individuals Receiving Vouchers	Total Amount Disbursed
2012	5	$3,537
2013	6	$11,120
2014	4	$2,005
2015	7	$5,816
TOTAL	**22**	**$22,478**

Source: Office of the Executive Secretary, Supreme Court of Virginia.

Finally, there is a specified process for the disbursal of proceeds from forfeited assets relating to criminal drug activity that are $500 or greater. Whenever such assets are forfeited, DCJS retains 10% of the proceeds "in a non-reverting fund, known as the Asset Sharing Administrative Fund" as outlined in Va. Code § 19.2-386.14(A1). The remaining

proceeds are then distributed by DCJS to any "federal, state or local agency or office that directly participated in the investigation or other law-enforcement activity which led…to the seizure and forfeiture" pursuant to Va. Code § 19.2-386.14(B). It is also mandated that forfeited property and proceeds not be used to supplant existing programs or funds, per Va. Code § 19.2-386.12(D).

Legal Overview of State and Federal Forfeiture Statues

A review of the forfeiture statutes of all fifty states, as well as the federal government, was conducted with a particular focus on the following issues:

(i) whether a conviction is required in order for a forfeiture to proceed;
(ii) the burden of proof required to establish forfeiture;
(iii) the burden of proof for an "innocent owner" exception and which party bears that burden;
(iv) whether either party is entitled to a stay of the forfeiture proceedings; and,
(v) whether a prevailing claimant is entitled to costs and/or attorney fees.

The findings of this review were categorized so as to develop a general overview of how the jurisdictions addressed each issue.[41]

Is a conviction required in order for a forfeiture to proceed?

The forfeiture statutes were reviewed for language indicating whether or not a criminal conviction was required as a prerequisite for a forfeiture to proceed. The results were as follows:

Twenty-four (24) jurisdictions contain no specific language in their forfeiture statutes requiring a conviction. These jurisdictions are: Alabama, Arizona, Arkansas, Connecticut, Delaware, Florida, Idaho, Indiana, Kentucky, Maine, Massachusetts, Mississippi, Nebraska, North Dakota, Oklahoma, Pennsylvania, Rhode Island, South Carolina, South Dakota, **Virginia**, Washington, West Virginia, Wisconsin and Wyoming.

Eleven (11) jurisdictions explicitly do not require a conviction in order for a forfeiture to proceed. These jurisdictions are: Alaska,[42] Georgia,[43] Hawaii,[44] Illinois,[45] Iowa,[46] Kansas,[47] Louisiana,[48] New Jersey,[49] Ohio,[50] Texas[51] and the federal government.[52]

Eight (8) jurisdictions require a conviction in certain instances in order for a forfeiture to proceed. These jurisdictions are: California,[53] Colorado,[54] Maryland,[55] Minnesota,[56] New York,[57] North Carolina,[58] Tennessee[59] and Utah.[60]

Eight (8) jurisdictions require a conviction in most instances in order for a forfeiture to proceed.[61] These jurisdictions are: Michigan,[62] Missouri,[63] Montana,[64] Nevada,[65] New Hampshire,[66] New Mexico,[67] Oregon[68] and Vermont.[69]

What is the burden of proof required to establish forfeiture?

The forfeiture statutes were reviewed to determine the burden of proof that the government must satisfy in order to establish forfeiture of the subject property. The results were as follows:

Twenty-four (24) jurisdictions use a preponderance of the evidence standard. These jurisdictions are: Arizona,[70] Arkansas,[71] Georgia,[72] Hawaii,[73] Idaho,[74] Indiana,[75] Iowa,[76] Kansas,[77] Louisiana,[78] Maine,[79] Maryland,[80] Michigan,[81] Mississippi,[82] Missouri,[83] New Hampshire,[84] New Jersey,[85] Ohio,[86] Oklahoma,[87] Pennsylvania,[88] Texas,[89] **Virginia**,[90] Washington,[91] West Virginia[92] and the federal government.[93]

Nine (9) jurisdictions use a probable cause standard. These jurisdictions are: Alaska,[94] Delaware,[95] Illinois,[96] Massachusetts,[97] North Dakota,[98] Rhode Island,[99] South Carolina,[100] South Dakota[101] and Wyoming.[102]

One (1) jurisdiction uses a *prima facie* case by reasonable satisfaction standard. This standard is used in Alabama.[103]

One (1) jurisdiction uses a reasonable certainty by greater weight of the credible evidence standard. This standard is used in Wisconsin.[104]

Eight (8) jurisdictions use a clear and convincing evidence standard. These jurisdictions are: Colorado,[105] Connecticut,[106] Florida,[107] Minnesota,[108] Montana,[109] Nevada,[110] New Mexico[111] and Vermont.[112]

Two (2) jurisdictions use a beyond a reasonable doubt standard. These jurisdictions are: Nebraska[113] and North Carolina.[114]

Six (6) jurisdictions use multiple burden of proof standards. The variance in the burden of proof is typically based upon the type of property to be forfeited. The jurisdictions which use multiple standards are:

- California, where clear and convincing evidence is required for cash or negotiable instruments;[115] and, beyond a reasonable doubt for real property, vehicles and various other personal property;[116]
- Kentucky, where *prima facie* evidence is required for personal property;[117] and, clear and convincing evidence for real property;[118]
- New York, where preponderance of the evidence is required for property of a convicted criminal defendant or of proceeds, substitute proceeds, or instrumentalities of a crime for a non-criminal defendant;[119] and, clear and convincing evidence for real property of a non-criminal defendant;[120]
- Oregon, where preponderance of the evidence is required for personal property; and, clear and convincing evidence for real property;[121]
- Tennessee, where preponderance of the evidence is required for personal property;[122] and, beyond a reasonable doubt for real property;[123] and,
- Utah, where clear and convincing evidence is required for a civil forfeiture;[124] and, beyond a reasonable doubt for a criminal forfeiture.[125]

What is the burden of proof for an "innocent owner" exception in a forfeiture proceeding and which party bears that particular burden of proof?

The forfeiture statutes were reviewed to determine the burden of proof required to establish an "innocent owner" exception at a forfeiture proceeding. The results were as follows:

Twenty-six (26) jurisdictions use a preponderance of the evidence standard. These jurisdictions are: Alaska,[126] Arizona,[127] Arkansas,[128] Florida,[129] Hawaii,[130] Idaho,[131] Illinois,[132] Indiana,[133] Iowa,[134] Kansas,[135] Louisiana,[136] Maine,[137] Maryland,[138] Michigan,[139] Nebraska,[140] New Hampshire,[141] New Jersey,[142] North Dakota,[143] Ohio,[144] Rhode Island,[145] South Carolina,[146] South Dakota,[147] Texas,[148] **Virginia**,[149] Washington[150] and the federal government.[151]

Four (4) jurisdictions use a clear and convincing evidence standard. These jurisdictions are: Colorado,[152] Minnesota,[153] Montana[154] and New Mexico.[155]

Fifteen (15) jurisdictions do not specify the "innocent owner" burden of proof in their forfeiture statutes. These jurisdictions are: Alabama, Connecticut, Delaware, Georgia, Massachusetts, Mississippi, Missouri, Nevada, North Carolina, Oklahoma, Pennsylvania, Tennessee, West Virginia, Wisconsin and Wyoming.

Six (6) jurisdictions use multiple burden of proof standards. The variance in the burden of proof is typically based upon the type of property to be forfeited. The jurisdictions which use multiple standards are:

- California, where a clear and convincing evidence is required for cash and negotiable instruments;[156] and, beyond a reasonable doubt for conveyances, real property and various personal property;[157]
- Kentucky, where preponderance of evidence is required generally;[158] and, clear and convincing for personal property related to controlled substance violations and real property;[159]
- New York, where preponderance of the evidence is required for personal property;[160] and, clear and convincing evidence for real property;[161]
- Oregon, where preponderance of the evidence is required generally,[162] as well as for cash, weapons or negotiable instruments;[163] and, clear and convincing evidence for real property;[164]
- Utah, where preponderance of the evidence is required for a non-criminal defendant in a criminal forfeiture;[165] clear and convincing evidence for a civil forfeiture;[166] and, beyond a reasonable doubt for a criminal forfeiture;[167] and,
- Vermont, where preponderance of the evidence is required for a non-criminal defendant;[168] and, clear and convincing evidence for a convicted criminal defendant.[169]

In addition to the "innocent owner" burden of proof standard, the forfeiture statutes were reviewed to determine which party had the burden of satisfying or overcoming the "innocent owner" exception. The results were as follows:

In thirty-four (34) jurisdictions, the claimant bears the burden of proving the "innocent owner" exception. These jurisdictions are: Alaska,[170] Arizona,[171] Arkansas,[172] Delaware,[173] Georgia,[174] Hawaii,[175] Idaho,[176] Illinois,[177] Iowa,[178] Kansas,[179] Louisiana,[180] Maryland,[181] Massachusetts,[182] Mississippi,[183] Missouri,[184] Nebraska,[185] Nevada,[186] New Hampshire,[187] New Jersey,[188] North Carolina,[189] North Dakota,[190] Oklahoma,[191] Pennsylvania,[192] Rhode Island,[193] South Carolina,[194] South Dakota,[195] Tennessee,[196] Texas,[197] **Virginia**,[198] Washington,[199] West Virginia,[200] Wisconsin,[201] Wyoming[202] and the federal government.[203]

In eleven (11) jurisdictions, the State bears the burden of proving that the claimant was not an "innocent owner." These jurisdictions are: California,[204] Colorado,[205] Connecticut,[206] Florida,[207] Indiana,[208] Michigan,[209] Minnesota,[210] Montana,[211] New Mexico,[212] New York[213] and Ohio.[214]

Six (6) jurisdictions use a mixed requirement in regard to the party that bears the burden of proving or disproving an "innocent owner" exception. The variance in the burden is typically based upon the type of property to be forfeited. The jurisdictions which use mixed requirements are:

- Alabama, where the State has the burden for real property and fixtures; and, the claimant has the burden for other property;[215]
- Kentucky, where the State has the burden for real property;[216] and, the claimant has the burden for other property[217] and in forfeitures related to controlled substance violations;[218]
- Maine, where the State has the burden for real property involving spouse/child of co-owner of primary residence;[219] and, the claimant has the burden for other property;[220]
- Oregon, where the State has the burden generally and for real property;[221] and, the claimant has the burden if property sought for forfeiture is cash, weapons or negotiable instruments;[222]
- Utah, where the State has the burden for civil[223] and criminal[224] forfeitures; and, the claimant has the burden in criminal forfeiture if the claimant is a non-criminal defendant;[225] and
- Vermont, where the State has the burden for forfeitures generally;[226] and the claimant has the burden if said claimant is a non-criminal defendant.[227]

Is either party entitled to a stay of the forfeiture proceeding while a related criminal proceeding is pending?

The forfeiture statutes were reviewed to determine whether either party was entitled to a stay of the forfeiture proceeding during the pendency of a related criminal proceeding. The forfeiture statutes were further reviewed to determine whether the stay was discretionary or mandatory and which party was permitted to request the stay. The results were as follows:

Ten (10) jurisdictions provide that a stay may be granted on the motion of the State or the claimant. These jurisdictions are: Alaska,[228] Arizona,[229] Georgia,[230] Iowa,[231] Mississippi,[232] New Hampshire,[233] New Jersey,[234] Oregon,[235] **Virginia**[236] and the federal government.[237]

Four (4) jurisdictions provide that a stay may be granted on the motion of the State. These jurisdictions are: Hawaii,[238] Illinois,[239] Kansas[240] and Louisiana.[241]

Three (3) jurisdictions provide that a stay may be granted on the motion of the claimant. These jurisdictions are: Massachusetts,[242] Utah[243] and Wisconsin.[244]

Seven (7) jurisdictions provide that a stay shall be granted.[245] These jurisdictions are: California,[246] Colorado,[247] Maryland,[248] Missouri,[249] Nevada,[250] New York[251] and Tennessee.[252]

Is a prevailing claimant entitled to costs and/or attorney fees?

The forfeiture statutes were reviewed to determine whether a prevailing claimant was entitled to costs and/or fees at the conclusion of the forfeiture proceeding. The review first focused on the issue of costs and/or fees generally. The review then focused on whether the forfeiture statutes specifically addressed attorney fees for a prevailing claimant. The results were as follows:

Six (6) jurisdictions provide that costs and/or fees are automatically awarded to a prevailing claimant. These jurisdictions are: Alabama,[253] Iowa,[254] Oregon,[255] Utah,[256] **Virginia**[257] and Washington.[258]

Two (2) jurisdictions provide that a prevailing claimant is automatically exempted from costs and/or fees. These jurisdictions are: Colorado[259] and Nebraska.[260]

Four (4) jurisdictions provide that costs and/or fees are awarded to a prevailing claimant upon a discretionary ruling of the court. These jurisdictions are: Arizona,[261] Hawaii,[262] New York[263] and Rhode Island.[264]

Four (4) jurisdictions provide for a mixed award of costs and/or fees to a prevailing claimant. These jurisdictions are: Florida,[265] Louisiana,[266] Minnesota[267] and New Mexico.[268]

In regard to the issue of attorney fees for a prevailing claimant, the review of the forfeiture statutes provided the following:

Five (5) jurisdictions provide that a prevailing claimant shall be awarded attorney fees. These jurisdictions are: Iowa,[269] Oregon,[270] Utah,[271] **Virginia**[272] and Washington.[273]

Four (4) jurisdictions provide that a prevailing claimant may be awarded attorney fees upon a requisite finding by the court. These jurisdictions are: Florida,[274] Louisiana,[275] Minnesota[276] and New York.[277]

Summary of Forfeiture Statutes

The statutory forfeiture scheme in Virginia is substantially similar to most of the other states and the federal government. A majority of the states and the federal government are analogous to Virginia in the following ways: a criminal conviction is not required as

a prerequisite to forfeiture, the burden of proof required to establish forfeiture is preponderance of the evidence or a similar evidentiary standard, and the claimant bears the burden of proving an "innocent owner" exception after the government has proven the property is subject to forfeiture. The main distinction between Virginia and the other jurisdictions is that Virginia is in the minority of jurisdictions that mandate reimbursement of attorney fees to a claimant who prevails in a forfeiture proceeding.

Asset Forfeiture Data

Overview

Staff requested data from the U.S. Departments of Justice and Treasury, as well as a number of Virginia agencies including DCJS, the Supreme Court of Virginia, the Department of Accounts, the Criminal Injuries Compensation's Criminal Fund, and the Department of Motor Vehicles.

In Virginia, law enforcement and prosecutors can participate in the federal Department of Justice's Asset Forfeiture Program, the federal Treasury Forfeiture Fund managed by the U.S. Department of the Treasury, Virginia's Forfeited Asset Sharing Program, or all three programs. Most, however, participate in the state program only. In FY14, Virginia received a combined total of approximately $10.8 million in disbursals from the U.S. Department of Justice and state asset forfeiture programs. Specifically, $6,641,267 was disbursed from the federal program and $4,185,594 was disbursed from the state program (as of September 8, 2015). Virginia also receives disbursals from the Treasury Forfeiture Fund managed by the U.S. Department of the Treasury; however, an anomaly exists in the amount disbursed during recent years due to the Abbott Laboratories settlement where Virginia was awarded over $115 million to be distributed over the course of FY13-FY16, as will be discussed in more detail below.

U.S. Department of Justice Asset Forfeiture Program

The U.S. Department of Justice's (DOJ) Asset Forfeiture Program "encompasses the seizure and forfeiture of assets that represent the proceeds of, or were used to facilitate federal crimes. The primary mission of the Program is to employ asset forfeiture powers in a manner that enhances public safety and security…accomplished by removing the proceeds of crime and other assets relied upon by criminals and their associates to perpetuate the criminal activity against our society."[278] The Program is authorized to share the proceeds of federal forfeitures, as well as other resources, with cooperating state and local law enforcement agencies.[279] Table 4 illustrates the amount of proceeds disbursed to states in FY14. California and New York received the largest disbursals from the Program. Virginia was ranked 15th, receiving a disbursal of $6,641,267.[280]

Table 4: Top 15 States Receiving Disbursals from DOJ's AF Program, FY14

Rank	State	Total
1	California	$77,400,978
2	New York	$76,140,067
3	Texas	$26,594,306
4	Georgia	$22,736,427
5	Florida	$17,045,912
6	Rhode Island	$17,026,355
7	Illinois	$16,143,203
8	New Jersey	$12,258,703
9	North Carolina	$10,805,901
10	Pennsylvania	$10,079,052
11	Connecticut	$8,823,913
12	Ohio	$8,402,535
13	Michigan	$8,101,026
14	Massachusetts	$7,719,173
15	**Virginia**	**$6,641,267**

Source: U.S. Department of Justice, Asset Forfeiture Fund Reports to Congress, Equitable Sharing Payments.

Table 5 illustrates the total proceeds disbursed from the Program to Virginia from FY04-FY14. The total number of agencies participating in and the total monies disbursed have remained fairly consistent over the past 11 years. An anomaly does exist in FY07-FY08, which is explained by one large case involving one Virginia law enforcement agency. These disbursals came as a result of a $600 million dollar OxyContin settlement case involving Purdue Pharma, of which the Virginia agency received $44 million over that two year period.[281] When removing this large disbursal, the total disbursed to the remaining agencies was approximately $4.5 million in 2007 and $5.6 million in 2008, which is consistent with all of the other fiscal years.

Table 5: Total Disbursed from DOJ's AF Program to Virginia, FY04-FY14

FY	# Agencies	Total Disbursed
2004	77	$4,268,111
2005	84	$4,069,042
2006	66	$4,948,114
2007	82	$29,647,752*
2008	75	$26,673,908*
2009	84	$7,067,360
2010	75	$5,701,332
2011	84	$6,331,350
2012	75	$7,326,146
2013	66	$4,382,422
2014	75	$6,641,267
TOTAL		**$107,056,804**

Source: U.S. Department of Justice, Asset Forfeiture Fund Reports to Congress, Equitable Sharing Payments. *Anomaly due to one large case settlement disbursed over a 2-year time period to one agency.

It must be noted that a letter from DOJ to all state, local and tribal law enforcement agencies was published on December 21, 2015, explaining the financial implications of budget legislation passed in late 2015 impacting the equitable sharing program. The legislation included a $746 million dollar reduction, or "rescission," of Asset Forfeiture Program Funds,[282] as well as an additional $458 million rescission in the FY16 budget.[283] As a result of these rescissions, DOJ was "deferring for the time being any equitable sharing payments from the Program."[284] No further equitable sharing program payments were to be made until the deferral was lifted. On March 28, 2016, DOJ announced that the Department was lifting the deferral and resuming Equitable Sharing payments effective immediately.[285]

U.S. Department of Treasury's Forfeiture Program

States may also participate in the Treasury Forfeiture Fund (TFF) managed by the U.S. Department of the Treasury. This Fund was established in 1992 and includes the following federal agencies: Internal Revenue Service Criminal Investigations Division, the U.S. Immigration and Customs Enforcement, the U.S. Customs and Border Protection, the U.S. Secret Service, and the U.S. Coast Guard. The mission of the Fund is to "affirmatively influence the consistent and strategic use of asset forfeiture by participating agencies to disrupt and dismantle criminal enterprises."[286]

As seen in Table 6, Virginia ranked 2nd in the total disbursal amounts received in FY14. However, it must be stressed that this is a somewhat atypical ranking for Virginia as it received a very large disbursal of funds resulting from a single, large settlement.

Table 6: Top 15 States Receiving Disbursals from TFF Program (Currency Value Only), FY14

Rank	State	Total
1	New York	$139,617,000
2	**Virginia**	**$61,417,000***
3	Florida	$19,267,000
4	California	$12,182,000
5	Texas	$9,742,000
6	New Jersey	$5,940,000
7	Illinois	$5,112,000
8	North Carolina	$5,095,000
9	Nevada	$4,410,000
10	Georgia	$4,135,000
11	Maryland	$3,783,000
12	South Carolina	$3,059,000
13	Massachusetts	$2,721,000
14	Indiana	$2,536,000
15	Guam	$2,373,000

Source: U.S. Department of Treasury, Treasury Forfeiture Fund Accountability Report, Fiscal Year 2014. *Anomaly due to partial funds disbursed from Abbott settlement.

As seen in Table 7, the total disbursed from the Fund to Virginia varies each year; however, one large settlement, totaling over $115 million, has been distributed over the course of FY13-FY16, rather than in one lump sum. The Abbott Laboratories settlement accounts for the vast majority of disbursals received from the Fund during this time frame and represents an anomaly to totals typically received in prior years.

Table 7: Total Disbursed from TFF Program to Virginia, (Currency and Property Value) FY04-FY14

FY	Total
2004	$434,000
2005	$3,877,000
2006	$2,954,000
2007	$1,880,000
2008	$10,827,000
2009	$1,794,000
2010	$1,386,000
2011	$994,000
2012	$628,000
2013	$45,838,000*
2014	$61,423,000*
TOTAL	**$132,035,000**

Source: U.S. Department of Treasury, Treasury Forfeiture Fund Accountability Reports, Fiscal Years 2004-2014. *Anomaly due to partial funds disbursed from Abbott Settlement.

Virginia DCJS Forfeited Asset Sharing Program

In 1991, DCJS began managing the tracking and reimbursement of state drug-related forfeitures in Virginia. Since that time, DCJS has disbursed over $106 million dollars to Virginia law enforcement and prosecutors.[287] The data maintained by DCJS is fairly comprehensive for all state drug-related items seized valued at $500 or more. However, their data does not account for any items seized pursuant to non-drug related crimes and less detailed information is collected for drug-related forfeitures valued at less than $500.[288] Agencies are only required to itemize forfeitures valued at less than $500 on their annual certification reports as additional asset forfeiture income received. Agencies will typically itemize the case number, description of asset and amount received from seizures valued at less than $500. Unlike forfeitures valued at or above $500, DCJS does not retain 10% of the value; rather, the locality keeps the total forfeited value.[289]

Crime Commission staff requested a number of items from DCJS. First, in order to capture general trends over time, staff requested 10 years of data on seizures made and disbursals received by law enforcement and prosecutors in Virginia. All participating agencies must submit forms for each and every drug-related item seized and must update DCJS on the outcome of each item in each case. Second, staff requested a sample of court orders, which DCJS requires be submitted for all items resulting in a forfeiture. Third, staff requested the FY14 annual certification reports for all 352 participating agencies. These reports require a very detailed, itemized account of how asset forfeiture

funds are received and spent, each year, by each participating agency. Finally, staff requested sharing agreements that were on file for all participating agencies. Sharing agreements essentially outline how proceeds from a disbursal are to be distributed once DCJS retains its 10% share. The remaining proceeds are divided according to each agency's or Task Force's sharing agreement between law enforcement and Commonwealth's Attorneys' Offices.[290] It does appear that these sharing agreements are effective, as only one dispute regarding local sharing of forfeitures has gone before the Criminal Justice Services Board in the past 20 years.

Ten Year Overview

Table 8 illustrates the general data trends for state drug-related asset forfeitures in Virginia. As illustrated, the number of agencies participating, the number of cases and items seized, the value of items seized and the total amount disbursed back to the agencies each year has remained fairly stable since FY10. More specifically, around $10 to $11 million in items have been seized and $4 to $5 million have been disbursed back to the participating agencies each year since 2010. It appears that the large increase in cases, items seized, and disbursals received since FY09-FY10 is primarily due to a marked increase in the total number of agencies participating in the state asset forfeiture program. As far as the values of items seized, item values ranged from as low as $71 to as high as $1.1 million. The range of disbursals received from DCJS was as low as $0 (when an item is not forfeited) to as high as $500,000 for a forfeiture.

Table 8: Ten Year Overview of State Drug-Related Forfeitures, FY06-FY15*

FY	Total Agencies	Total Cases	Total Items Seized	Value of Items Seized	Total Disbursed to Agencies
2006	42	143	189	$639,152	$110,899
2007	46	180	219	$991,263	$235,460
2008	68	265	365	$2,020,786	$266,128
2009	96	432	582	$2,639,639	$780,855
2010	158	2,006	2,464	$10,134,559	$4,957,627
2011	150	2,002	2,346	$10,258,608	$5,350,350
2012	143	2,003	2,457	$11,576,315	$5,820,171
2013	161	2,000	2,369	$11,546,672	$5,253,183
2014	149	1,994	2,412	$10,624,949	$4,185,594
2015	154	1,775	2,123	$10,250,119	$5,600,969**
TOTAL		**12,800**	**15,526**	**$70,682,062**	**$32,561,236**

Source: VA Department of Criminal Justice Services. * Data as of September 8, 2015. ** Most recent figure provided on DCJS website retrieved on October 21, 2015.

There are additional overall trends that should be noted. As seen in Table 9, currency is the most frequently seized item each year, followed by vehicles, electronics, jewelry, firearms, property and other items.[291] Currency and vehicles, however, comprise 85-90% of the items seized each year.

Table 9: Types of Items Seized in State Drug-Related Forfeitures, FY10-FY15

FY	Total Items Seized	Currency	Vehicles	Electronics	Jewelry	Firearms	Property	Boats	Other
2010	**2,464**	1,511	627	152	64	26	8	4	72
2011	**2,346**	1,426	604	117	83	39	7	4	66
2012	**2,457**	1,438	630	139	33	59	7	3	148
2013	**2,369**	1,541	571	73	75	42	4	1	62
2014	**2,412**	1,613	585	76	21	46	4	4	63
2015*	**2,123**	1,505	462	53	15	39	6	0	43

Source: VA Department of Criminal Justice Services. * Data as of September 8, 2015.

Staff analyzed asset forfeiture case outcomes for drug-related cases in FY14. In order to obtain a more accurate conclusion regarding case outcomes, pending cases were removed from the analysis. In FY14, there were 2,412 items seized with 936 having a pending status. When removing these pending cases, there were 1,476 items with a finalized status. The overall case status for the remaining 1,476 items was:

- 75% (1,107 of 1,476) were forfeited;
- 17% (245 of 1,476) were returned to the owner;
- 6% (85 of 1,476) were dismissed in court;
- 2% (34 of 1,476) were released to a lienholder; and,
- <1% (5 of 1,476) was administrative/other.[292]

While 75% of overall cases resulted in forfeiture, there are variations in outcomes depending on the *type* of item seized. As illustrated in Table 10, currency is more frequently forfeited than other items. Specifically, 86% (959 of 1,115) of cases involving currency result in the currency being forfeited; whereas, only 41% (116 of 282) of seized vehicles were forfeited in FY14.[293]

Table 10: Types of Items Seized by Case Outcome, FY14

Type of Item Seized	Total Items	Forfeited	Return to Owner	Dismissal	Release to Lienholder	Other
Currency	**1,115**	959	101	53	0	2
Vehicles	**282**	116	110	29	26	1
Electronics	**23**	8	12	1	2	0
Jewelry	**13**	11	1	1	0	0
Boat	**3**	2	1	0	0	0
Firearms	**2**	1	1	0	0	0
Real Estate	**2**	0	2	0	0	0
Other	**36**	10	17	1	6	2
TOTAL*	**1,476**	**1,107**	**245**	**85**	**34**	**5**

Source: VA Department of Criminal Justice Services. * Only cases with a finalized disposition are included in these figures; pending cases are not included.

Court Order Analysis

Staff was unable to determine the specific circumstances that led to a forfeiture court order based on the 10 year trend data provided by DCJS; it could not be determined what were the usual circumstances in which a forfeiture order was ultimately issued. However, as mentioned earlier, DCJS requires that copies of court orders be submitted in all cases resulting in forfeitures. Staff requested and analyzed a statistically significant sample of court orders from FY14 state drug-related cases with the hope of being able to determine how many forfeitures were a result of default versus other means.

The forfeiture orders were an excellent resource to reach this determination. Of the 388 forfeiture court orders included in the sample, 95% (368 of 388) involved currency. The remaining orders involved vehicles (56 of 388), electronics (12 of 388), firearms (7 of 388) and jewelry (3 of 388).

After reviewing all of the orders, staff determined that:

- 61% (237 of 388) were a result of default (the defendant did not answer or did not appear);
- 28% (108 of 388) involved a defendant signing a plea agreement, waiver, consent to forfeiture or other type of settlement prior to the hearing;
- 11% (41 of 388) involved a defendant, owner, or GAL appearing but case still resulted in forfeiture; and,
- <1% (2 of 288) resulted in trial.[294]

Unfortunately, since DCJS only requires court orders for cases resulting in forfeiture, there was no way to readily gather information for cases that resulted in the item being returned to the owner, a lienholder, or other outcomes where a forfeiture was not ordered.

Annual Certification Report Analysis

Staff entered and analyzed data from the annual certification reports submitted by all 352 participating agencies for FY14.[295] Agencies are required to list a number of items in these certification reports. First, they must indicate their beginning asset forfeiture balance. Agencies reported a range of beginning balances from $0 to over $1 million in FY14. Second, agencies must report any additional asset forfeiture funds received in addition to disbursals from DCJS. This category includes items seized that are valued under $500, proceeds from auction sales, and transfers from other agencies or Task Forces. Agencies reported a range of additional funds from $0 to $95,271 in FY14. Third, agencies must report the amount of asset forfeiture funds spent. Agencies reported spending a range of $0 to $361,000 in FY14. Finally, agencies must itemize how those funds were spent by specific category, as illustrated in Table 11, which lists the various categories prescribed by DCJS. As seen in Table 11, 75% of the $4.7 million asset forfeiture dollars were spent on travel/training, communications/computers, and "other" items that did not fall within DCJS' specified categories. Whenever an item falls into the "other" category, the agency must itemize how the funds were specifically used so DCJS can approve or deny the purchase. The items included in the "other" category varied tremendously, including uniforms, police dogs and their care, drug test kits, task force and other professional dues, expert witnesses, and psychological examinations.

Table 11: Total Forfeiture Funds Spent by Itemized Category, FY14

Category	Number of Agencies	Total Funds Spent	% of Total
Informants/Buys	24	$44,783	0.9%
Body Armor/Protective Gear	23	$87,398	1.8%
Firearms/Weapons	30	$150,942	3.2%
Electronics/Surveillance Equipment	34	$176,844	3.7%
Building/ Improvements	28	$340,356	7.2%
Salaries	13	$366,563	7.7%
Travel/Training	86	$571,458	12.1%
Communications/Computers	88	$881,588	18.6%
Other*	137	$2,120,675	44.7%
TOTAL SPENT		**$4,740,607**	

Source: VA Department of Criminal Justice Services, FY14 Annual Certification Reports. * "Other" category included a wide array of approved expenditures for items such as uniforms, K-9 officers, drug test kits, task force/professional dues and expert witnesses.

State Non-Drug Related Data

Staff attempted to determine the amount of funds sent by law enforcement to the Literary Fund from non-drug related asset forfeitures. Since the Literary Fund data requested from the Virginia Department of Accounts was unable to be specifically broken down into total revenue from non-drug related seizures versus other revenues, staff attempted to obtain this information from surveys to law enforcement agencies. Most of the law enforcement agencies reported that they sent $0 to the Literary Fund in FY14 from their agency. Several more indicated that they did not even track this information. However, 15 agencies *were* able to provide the amount of funds they sent to the Literary Fund in FY14. From the information provided by these agencies, it was determined that a *minimum* of $159,972 was sent to the Literary Fund from law enforcement agencies for non-drug related crimes such as transportation of stolen goods, gambling, and prostitution in FY14. Unfortunately, these agencies were unable to provide a break down by the type of non-drug related crimes the monies stemmed from as it would have required them to go back through individual case files. Although this issue shows a gap in available data, it is unlikely to be a large gap due to law enforcement and prosecutors reporting that their caseload of asset forfeitures typically involves at least 90% of cases stemming from drug-related crimes, rather than non-drug related crimes.

Survey of Virginia's Law Enforcement and Prosecutors

Staff surveyed all law enforcement agencies and Commonwealth's Attorneys. There was a high response rate with 87% (118 of 135) of primary law enforcement and 83% (99 of 120) of Commonwealth's Attorneys responding. Staff received an additional 56 surveys from town, campus and other law enforcement agencies. Staff also reviewed over 80 policies/general orders relating to asset forfeiture from law enforcement agencies.

All survey respondents indicated that they participated in state asset forfeiture proceedings. However, fewer participated in the federal asset forfeiture programs. Only 85% (100 of 118) of responding law enforcement agencies and 31% (31 of 99) of Commonwealth's Attorneys' Offices reported participating in federal asset forfeiture proceedings.[296] The majority of survey respondents reported that they had a designated person(s) to handle these types of cases for their agency or office. The most common type of crimes involved in asset forfeiture cases according to all survey respondents were felony drug offenses. In fact, responding prosecutors reported that 90% or more of the informations filed by their offices in FY14 were for drug-related cases. However, both prosecutors and law enforcement reported handling other eligible offenses, including child pornography, cigarette trafficking, computer crimes, felony DUIs, gambling, money laundering, moonshining/bootlegging, prostitution and transportation of stolen goods.

Most law enforcement agencies, 65% (75 of 115), reported not requiring a criminal charge against someone before referring a civil forfeiture case to their Commonwealth's Attorney. Similarly, 60% (56 of 94) of Commonwealth's Attorneys' Offices do not require a criminal charge against someone before an information is filed for the related civil forfeiture case. Very few respondents indicated that they require a criminal

conviction before referring or proceeding with a civil forfeiture case. Specifically, 93% (104 of 112) of law enforcement agencies do not require a criminal conviction before referring to their Commonwealth's Attorney and 82% (78 of 95) of Commonwealth's Attorneys' Offices do not require a criminal conviction before proceeding with a related civil forfeiture case.[297] However, it is interesting to note that 40% (38 of 94) of responding Commonwealth's Attorneys' Offices stay civil forfeiture cases until the related criminal case is completely resolved.

Survey respondents were asked to designate their level of support or opposition for three potential options: (1) Requirement to stay a civil asset forfeiture case until any related criminal charges are resolved; (2) Requirement for a criminal charge before the related civil asset forfeiture case can proceed; and, (3) Requirement for a criminal conviction before the related civil asset forfeiture case can proceed. The level of support from law enforcement and prosecutors was very mixed for the first two proposed options as seen in Tables 12 and 13.

Table 12: Support of Requirement to Stay a Civil AF Case

Opinion	Law Enforcement	Commonwealth's Attorneys
Strongly Favor	18% (21)	19% (18)
Somewhat Favor	23% (27)	19% (18)
Somewhat Oppose	12% (14)	17% (16)
Strongly Oppose	34% (39)	34% (32)
Undecided	12% (14)	12% (11)
# Respondents	**n=115**	**n=95**

Source: Virginia State Crime Commission, Law Enforcement and Commonwealth's Attorneys' Asset Forfeiture Survey, 2015. Note: Percentages may not total 100% due to rounding.

Table 13: Support of Requirement for a Criminal Charge Before Related Civil AF Case Proceeds

Opinion	Law Enforcement	Commonwealth's Attorneys
Strongly Favor	22% (25)	24% (23)
Somewhat Favor	22% (26)	16% (15)
Somewhat Oppose	13% (15)	15% (14)
Strongly Oppose	37% (43)	39% (37)
Undecided	6% (7)	6% (6)
# Respondents	**n=116**	**n=95**

Source: Virginia State Crime Commission, Law Enforcement and Commonwealth's Attorneys' Asset Forfeiture Survey, 2015. Note: Percentages may not total 100% due to rounding.

However, as seen in Table 14, there was strong opposition by both law enforcement and prosecutors to require a criminal conviction before the related civil asset forfeiture case could proceed.

Table 14: Support of Requirement for a Criminal Conviction Before Related Civil AF Case Proceeds

Opinion	Law Enforcement	Commonwealth's Attorneys
Strongly Favor	9% (11)	5% (5)
Somewhat Favor	16% (18)	15% (14)
Somewhat Oppose	11% (13)	16% (15)
Strongly Oppose	51% (59)	62% (59)
Undecided	13% (15)	2% (2)
# Respondents	**n=116**	**n=95**

Source: Virginia State Crime Commission, Law Enforcement and Commonwealth's Attorneys' Asset Forfeiture Survey, 2015. Note: Percentages may not total 100% due to rounding.

It appears that nearly all of the responding law enforcement agencies, 97% (113 of 117), maintain a separate account or accounting system for funds related to asset forfeiture. All responding law enforcement agencies reported that they are audited on a regular basis both internally and externally.[298] Finally, prosecutors reported that they do not frequently have to inform law enforcement that they will not proceed against a seized item and not file an information: 23% (22 of 95) of offices reported never having to do this, with an additional 34% (32 of 95) reporting that they generally only have to do this 1-2 times per year.

Data Summary

Staff found that excellent data is maintained for state drug-related asset forfeiture cases by DCJS. The volume of cases, items seized, and disbursals received by participating agencies from DCJS have remained consistent over the past five years. The vast majority of seizures involve currency and vehicles. In general, 75% of cases result in forfeiture and 25% of cases result in the item being returned to the owner or a lienholder. Most forfeitures are a result of default or some type of plea agreement or settlement. Very few cases appear to go to trial. Staff found that agencies are held accountable to the state program through detailed annual certification reports to DCJS. Further, nearly all agencies reported having annual audits by DCJS or other entities.

There were, however, some data limitations identified by staff. Unlike data for drug-related asset forfeitures, non-drug related forfeiture data is not captured in a reliable, transparent manner. Nor is data readily captured to connect any related criminal charges or convictions. Data is also not readily available to ascertain how many civil asset forfeiture trials involve a verdict in favor of the defendant. Staff accordingly made recommendations to help close this gap in available data.

Summary and Conclusion

Senate Bill 684, patroned by Senator Charles Carrico, and House Bill 1287, patroned by Delegate Mark Cole, were introduced during the Regular Session of the 2015 General Assembly and subsequently sent, by bill referral, to the Crime Commission for review. The Executive Committee of the Crime Commission authorized a broad review of asset forfeiture in Virginia. Staff undertook a number of activities to thoroughly examine the topic, including: a review of Virginia and other state and federal statutes, collection of relevant data and literature, a review of recent asset forfeiture cases around the country, a survey of all law enforcement agencies and Commonwealth's Attorneys' Offices, a review of law enforcement agencies' policies/general orders pertaining to asset forfeiture, and numerous meetings with key stakeholders.

Overall, staff found that Virginia's current statutes and practices balance the interests of property owners and the Commonwealth. While additional protections for citizens could be implemented in Virginia, no direct evidence was found of systemic abuse of the asset forfeiture process by law enforcement or prosecutors under Virginia's asset forfeiture laws.

A legal review of all state and federal forfeiture statutes revealed that Virginia is substantially similar to most of the other states and the federal government. A majority of the states and the federal government are analogous to Virginia in the following ways: a criminal conviction is not required as a prerequisite to forfeiture, the burden of proof required to establish forfeiture is preponderance of the evidence or a similar evidentiary standard, and the claimant bears the burden of proving an "innocent owner" exception after the government has proven the property is subject to forfeiture. The main distinction between Virginia and other jurisdictions is that Virginia is in the minority of jurisdictions that mandate reimbursement of attorney fees to a claimant that prevails in a forfeiture proceeding.

In Virginia, law enforcement and prosecutors can participate in DCJS' Forfeited Asset Sharing Program, DOJ's Asset Forfeiture Program, the federal Treasury Forfeiture Fund managed by the U.S. Department of the Treasury, or all three programs. Most, however, participate in the state program only. The total number of agencies participating and the amount of monies disbursed has remained fairly consistent over the past five years from the state and DOJ asset forfeiture programs. However, due to the Abbott Laboratories settlement, where Virginia was awarded over $115 million, disbursals from the Treasury Forfeiture Fund managed by the U.S. Department of the Treasury during the FY13-FY16 time frame have represented an anomaly to totals received in previous years.

Staff focused the majority of their analysis on data from Virginia's Forfeited Asset Sharing Program. It was found that excellent data is maintained for this program. Since 1991, DCJS has managed the tracking and reimbursement of all state drug-related forfeitures valued at $500 or more. All proceeds from state non-drug related forfeitures, which are not tracked by DCJS, are sent to the Literary Fund directly by law enforcement agencies.

The Department of Criminal Justice Services has distributed over $106 million dollars to Virginia's law enforcement and Commonwealth's Attorneys' Offices since 1991. In general (for drug-related cases), DCJS retains 10% of the proceeds from each forfeited item. The remaining proceeds are distributed based on sharing agreements between law enforcement and Commonwealth's Attorneys' Offices. Staff found that, since 2010, the value of items seized, as well as the total amounts disbursed, has remained stable with approximately $10 to $11 million in items seized and $4 to $5 million disbursed back to agencies each year. Most seizures involve currency and vehicles. Examining case dispositions, staff found that approximately 75% resulted in forfeiture and 25% resulted in the item being returned to the owner or a lienholder. Taking a closer look at cases resulting in forfeiture, staff found that most asset forfeitures are a result of default judgement or some type of plea agreement or settlement. Very few cases appear to go to trial. Staff found that participating agencies in the state forfeiture program are held accountable through detailed annual certification reports to DCJS. Further, nearly all agencies reported having annual audits conducted internally, by DCJS, or by other independent entities.

There were, however, some data limitations identified by staff. Unlike data for drug-related asset forfeitures, non-drug related forfeiture data is not captured in a reliable, transparent manner. Nor is data readily captured to connect any related criminal charges and convictions with civil forfeiture proceedings. Data is also not readily available to ascertain how many civil asset forfeiture trials involve a verdict in favor of the defendant. Staff accordingly made recommendations to help close this gap in available data.

Staff surveyed all Virginia law enforcement agencies and Commonwealth's Attorneys. There was a high response rate with 87% (118 of 135) of primary law enforcement and 83% (99 of 120) of Commonwealth's Attorneys responding. All survey respondents indicated that they participated in state asset forfeiture proceedings. The majority of survey respondents reported that they had a designated person(s) to handle these types of cases for their agency or office. The most common type of crimes involved in asset forfeiture cases, according to all survey respondents, were felony drug offenses. Responding prosecutors reported that 90% or more of the informations they filed in FY14 were for drug-related cases. However, both prosecutors and law enforcement also reported handling eligible offenses relating to child pornography, cigarette trafficking, computer crimes, felony DUIs, gambling, money laundering, moonshining/bootlegging, prostitution and transportation of stolen goods. Survey respondents were also asked to designate their level of support or opposition for the following three proposed options: (1) Requirement to stay a civil asset forfeiture case until any related criminal charges are resolved; (2) Requirement for a criminal charge before the related civil asset forfeiture case can proceed; and, (3) Requirement for a criminal conviction before the related civil asset forfeiture case can proceed. The level of support from law enforcement and prosecutors was very mixed for the first two proposed options. However, there was strong opposition by both law enforcement and prosecutors to requiring a criminal conviction before the related civil asset forfeiture case could proceed.

The Crime Commission reviewed study findings at its October meeting and directed staff to draft legislation for several key issues, as well as provide a list of additional policy options to consider relating to the requirement of a criminal conviction prior to a civil forfeiture proceeding, burden of proof levels, and stays in relation to forfeiture proceedings.

There were seven staff recommendations presented for the Crime Commission's consideration at its December meeting. Staff recommendations, which were based upon the key findings of the study, focused on transparency of the forfeiture process in Virginia, preventing potential for abuses, as well as automation and efficiencies. The Crime Commission unanimously endorsed all of the following seven staff recommendations at its December meeting:

> **Recommendation 1:** The use of "waivers" by law enforcement, whereby the declared owners or lawful possessors of property "waive" their rights to contest forfeiture, should be prohibited.

Recommendation 1 would not apply to cases where someone denies he is the owner or lawful possessor of property. Staff felt that having law enforcement directly "negotiate" with a property owner, without the direct involvement of a prosecutor and/or an attorney for the owner, can raise the appearance of unfair dealing or coercion. In other states where this practice became widespread, there have been reports that the process was abused.

> **Recommendation 2:** The Virginia Department of Criminal Justice Services (DCJS) should be required to prepare an annual report to the Governor and General Assembly regarding information on all drug and non-drug asset seizures and forfeitures.

Staff believed public confidence in civil forfeiture in Virginia could be improved if information was readily available. A report, as required in Recommendation 2, would be made available to the public and would also include information on disbursals received by Virginia agencies from the federal asset forfeiture programs.

> **Recommendation 3:** The word "warrant" should be added to Va. Code § 19.2-386.10(B), so that a forfeiture proceeding may be stayed if it is also related to a warrant.

Current law only specifies forfeiture proceedings be stayed when related to an indictment or information. Recommendation 3 would allot for instances where the forfeiture is related to a case that is pending for a preliminary hearing and no indictment has yet been prepared.

> **Recommendation 4:** The Virginia Department of Criminal Justice Services (DCJS) should require participating agencies to submit information on all state law enforcement seizures and state forfeiture actions *stemming from any criminal activity*, not just those related to drug offenses.

Currently, Virginia does not have any detailed data readily available on non-drug related asset forfeitures. Recommendation 4 would help capture information related to the roughly 20 other crimes where forfeitures are permitted.

> **Recommendation 5:** The Virginia Department of Criminal Justice Services (DCJS) should collect additional data related to asset forfeitures for criminal charges and convictions that may accompany drug and non-drug related civil asset forfeitures.

Currently, the ability to match criminal charges and convictions with civil forfeiture proceedings is not readily available. Recommendation 5 would allow for some of this information to be more readily available.

> **Recommendation 6:** The Virginia Department of Criminal Justice Services (DCJS) should consider further automating Virginia's Forfeited Asset Sharing Program so participating agencies have the ability to upload all forms, annual certification reports, and supporting documentation. It was also recommended that Commonwealth's Attorneys be permitted to notify the Commissioner of the Va. Department of Motor Vehicles (DMV) electronically, as opposed to using certified mail, which is the current requirement, whenever a vehicle has been seized in anticipation of a forfeiture proceeding per Va. Code § 19.2-386.2:1.

Participating agencies in the state asset forfeiture program submit thousands of forms and supporting documentation each year to DCJS. Survey results indicated that participating agencies desired a more automated process. Recommendation 6 encourages a more efficient, automated process for participants.

> **Recommendation 7:** Crime Commission staff should work with law enforcement and prosecutors to help implement training that can be readily accessible online to new asset forfeiture directors.

Finally, staff found that there is a high turnover rate for asset forfeiture coordinators. When a new individual is designated as an asset forfeiture coordinator, he should be able to receive training and education quickly, rather than waiting for the next available course. While training has already been developed, it is not typically offered online or regularly scheduled. Recommendation 7 aims to close any unnecessary gaps in training for new coordinators.

Recommendations 1, 2, 3, and a portion of Recommendation 6 were combined into an omnibus bill. Specifically, the omnibus bill prohibits law enforcement from requesting a "waiver" until after an information is filed, permits electronic notification to DMV of seized vehicles, removes the requirement that DMV certify to the Commonwealth's

Attorney the amount of any lien on a vehicle, allows for the stay of a civil forfeiture proceeding related to a warrant, and requires that DCJS prepare an annual report to the Governor and General Assembly that details all funds forfeited to the Commonwealth as a result of civil asset forfeiture proceedings. The bill does not represent an overhaul of the asset forfeiture process in Virginia, but rather improvements to the functionality and transparency of the present system. The omnibus bill was introduced during the 2016 Regular Session of the Virginia General Assembly in both the Virginia Senate and House of Delegates: Senators Janet Howell and Thomas Norment introduced Senate Bill 423 and Delegate C. Todd Gilbert introduced House Bill 771. Both bills passed the legislature, and were signed into law by the governor; House Bill 771 was signed on March 1, 2016, and Senate Bill 423 was signed on March 11, 2016.

Recommendations 4 and 5 were handled via a letter request from the Crime Commission to DCJS. In response, DCJS indicated that they would request that agencies include information on non-drug asset seizures and forfeitures in their annual reports filed with the agency and that they would modify reporting documents to request information about criminal charges and convictions related to all forfeiture cases. Recommendation 6 was handled by both a letter request to DCJS and a legislative component to address changes to Va. Code § 19.2-386.2:1. This legislative component was included in the two omnibus bills, discussed above, that were signed into law by the governor. Staff will ensure that Recommendation 7 is implemented by meeting with all involved parties in 2016.

There were five policy options presented for the Crime Commission's consideration at its December meeting. None of the Policy Options were endorsed by the Crime Commission; motions for Policy Options 1, 2, and 3 failed to pass and no motions were made for Policy Options 4 or 5.

Policy Option 1: Should criminal convictions be required, and the conclusion of all appeals, before any civil forfeiture could be ordered? Should additional exceptions be included to what was proposed in SB 684/HB 1287?

Policy Option 2: Should a criminal conviction be required before any civil forfeiture could be ordered?

Policy Option 3: Should the burden of proof on the Commonwealth be increased from "preponderance of the evidence" to "clear and convincing evidence"?

Policy Option 4: Should defendants be entitled to have forfeiture proceedings heard prior to the resolution of any related pending criminal cases, even if the Commonwealth wants to stay the forfeiture cases?

Policy Option 5: Should defendants be entitled to a mandatory stay until the resolution of any related pending criminal cases?

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Virginia Department of Accounts

Virginia Department of Criminal Justice Services

Virginia Department of Motor Vehicles

Virginia Commonwealth's Attorneys

Virginia Law Enforcement Agencies

Virginia Sheriffs' Association

Virginia State Compensation Board

Virginia State Police

[1] Revised Code of Virginia of 1819, Chapter 147, section 11. The antecedent for this statute, providing for the forfeiture of prize monies offered for private lotteries or raffles (which were made illegal), was enacted in 1779. October of 1779 Va. Acts, Chapter XLII. This appears to have been the first forfeiture statute in Virginia based upon a criminal activity that did not involve smuggling or the evasion of customs duties; e.g., liquors imported or transported "without producing a proper certificate to the officer into whose district the same shall be transported, shall be liable to be seised and forfeited." November of 1738 Va. Acts—12th year of the reign of George II, Chapter V, section VI.

[2] *See* Williams, M.R. *et al* (March 2010). Policing for Profit: The Abuse of Civil Asset Forfeiture, *Institute for Justice*, *available at* http://www.ij.org/images/pdf_folder/other_pubs/assetforfeituretoemail.pdf. For example, the federal Assets Forfeiture Fund was created by Congress in 1984 to allow federal agencies to retain proceeds from their seizures; prior to this time forfeited funds went to the General Fund of the Treasury. Id.; Comprehensive Crime Control Act of 1984, Pub. L. No. 98-473, 98 Stat. 1837 (1984).

[3] *See* Stillman, S. (2013, August 12). Taken. *The New Yorker*. Retrieved from http://www.newyorker.com/magazine/2013/08/12/taken; Harki, G. A., & Davenport, J. (2014, May 21). Law enforcement agencies get millions from seizures. *The Virginian-Pilot.* Retrieved from http://pilotonline.com/news/local/crime/law-enforcement-agencies-get-millions-from-seizures/article_9ad7876b-16ca-53d5-9cb1-4b37fbcffb90.html; Sallah, M., O'Harrow, Jr., R., Rich, S., & Silverman, G. (2014, September 6). Stop and seize. *The Washington Post.* Retrieved from http://www.washingtonpost.com/sf/investigative/2014/09/06/stop-and-seize/;

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[4] Va. Const. article VIII, § 8.

[5] Austin v. United States, 509 U.S. 602 (1993).

[6] U.S. v. James Daniel Good Real Property et al., 510 U.S. 43 (1993). It can be noted that the Exclusionary Rule also applies to at least some forfeitures; for instance, those that require a criminal conviction before the civil forfeiture can be ordered. One 1958 Plymouth Sedan v. Pennsylvania, 380 U.S. 693 (1965).

[7] Id.

[8] Commonwealth v. Brunson, 248 Va. 347 (1994).

[9] Bennis v. Michigan, 516 U.S. 442 (1996).

[10] Commonwealth v. Wilks, 260 Va. 194 (2000).

[11] Id.

[12] VA. CODE ANN. § 8.01-526 *et seq.*(2015).

[13] VA. CODE ANN. § 4.1-336 (2015).

[14] VA. CODE ANN. § 19.2-386.15 (2015).

[15] VA. CODE ANN. § 19.2-386.16(A) (2015).

[16] Id.

[17] Id.

[18] VA. CODE ANN. § 19.2-386.16(B) (2015).

[19] Id.

[20] VA. CODE ANN. § 19.2-386.17 (2015).

[21] VA. CODE ANN. § 19.2-386.18 (2015).

[22] VA. CODE ANN. § 19.2-386.19 (2015).

[23] VA. CODE ANN. §§ 19.2-386.20, 19.2-386.21 (2015).

[24] VA. CODE ANN. § 19.2-386.22 (2015). Note that real property may not be forfeited for drug offenses unless the offense carries a minimum punishment of five years or more. Id.

[25] VA. CODE ANN. §§ 19.2-386.27, 19.2-386.28, 19.2-386.29 (2015). Under Va. Code § 19.2-386.29, a lawful owner of a weapon subject to forfeiture shall have it returned to him if he did not know, and had no reason to know, of the illegal conduct, and is not otherwise prohibited from possessing the weapon.

[26] VA. CODE ANN. § 19.2-386.30 (2015).

[27] VA. CODE ANN. § 19.2-386.31 (2015). Note that under this forfeiture statute, the forfeiture action must be stayed "until conviction of the person whose property is subject to forfeiture."

[28] VA. CODE ANN. § 19.2-386.32 (2015). Note that under this Code section, the forfeiture is dependent upon a criminal conviction first being obtained.
[29] VA. CODE ANN. § 19.2-386.33 (2015).
[30] VA. CODE ANN. § 19.2-386.34 (2015). Under this forfeiture statute, not only must there be a conviction, but also "the exhaustion of all appeals." In addition, an immediate family member, who is not the owner of the vehicle, but who would "suffer a substantial hardship" if the sole vehicle of the immediate family were forfeited, may petition the court to release the vehicle to the family member.
[31] VA. CODE ANN. § 19.2-386.35 (2015). Under this Code Section, the forfeiture action is stayed until conviction; if there is no conviction, the property must be returned. Also, real property may not be forfeited unless the related criminal offense carries a minimum penalty of five years or greater.
[32] VA. CODE ANN. §§ 19.2-386.15, 19.2-386.22, 19.2-386.35 (2015).
[33] VA. CODE ANN. §§ 19.2-386.30, 19.2-386.31, 19.2-386.20, 19.2-386.21 (2015).
[34] VA. CODE ANN. § 19.2-386.29 (2015).
[35] VA. CODE ANN. § 19.2-386.31 (2015).
[36] VA. CODE ANN. § 19.2-386.32 (2015).
[37] *Supra* note 30. Not only is a conviction required, but the forfeiture action is stayed "until the exhaustion of all appeals." This statute also uniquely provides for a family hardship exception to the forfeiture of the vehicle, which does not exist for any other forfeiture statute.
[38] *Supra* note 31. A conviction is required and the civil forfeiture action "shall be stayed until conviction."
[39] However, failure to file does not invalidate the forfeiture, per Wilks, *supra* note 10.
[40] According to DCJS, only one such petition was filed in FY14.
[41] The review focused on the forfeiture statutes of the fifty states and the federal government. Other sources that may impact the forfeiture proceeding, such as applicable case law, Rules of Court, and other regulations, were not an in-depth focus of the review. The final categorization of each issue was based on the general overall rule of the jurisdiction. The forfeiture statutes for each jurisdiction often contained various exceptions or caveats to the general overall rule, depending, for instance, on the type of property involved or the type of criminal activity underlying the basis for the forfeiture.
[42] ALASKA STAT. § 17.30.112(a) (Lexis Advance 2015).
[43] O.C.G.A. § 9-16-15(b) (Lexis Advance 2015).
[44] HRS § 712A-11(6) (Lexis Advance 2015).
[45] 725 ILL. COMP. STAT. ANN. 150/9(J) (Lexis Advance 2015).
[46] IOWA CODE § 809A.12(14) (Lexis Advance 2015).
[47] K.S.A. § 60-4112(o) (Lexis Advance 2015).
[48] LA. R.S. § 40:2611(J) (Lexis Advance 2015).
[49] N.J. STAT. § 2C:64-4(b) (Lexis Advance 2015).
[50] OR. REV. STAT. ANN. § 2981.03(F) (Lexis Advance 2015).
[51] TEX. CODE CRIM. PROC. ART. 59.05(d) (Lexis Advance 2015).
[52] 18 U.S.C.S. § 983(a)(3)(C) (Lexis Advance 2015).
[53] CAL HEALTH & SAF CODE §§ 11488.4(i)(3), 11488.4(i)(4) (Lexis Advance 2015). Conviction is required to forfeit real property, vehicles and miscellaneous personal property, but conviction is not required to forfeit cash or negotiable instruments.
[54] C.R.S. 16-13-307(1.5), 16-13-307(1.7)(c) (Lexis Advance 2015). Conviction for a qualifying offense is typically required, but if the state can prove the property was instrumental to the crime, or the proceeds of a crime committed by a non-owner, and the owner is not an innocent owner, then the forfeiture can proceed without a conviction.
[55] MD. CRIMINAL PROCEDURE CODE ANN. §§ 12-103(d), 12-103(e) (Lexis Advance 2015). Conviction of requisite offense is required to forfeit the family residence.

[56] MINN. STAT. § 609.531(6a) (Lexis Advance 2015). Conviction is generally required, however forfeiture can proceed without a conviction when there is an admission to a drug offense, a deferred disposition on a drug offense or an agreement with a criminal informant.
[57] N.Y. CIVIL PRACTICE LAW § 1311(1) (Consol. Lexis Advance 2015). Conviction is generally required but the forfeiture can proceed based upon certain narcotics offenses without a conviction.
[58] *See* State v. Johnson, 124 N.C. App. 462, 478 S.E.2d 16, 1996 N.C. App. LEXIS 1157 (N.C. Ct. App. 1996). Under the general statute, forfeiture is *in personam* and must follow criminal conviction. *But see* N.C. GEN. STAT. §§ 75D-5(c), 75D-5(d) (Lexis Advance 2015). Forfeiture under the RICO statute is an *in rem* proceeding and a conviction is not required to proceed.
[59] TENN. CODE ANN. §§ 39-11-704(b), 40-33-101(a) (Lexis Advance 2015). Conviction is required for certain offenses in order to forfeit real property or conveyances.
[60] UTAH CODE ANN. §§ 24-4-104, 24-4-105(1), 24-4-107(4) (Lexis Advance 2015). If the State seeks forfeiture through a criminal proceeding and the defendant is acquitted, the property must be returned. However, the State may choose to pursue civil or criminal forfeiture.
[61] These jurisdictions may allow minor exceptions for the forfeiture to proceed absent a conviction. Such exceptions typically require the consent of the claimant in order to proceed.
[62] MCLS § 600.4706(1) (Lexis Advance 2015).
[63] § 513.617(1) R.S.MO. (Lexis Advance 2015).
[64] 44-12-207(1)(a), MCA (Lexis Advance 2015).
[65] NEV. REV. STAT. ANN. §§ 179.1173(2), 179.1173(3) (Lexis Advance 2015).
[66] RSA 318-B:17-b(IV)(d) (Lexis Advance 2015).
[67] N.M. STAT. ANN. § 31-27-4(A) (Lexis Advance 2015).
[68] OR. REV. STAT. § 131A.255(1) (Lexis Advance 2015).
[69] 18 V.S.A. § 4243(a) (Lexis Advance 2015).
[70] A.R.S. § 13-4311(M) (Lexis Advance 2015).
[71] A.C.A. § 5-64-505(g)(5)(B)(i) (Lexis Advance 2015).
[72] O.C.G.A. § 9-16-17(a)(1) (Lexis Advance 2015).
[73] HRS §§ 712A-10(10), 712A-12(8) (Lexis Advance 2015).
[74] IDAHO CODE ANN. §§ 37-2744(d), 37-2744A(d) (Lexis Advance 2015).
[75] IND. CODE ANN. § 34-24-1-4(a) (Lexis Advance 2015).
[76] IOWA CODE § 809A.13(7) (Lexis Advance 2015).
[77] K.S.A. § 60-4113(g) (Lexis Advance 2015).
[78] LA. R.S. § 40:2612(G) (Lexis Advance 2015).
[79] 15 M.R.S. §§ 5822(3), 5826(4)(A) (Lexis Advance 2015).
[80] *See* 1986 Mercedes Benz 560 CE v. State, 334 Md. 264, 638 A.2d 1164, 1994 Md. LEXIS 47 (Md. 1994).
[81] MCLS § 600.4707(6) (Lexis Advance 2015).
[82] MISS. CODE ANN. § 41-29-179(2) (Lexis Advance 2015).
[83] *See* State v. 5708 Paseo, 896 S.W.2d 532, 1995 Mo. App. LEXIS 782 (Mo. Ct. App. 1995).
[84] RSA 318-B:17-b(IV)(b) (Lexis Advance 2015).
[85] *See* State v. Seven Thousand Dollars, 136 N.J. 223, 642 A.2d 967, 1994 N.J. LEXIS 497 (N.J. 1994).
[86] O.R.C. ANN. 2981.03(A)(5)(a), 2981.04(B), 2981.05(D) (Lexis Advance 2015).
[87] 63 OKL. ST. §§ 2-503(B), 2-503(C), 2-503(G) (Lexis Advance 2015).
[88] *See* Commonwealth v. Fid. Bank Accounts, 158 Pa. Commw. 109, 631 A.2d 710, 1993 Pa. Commw. LEXIS 530 (Pa. Commw. Ct. 1993).
[89] TEX. CODE CRIM. PROC. ART. 59.05(b) (Lexis Advance 2015).
[90] VA. CODE ANN. § 19.2-386.10(A) (2015).
[91] REV. CODE WASH. (ARCW) § 69.50.505(5) (Lexis Advance 2015).
[92] W. VA. CODE § 60A-7-705(e) (Lexis Advance 2015).
[93] 18 U.S.C.S. § 983(c)(1) (Lexis Advance 2015).
[94] *See* Resek v. State, 706 P.2d 288, 1985 Alas. LEXIS 300 (Alaska 1985).

[95] *See* Brown v. State, 721 A.2d 1263, 1998 Del. LEXIS 494 (Del. 1998).
[96] 725 ILCS 150/9(G) (Lexis Advance 2015).
[97] ALM GL ch. 94C, § 47(d) (Lexis Advance 2015).
[98] N.D. CENT. CODE, § 19-03.1-36.6 (Lexis Advance 2015).
[99] R.I. GEN. LAWS § 21-28-5.04.2(p) (Lexis Advance 2015).
[100] *See* Medlock v. One 1985 Jeep Cherokee, 322 S.C. 127, 470 S.E.2d 373, 1996 S.C. LEXIS 64 (S.C. 1996).
[101] S.D. CODIFIED LAWS § 34-20B-88 (Lexis Advance 2015).
[102] *See* State v. Eleven Thousand Three Hundred Forty-Six Dollars & No Cents in United States Currency, 777 P.2d 65, 1989 Wyo. LEXIS 168, 1 A.L.R.5th 1057 (Wyo. 1989).
[103] *See* Wherry v. State ex rel. Brooks, 637 So. 2d 1353, 1994 Ala. Civ. App. LEXIS 78 (Ala. Civ. App. 1994).
[104] WIS. STAT. § 961.555(3) (Lexis Advance 2015).
[105] COLO. REV. STAT. § 16-13-303(5.1)(a), 16-13-504(2.1)(a) (Lexis Advance 2015).
[106] CONN. GEN. STAT. § 54-36h(b) (Lexis Advance 2015).
[107] FLA. STAT. § 932.704(8) (Lexis Advance 2015).
[108] MINN. STAT. § 609.531(6a)(d) (Lexis Advance 2015).
[109] MONT. CODE ANN. § 44-12-207(1)(c) (Lexis Advance 2015).
[110] NEV. REV. STAT. ANN. § 179.1173(4) (Lexis Advance 2015).
[111] N.M. STAT. ANN. § 31-27-4(A)(3) (Lexis Advance 2015).
[112] 18 V.S.A. §§ 4243(c), 4244(e) (Lexis Advance 2015).
[113] R.R.S. NEB. § 28-431(4) (Lexis Advance 2015).
[114] *See* State v. Johnson, 124 N.C. App. 462, 478 S.E.2d 16, 1996 N.C. App. LEXIS 1157 (N.C. Ct. App. 1996).
[115] CAL HEALTH & SAF CODE § 11488.4(i)(4) (Lexis Advance 2015).
[116] CAL HEALTH & SAF CODE §§ 11488.4(i)(1), 11488.4(i)(2) (Lexis Advance 2015).
[117] *See* Smith v. Commonwealth, 339 S.W.3d 485, 2010 Ky. App. LEXIS 166 (Ky. Ct. App. 2010).
[118] KRS § 218A.410(1)(j) (Lexis Advance 2015).
[119] N.Y. CIVIL PRACTICE LAW §§ 1311(3)(a), 1311(3)(b)(ii), 1311(3)(b)(iii), 1311(3)(b)(iv) (Lexis Advance 2015).
[120] N.Y. CIVIL PRACTICE LAW § 1311(b)(v) (Lexis Advance 2015).
[121] OR. REV. STAT. § 131A.255(3) (Lexis Advance 2015).
[122] TENN. CODE ANN. §§ 39-11-708(c), 39-11-708(d), 40-33-107(4) (Lexis Advance 2015).
[123] TENN. CODE ANN. § 53-11-452(d)(1)(E) (Lexis Advance 2015).
[124] UTAH CODE ANN. § 24-4-104(6) (Lexis Advance 2015).
[125] UTAH CODE ANN. § 24-4-105(4)(b) (Lexis Advance 2015).
[126] ALASKA STAT. §§ 17.30.110(4)(A), 17.30.110(4)(B) (Lexis Advance 2015). *See also,* Resek v. State, 706 P.2d 288 (Alaska 1985).
[127] A.R.S. § 13-4310(D) (Lexis Advance 2015).
[128] A.C.A. § 5-64-505(a)(6)(B) (Lexis Advance 2015).
[129] FLA. STAT. § 932.703(6) (Lexis Advance 2015).
[130] HAW. REV. STAT. §§ 712A-10(10), 712A-12(8) (Lexis Advance 2015).
[131] IDAHO CODE § 37-2744(d) (Lexis Advance 2015).
[132] 725 ILL. COMP. STAT. 150/8, 150/9(G) (Lexis Advance 2015).
[133] IND. CODE ANN. §§ 34-24-1-1(b), 34-24-1-1(c), 34-24-1-1(e), 34-24-1-4(a) (Lexis Advance 2015).
[134] IOWA CODE § 809A.13(7) (Lexis Advance 2015).
[135] K.S.A. § 60-4113(g) (Lexis Advance 2015).
[136] LA. R.S. § 40:2612(H) (Lexis Advance 2015).
[137] 15 M.R.S. §§ 5821(3-A), 5821(7)(A), 5822(3) (Lexis Advance 2015).
[138] MD. CRIMINAL PROCEDURE CODE ANN. § 12-103(a) (Lexis Advance 2015).
[139] MCLS §§ 600.4707(6), 600.4707(7) (Lexis Advance 2015).

[140] NEB. REV. STAT. ANN. § 28-431(4) (Lexis Advance 2015).
[141] N.H. REV. STAT. ANN. § 318-B:17-b(IV)(b) (Lexis Advance 2015).
[142] N.J. STAT. § 2C:64-5(b) (Lexis Advance 2015).
[143] N.D. CENT. CODE, § 19-03.1-36.7 (Lexis Advance 2015).
[144] OR. REV. STAT. ANN. § 2981.04(B) (Lexis Advance 2015).
[145] R.I. GEN. LAWS § 21-28-5.04.2(p) (Lexis Advance 2015).
[146] S.C. CODE ANN. § 44-53-586(b) (Lexis Advance 2015).
[147] S.D. CODIFIED LAWS § 34-20B-80 (Lexis Advance 2015).
[148] TEX. CODE CRIM. PROC. ART. 59.02(c), 59.02(h)(1) (Lexis Advance 2015).
[149] VA. CODE ANN. § 19.2-386.10(A) (Lexis Advance 2015).
[150] *See* Escamilla v. Tri-City Task Force, 100 Wn. App. 742, 999 P.2d 625, 2000 Wash. App. LEXIS 720 (Wash. Ct. App. 2000).
[151] 18 U.S.C.S. § 983(d)(1) (Lexis Advance 2015).
[152] COLO. REV. STAT. § 16-13-303(5.1)(a), 16-13-504(2.1)(a) (Lexis Advance 2015).
[153] MINN. STAT. § 609.531(6a)(d) (Lexis Advance 2015).
[154] MONT. CODE ANN. § 44-12-211(2)(b) (Lexis Advance 2015).
[155] N.M. STAT. ANN. §§ 31-27-7.1(D), 31-27-7.1(F) (Lexis Advance 2015).
[156] CAL HEALTH & SAF CODE § 11488.4(i)(4) (Lexis Advance 2015).
[157] CAL HEALTH & SAF CODE §§ 11488.4(i)(1), 11488.4(i)(2) (Lexis Advance 2015).
[158] KY. REV. STAT. ANN. § 218A.460(4) (Lexis Advance 2015).
[159] KY. REV. STAT. ANN. § 218A.410(1)(j) (Lexis Advance 2015).
[160] N.Y. CIVIL PRACTICE LAW §§ 1311(3)(b)(ii), 1311(3)(b)(iii), 1311(3)(b)(iv) (Lexis Advance 2015).
[161] N.Y. CIVIL PRACTICE LAW § 1311(3)(b)(v) (Lexis Advance 2015).
[162] OR. REV. STAT. § 131A.255(3) (Lexis Advance 2015).
[163] OR. REV. STAT. § 131A.255(5) (Lexis Advance 2015).
[164] OR. REV. STAT. § 131A.255(3) (Lexis Advance 2015).
[165] UTAH CODE ANN. § 24-4-105(10)(f) (Lexis Advance 2015).
[166] UTAH CODE ANN. § 24-4-104(6) (Lexis Advance 2015).
[167] UTAH CODE ANN. § 24-4-105(4)(b) (Lexis Advance 2015).
[168] 18 V.S.A. § 4244(d) (Lexis Advance 2015).
[169] 18 V.S.A. §§ 4243(c), 4244(e) (Lexis Advance 2015).
[170] ALASKA STAT. §§ 17.30.110(4)(A), 17.30.110(4)(B) (Lexis Advance 2015). *See also* Resek v. State, 706 P.2d 288 (Alaska 1985).
[171] A.R.S. § 13-4310(D) (Lexis Advance 2015).
[172] A.C.A. §§ 5-64-505(a)(4), 5-64-505(a)(6), 5-64-505(a)(8) (Lexis Advance 2015).
[173] DEL. CODE ANN. tit. 16, § 4785(a) (Lexis Advance 2015).
[174] O.C.G.A. § 16-13-50(a) (Lexis Advance 2015).
[175] HAW. REV. STAT. ANN. §§ 712A-10(10), 712A-12(8) (Lexis Advance 2015).
[176] IDAHO CODE § 37-2745(a) (Lexis Advance 2015).
[177] 725 ILL. COMP. STAT. 150/8, 150/9(G) (Lexis Advance 2015).
[178] IOWA CODE § 809A.13(7) (Lexis Advance 2015).
[179] K.S.A. § 60-4113(g) (Lexis Advance 2015).
[180] LA. R.S. § 40:2612(H) (Lexis Advance 2015).
[181] MD. CODE ANN. CRIM. PROC. § 12-103(a) (Lexis Advance 2015).
[182] ALM GL ch. 94C, § 47(d) (Lexis Advance 2015).
[183] MISS. CODE ANN. § 41-29-179(3) (Lexis Advance 2015).
[184] MO. REV. STAT. § 195.140(2)(1) (Lexis Advance 2015).
[185] NEB. REV. STAT. ANN. §§ 28-431(4), 28-432(1) (Lexis Advance 2015).
[186] NEV. REV. STAT. ANN. § 179.1173(8) (Lexis Advance 2015).
[187] N.H. REV. STAT. ANN. § 318-B:17-b(IV)(b) (Lexis Advance 2015).
[188] N.J. STAT. § 2C:64-5(b) (Lexis Advance 2015).
[189] N.C. GEN. STAT. § 90-113.1(a) (Lexis Advance 2015).

[190] N.D. CENT. CODE, §§ 19-03.1-36.6, 19-03.1-37(1) (Lexis Advance 2015).
[191] OKLA. STAT. tit. 63 § 2-506(H) (Lexis Advance 2015).
[192] 42 PA.C.S. § 6802(j) (Lexis Advance 2015).
[193] R.I. GEN. LAWS § 21-28-5.04.2(p) (Lexis Advance 2015).
[194] S.C. CODE ANN. §§ 44-53-540(a), 44-53-586(b) (Lexis Advance 2015).
[195] S.D. CODIFIED LAWS § 34-20B-88 (Lexis Advance 2015).
[196] TENN. CODE ANN. §§ 53-11-451(a)(4)(B), 53-11-451(a)(6)(B) (Lexis Advance 2015).
[197] TEX. CODE CRIM. PROC. Art. 59.02(c), 59.02(h)(1) (Lexis Advance 2015).
[198] VA. CODE ANN. § 19.2-386.10(A) (2015).
[199] WASH. REV. CODE ANN. §§ 69.50.505(1)(d)(ii), 69.50.505(1)(g), 69.50.506(a) (Lexis Advance 2015).
[200] W. VA. CODE §§ 60A-7-703(a)(5)(i), 60A-7-703(a)(7), 60A-7-703(a)(8) (Lexis Advance 2015).
[201] WIS. STAT. § 961.56(1) (Lexis Advance 2015).
[202] WYO. STAT. § 35-7-1050(a) (Lexis Advance 2015).
[203] 18 U.S.C.S. § 983(d)(1) (Lexis Advance 2015).
[204] CAL HEALTH & SAF CODE § 11488.5(d)(1) (Lexis Advance 2015).
[205] COLO. REV. STAT. § 16-13-303(5.2)(c), 16-13-504(2.2)(c) (Lexis Advance 2015).
[206] CONN. GEN. STAT. § 54-36h(c) (Lexis Advance 2015).
[207] FLA. STAT. § 932.703(6) (Lexis Advance 2015).
[208] IND. CODE ANN. §§ 34-24-1-1(b), 34-24-1-1(c), 34-24-1-1(e), 34-24-1-4(a) (Lexis Advance 2015).
[209] MICH. COMP. LAWS SERV. § 600.4707(6)(b) (Lexis Advance 2015). Generally the burden is on the State. *But see* MICH. COMP. LAWS SERV. § 600.4707(7) (Lexis Advance 2015), which places the burden on the claimant if the property was transferred after the criminal conduct giving rise to the forfeiture occurred.
[210] MINN. STAT. §§ 609.531(6a)(d), 609.5318(1)(a) (Lexis Advance 2015).
[211] MONT. CODE ANN. § 44-12-211(2)(b) (Lexis Advance 2015).
[212] N.M. STAT. ANN. §§ 31-27-7.1(D), 31-27-7.1(F) (Lexis Advance 2015).
[213] N.Y. CIV. PRACTICE LAW §§ 1311(3)(b)(ii), 1311(3)(b)(iii), 1311(3)(b)(iv), 1311(3)(b)(v) (Lexis Advance 2015).
[214] OR. REV. STAT. § 2981.04(E)(2)(c) (Lexis Advance 2015).
[215] CODE OF ALA. § 20-2-93(h) (Lexis Advance 2015).
[216] KY. REV. STAT. ANN. § 218A.410(1)(k) (Lexis Advance 2015).
[217] KY. REV. STAT. ANN. § 218A.460(4) (Lexis Advance 2015).
[218] KY. REV. STAT. ANN. § 218A.410(1)(j) (Lexis Advance 2015).
[219] ME. REV. STAT. tit. 15, § 5821(7)(A) (Lexis Advance 2015).
[220] ME. REV. STAT. tit. 15, §§ 5821(3-A), 5822(3) (Lexis Advance 2015).
[221] OR. REV. STAT. § 131A.255(3) (Lexis Advance 2015).
[222] OR. REV. STAT. § 131A.255(5) (Lexis Advance 2015).
[223] UTAH CODE ANN. § 24-4-107(2) (Lexis Advance 2015).
[224] UTAH CODE ANN. § 24-4-105(4)(a) (Lexis Advance 2015).
[225] UTAH CODE ANN. § 24-4-105(10)(f) (Lexis Advance 2015).
[226] 18 V.S.A. §§ 4243(c), 4244(e) (Lexis Advance 2015).
[227] 18 V.S.A. § 4244(d) (Lexis Advance 2015).
[228] ALASKA STAT. § 17.30.116(c) (Lexis Advance 2015).
[229] A.R.S. § 13-4310(I) (Lexis Advance 2015).
[230] O.C.G.A. § 9-16-15(a) (Lexis Advance 2015).
[231] IOWA CODE § 809A.12(15) (Lexis Advance 2015).
[232] MISS. CODE ANN. § 41-29-179(1) (Lexis Advance 2015).
[233] N.H. REV. STAT. ANN. § 318-B:17-b(IV)(d) (Lexis Advance 2015).
[234] N.J. STAT. § 2C:64-3(f) (Lexis Advance 2015).
[235] OR. REV. STAT. § 131A.265(2) (Lexis Advance 2015).

[236] VA. CODE ANN. § 19.2-386.10 (Lexis Advance 2015).
[237] 18 U.S.C.S. §§ 981(g)(1), 981(g)(2) (Lexis Advance 2015).
[238] HAW. REV. STAT. § 712A-11(8) (Lexis Advance 2015).
[239] 725 ILL. COMP. STAT. ANN. 150/9(J) (Lexis Advance 2015).
[240] KAN. STAT. ANN. § 60-4112(p) (Lexis Advance 2015).
[241] LA. REV. STAT. ANN. § 40:2611(J) (Lexis Advance 2015).
[242] MASS. ANN. LAWS ch. 94C, § 47(d) (Lexis Advance 2015).
[243] UTAH CODE ANN. § 24-4-105(6)(b) (Lexis Advance 2015). Provides for a stay of the sale or disposition of the property on the claimant's motion.
[244] WIS. STAT. § 961.555(2)(a) (Lexis Advance 2015).
[245] A mandatory stay appears to be available to both the State and the claimant in the jurisdictions listed.
[246] CAL HEALTH & SAF CODE § 11488.5(e) (Lexis Advance 2015).
[247] COLO. REV. STAT. § 16-13-505(1.5) (Lexis Advance 2015).
[248] MD. CODE ANN., CRIM. PROC. § 12-311 (Lexis Advance 2015). Provides for a stay of the forfeiture during the criminal appeal of a conviction which is the prerequisite for forfeiture of the principal family residence.
[249] MO. REV. STAT. § 513.617(1) (Lexis Advance 2015).
[250] NEV. REV. STAT. ANN. § 179.1173(2) (Lexis Advance 2015).
[251] N.Y. CIVIL PRACTICE LAW §§ 1311(1)(a), 1311(1)(b) (Lexis Advance 2015).
[252] TENN. CODE ANN. §§ 39-11-710(g), 53-11-452(e)(1) (Lexis Advance 2015).
[253] ALA. CODE § 28-4-289 (Lexis Advance 2015). Provides for court costs in regard to a conveyance.
[254] IOWA CODE § 809A.12(7) (Lexis Advance 2015). Provides for attorney fees.
[255] OR. REV. STAT. §§ 131A.245, 131A.310(1), 131A.310(2) (Lexis Advance 2015). Provides for towing, storage costs and attorney fees.
[256] UTAH CODE ANN. § 24-4-110 (Lexis Advance 2015). Provides for attorney fees.
[257] VA. CODE ANN. § 19.2-386.12(B) (2015). Provides for attorney fees.
[258] WASH. REV. CODE ANN. § 69.50.505(6) (Lexis Advance 2015). Provides for attorney fees.
[259] COLO. REV. STAT. § 16-13-505(1.6) (Lexis Advance 2015). Exempt from storage and preservation costs.
[260] NEB. REV. STAT. ANN. § 28-431(4) (Lexis Advance 2015). Exempt from court costs, fees and storage expenses.
[261] ARIZ. REV. STAT. § 13-4314(E) (Lexis Advance 2015). Costs are awarded if no reasonable cause.
[262] HAW. REV. STAT. ANN. § 712A-15(4) (Lexis Advance 2015). Costs are awarded if no reasonable cause.
[263] N.Y. CIVIL PROCEDURE LAW § 1318(4) (Lexis Advance 2015). Costs and attorney fees are awarded if no reasonable cause or a lack of good faith in regard to motions for attachment.
[264] R.I. GEN. LAWS § 21-28-5.04.2(o) (Lexis Advance 2015). Costs are awarded if no reasonable cause.
[265] FLA. STAT. §§ 932.704(9)(a), 932.704(9)(b), 932.704(10) (Lexis Advance 2015). Provides that no towing, storage, or administrative costs are charged. The owner is reimbursed for loss in value and/or loss of income from seized property. Attorney fees are awarded if no probable cause existed for seizure. If probable cause existed, attorney fees are awarded if lack of good faith or a gross abuse by the seizing agency.
[266] LA. R.S. §§ 40:2611(L), 40:2615(D) (Lexis Advance 2015). Attorney fees may be awarded. Claimant is exempted from storage or preservation fees. Costs are awarded if no reasonable cause.
[267] MINN. STAT. §§ 609.5312(1a)(c), 609.5312(3)(c), 609.5312(4)(c), 609.5314(3)(d), 609.5318(4)(b) (Lexis Advance 2015). Claimant is exempted from costs and shall be reimbursed for filing fees. Attorney fees and costs may be awarded.

[268] N.M. STAT. ANN. §§ 31-27-6(F), 31-27-10 (Lexis Advance 2015). Claimant is exempted from storage costs. State is liable for any damages, fees or costs related to returned property.
[269] IOWA CODE § 809A.12(7) (Lexis Advance 2015).
[270] OR. REV. STAT. §§ 131A.245, 131A.310(1) (Lexis Advance 2015).
[271] UTAH CODE ANN. § 24-4-110 (Lexis Advance 2015).
[272] VA. CODE ANN. § 19.2-386.12(B) (2015).
[273] WASH. REV. CODE ANN. § 69.50.505(6) (Lexis Advance 2015).
[274] FLA. STAT. § 932.704(10) (Lexis Advance 2015).
[275] LA. REV. STAT. ANN. § 40:2611(L) (Lexis Advance 2015).
[276] MINN. STAT. § 609.5318(4)(b) (Lexis Advance 2015).
[277] N.Y. CIVIL PROCEDURE LAW § 1318(4) (Lexis Advance 2015). Attorney fees in this instance are limited to matters involving motions for attachment and the affidavits related to said motions.
[278] Retrieved from www.justice.gov/afp.
[279] 21 U.S.C. § 881(e)(1)(A) and (e)(3) (Lexis 2015); 18 U.S.C. § 981 (e)(2) (Lexis 2015); and 19 U.S.C. § 1616a (Lexis 2015) provide for this authorization.
[280] In FY14, 42 states received $1 million or more in disbursals. The lowest disbursal received by a state in FY14 was South Dakota with a total of $500.
[281] *See* Meier, B. (May 11, 2007). U.S. maker of OxyContin painkiller to pay $600 million in guilty plea, *The New York Times.*
[282] *See* The Bipartisan Budget Act of 2015 (P.L. 114-74) enacted in November 2015.
[283] *See* the Consolidated Appropriations Act of 2016, signed December 18, 2015.
[284] *See* U.S. Dep't. of Justice (2015). *Letter to State, Local and Tribal Law Enforcement Agencies,* December 21, 2015. Available at: http://www.justice.gov/criminal-afmls/file/801381/download. The deferment was effective immediately.
[285] Retrieved from https://www.justice.gov/criminal-afmls/file/835606/download.
[286] Retrieved from https://www.treasury.gov/about/organizational-structure/offices/9742000Pages/The-Executive-Office-for-Asset-Forfeiture.aspx.
[287] Retrieved from http://www.dcjs.virginia.gov/fasp/stats.cfm (data retrieved January 26, 2016).
[288] According to DCJS staff, the minimum threshold for reporting has increased over the years to manage the volume of seized items. The current threshold of $500 has worked well for both participating agencies and DCJS' ability to manage the process of maintaining detailed information.
[289] A review of all of the itemized accounts of forfeitures under $500 for all participating agencies reveals that these comprised a very small percentage of overall forfeiture amounts.
[290] Many of the sharing agreements provide that 80% of the share goes to the law enforcement agency and 20% goes to the Commonwealth's Attorney's Office; however, some prosecutors receive shares as low as 10% to as high as 45%. Some agreements provide prosecutors with an increased share (e.g., 50/50) if the case results in a trial or involves real estate. Task Force sharing agreements are far more complex as they involve multiple agencies and various share percentages.
[291] The "other" category includes a wide array of items, but frequently includes ATVs, utility trailers, and clothing items, for example.
[292] The administrative/other category has a different explanation for each case. Common explanations include duplicate entries and old cases that were never properly closed by the submitting agency.
[293] Staff found that vehicles likely have a lower forfeiture rate because they are often a more complicated item to seize and forfeit for a number of reasons, such as innocent owner or lienholder claims, high liens on the vehicle making the forfeiture cost ineffective, or settlement negotiations involving currency and the vehicle, where the owner agrees to not contest the currency seizure in return for having his vehicle returned to him.
[294] These two trials were bench trials. One trial involved the actual defendant while the other trial involved another party claiming interest in the item. In both trials, the courts entered verdicts in favor of the Commonwealth.

[295] The 352 participating agencies included 224 law enforcement agencies, 109 Commonwealth's Attorneys' Offices, and 19 Drug Task Forces.
[296] The primary reason for lack of Commonwealth's Attorney Office participation is that they simply did not have any cross-designated attorneys; their respective U.S. Attorney's Offices handled such cases.
[297] For offices that do require a conviction, it is often with the understanding that they may have already filed an information *before* the defendant's conviction.
[298] External audits are conducted by entities such as county/city auditors or independent auditing firms. DCJS requires annual audits and certifications as well.

DNA Notification Project Update

Background

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

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

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

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

2015 Summary of Activities

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

Inconclusive Case File Review

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

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

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

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

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

Next of Kin Notification

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

Notification Status Project

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

[1] However, only 33 were sent for testing because one case no longer had any remaining evidence to test.
[2] Letters to the next of kin for the deceased, eliminated defendants were mailed in March 2016. As of June 2016, four mailings have been returned with positive ID of next of kin.

Illegal Cigarette Trafficking Update

Executive Summary

During the 2012 Regular Session of the Virginia General Assembly, Senate Joint Resolution 21 was enacted, which directed the Crime Commission to study and report on a number of topics involving the subject of illegal cigarette trafficking. At the conclusion of the study, the Commission recommended a number of statutory changes, including increasing the penalties for cigarette trafficking. These recommendations were enacted during the 2013 Regular Session of the Virginia General Assembly. Concurrently, the Commission unanimously agreed to continue the study, both to monitor the ongoing trafficking situation in Virginia, and to assess the impact of the proposed statutory changes.

During both 2013 and 2014, staff met formally and informally with state and federal prosecutors and law enforcement. Briefings on certain ongoing criminal investigations were received, available data was collected, and staff participated in a number of trainings and conferences on the topic. At the end of each year, based upon what had been learned and the general discussions with law enforcement and prosecutors, the Crime Commission recommended additional legislation to deal with what was revealed to be a continuing, and growing, problem in Virginia. All of the Crime Commission's recommendations for increased penalties for cigarette trafficking, eliminating the ability of a convicted trafficker to purchase cigarettes under the guise of being a "legitimate" wholesaler or retailer, creating a new crime of using a false business to purchase cigarettes, and amending existing statutes to clarify evidentiary issues which prosecutors had faced during cases, were enacted into law. At the end of 2014, as in the previous two years, the Crime Commission directed staff to continue actively monitoring the cigarette trafficking situation in Virginia.

In 2015, staff continued their activities in regard to this study. Meetings were held with law enforcement and prosecutors, and data on numbers of charges and convictions was received from the Virginia Criminal Sentencing Commission. Staff continued to be involved with trainings provided to law enforcement and prosecutors. Lastly, specific ongoing criminal cases were followed. As in the past, the Crime Commission did not publically report on any ongoing criminal investigations, in order not to interfere with the work of law enforcement, but did reference cases that had already been reported by the press.

At the December 2015 meeting of the Crime Commission, staff reported on the general trends for cigarette trafficking that had been observed. Cigarette trafficking was still wide-spread in Virginia, with organized gangs realizing large profits from purchasing cigarettes cheaply in Virginia, and then selling them illegally up north. Virginia's statutes were being used to combat cigarette trafficking, but the sentences given by courts were low, especially when compared with the amounts of money generated by this crime. To some extent, this is offset by convictions in other states and in federal court. For this reason, multi-state and federal coordination between law enforcement

agencies continues to be essential to combat trafficking rings effectively. No recommendations for any additional legislation were made.

Court Data

Staff requested updated data from the Virginia Criminal Sentencing Commission as to the number of charges and convictions related to illegal cigarette trafficking.

The data shows that fewer cigarette trafficking charges were brought in general district courts in FY15, compared with FY14, as seen in Table 1. As would be expected, there were also fewer misdemeanor convictions in FY15, as seen in Table 2. In circuit courts, however, there were more charges for certain offenses in FY15 than in FY14; for example, second or subsequent offenses for the distribution of tax paid cigarettes in violation of Va. Code § 58.1-1017.1, as seen in Table 3. Interestingly, there were more convictions in FY15 for distribution of tax paid cigarettes, first offense, in violation of Va. Code § 58.1-1017.1, than there were in FY14, as seen in Table 4.

Table 1: General District Court Charges for Common Cigarette-Related Offenses, FY13-FY15*

Va. Code Section	Description	FY13	FY14	FY15
§ 58.1-1017(B)	Cigarettes without stamp, sale, purchase, possess, < 3000 pks (FY13); <500 pks (FY14 onward)	8	3	1
§ 58.1-1017(B)	Cigarettes without stamp, sale, purchase, possess, <500 pks, subseq.	-	0	0
§ 58.1-1017(C)	Cigarettes without stamp, sale, purchase, possess, > 3000 pks (FY13); >= 500 pks (FY14 onward)	12	14	4
§ 58.1-1017(C)	Cigarettes without stamp, sale, purchase, possess, >= 500 pks, subseq.	-	0	1
§ 58.1-1017.1	Possession with intent to distribute tax-paid, contraband cig.	102	109	45
§ 58.1-1017.1	Possession with intent to distribute tax-paid, contraband cig., subseq.	2	8	4
§ 58.1-1017.1	Intent/distribute >=100,000 tax-paid cigarettes	-	14	5
§ 58.1-1017.1	Intent/distribute >=100,000 tax-paid cigarettes, subseq.	-	0	0
Local Cigarette Tax Ordinance	Local Cigarette Tax Ordinance Violation	7	14	1

Source: Supreme Court of Virginia- General District Court Case Management System (CMS) data provided by the Virginia Criminal Sentencing Commission.* Fiscal year in which charge was filed.

Table 2: General District Court Convictions for Common Cigarette-Related Offenses, FY13-FY15*

Va. Code Section	Description	FY13	FY14	FY15
§ 58.1-1017(B)	Cigarettes without stamp, sale, purchase, possess, < 3000 pks (FY13); <500 pks (FY14 onward)	7	6	2
§ 58.1-1017(B)	Cigarettes without stamp, sale, purchase, possess, <500 pks, subseq.	-	0	0
§ 58.1-1017(C)	Cigarettes without stamp, sale, purchase, possess, > 3000 pks (FY13); >= 500 pks (FY14 onward)	0	0	0
§ 58.1-1017(C)	Cigarettes without stamp, sale, purchase, possess, >= 500 pks, subseq.	-	0	0
§ 58.1-1017.1	Possession with intent to distribute tax-paid, contraband cig.	68	82	46
§ 58.1-1017.1	Possession with intent to distribute tax-paid, contraband cig., subseq.	2	0	0
§ 58.1-1017.1	Intent/distribute >=100,000 tax-paid cigarettes	-	0	0
§ 58.1-1017.1	Intent/distribute >=100,000 tax-paid cigarettes, subseq.	-	0	0
Local Cigarette Tax Ordinance	Local Cigarette Tax Ordinance Violation	3	4	2

Source: Supreme Court of Virginia- General District Court Case Management System (CMS) data provided by the Virginia Criminal Sentencing Commission. * Fiscal year in which charge was concluded.

Table 3: Circuit Court Charges for Common Cigarette-Related Offenses, FY13-FY15*

Va. Code Section	Description	FY13	FY14	FY15
§ 58.1-1017(B)	Cigarettes without stamp, sale, purchase, possess, < 3000 pks (FY13); <500 pks (FY14 onward)	0	0	0
§ 58.1-1017(B)	Cigarettes without stamp, sale, purchase, possess, <500 pks, subseq.	-	0	0
§ 58.1-1017(C)	Cigarettes without stamp, sale, purchase, possess, > 3000 pks (FY13); >= 500 pks (FY14 onward)	9	0	1
§ 58.1-1017(C)	Cigarettes without stamp, sale, purchase, possess, >= 500 pks, subseq.	-	5	0
§ 58.1-1017.1	Possession with intent to distribute tax-paid, contraband cig.	4†	7†	4†
§ 58.1-1017.1	Possession with intent to distribute tax-paid, contraband cig., subseq.	0	3	6
§ 58.1-1017.1	Intent/distribute >=100,000 tax-paid cigarettes	-	4	0
§ 58.1-1017.1	Intent/distribute >=100,000 tax-paid cigarettes, subseq.	-	0	4
Local Cigarette Tax Ordinance	Local Cigarette Tax Ordinance Violation	0	0	1

Source: Supreme Court of Virginia- Circuit Court Case Management System (CMS) data provided by the Virginia Criminal Sentencing Commission.* Fiscal year in which charge was filed. † These charges were the result of appeals from General District Court. Note: The CMS does not include cases from Alexandria or Fairfax. Virginia Beach rejoined the system in October 2014 after leaving the system in FY09.

Table 4: Circuit Court Convictions for Common Cigarette-Related Offenses, FY13-FY15*

Va. Code Section	Description	FY13	FY14	FY15
§ 58.1-1017(B)	Cigarettes without stamp, sale, purchase, possess, < 3000 pks (FY13); <500 pks (FY14 onward)	5	3	0
§ 58.1-1017(B)	Cigarettes without stamp, sale, purchase, possess, <500 pks, subseq.	-	0	0
§ 58.1-1017(C)	Cigarettes without stamp, sale, purchase, possess, > 3000 pks (FY13); >= 500 pks (FY14 onward)	4	2	1
§ 58.1-1017(C)	Cigarettes without stamp, sale, purchase, possess, >= 500 pks, subseq.	-	0	0
§ 58.1-1017.1	Possession with intent to distribute tax-paid, contraband cig.	2†	5†	10†
§ 58.1-1017.1	Possession with intent to distribute tax-paid, contraband cig., subseq.	0	2	0
§ 58.1-1017.1	Intent/distribute >=100,000 tax-paid cigarettes	-	1	4
§ 58.1-1017.1	Intent/distribute >=100,000 tax-paid cigarettes, subseq.	-	0	1
Local Cigarette Tax Ordinance	Local Cigarette Tax Ordinance Violation	0	0	0

Source: Supreme Court of Virginia- Circuit Court Case Management System (CMS) data provided by the Virginia Criminal Sentencing Commission. * Fiscal year in which charge was concluded.† At least one of the convictions was the result of an appeal from General District Court. Note: The CMS does not include cases from Alexandria or Fairfax. Virginia Beach rejoined the system in October 2014 after leaving the system in FY09.

In sum, the total number of charges and convictions, overall and in all courts, is noticeably low. This may be a reflection of the time and effort it takes to thoroughly investigate a complicated cigarette trafficking operation. Alternatively, it may indicate that, with certain exceptions, local law enforcement agencies are devoting more resources to other types of criminal investigations, rather than cigarette trafficking. A third possibility is that Virginia prosecutors and law enforcement are willing, or prefer, to have these cases prosecuted in federal court or in other states, rather than in Virginia courts.

Recent Cases

Informal reports from law enforcement indicate that organized crime is continuing to come to Virginia as a main source state for obtaining cigarettes, which they can then traffic up north for enormous profits. Law enforcement has noted that ethnic gangs with direct ties to foreign countries continue to engage in cigarette trafficking, frequently with links to drug and weapons trafficking. Arrests of both low-level

traffickers and large organized criminal gangs continue to occur. Notably in the past year, a number of ongoing criminal investigations led to arrests and criminal charges, which were reported in the news. A number of these were the end result of lengthy cases of which staff had been aware, but had not publically reported on in earlier years, so as not to impede the work of law enforcement. A review of these major arrests and convictions reported in the press in 2015 was provided at the December 2015 Crime Commission meeting.

On February 23, 2015, Min Jie Zhu, Yau Mau Chu, and Rafel Dominquez pled guilty in Chesterfield Circuit Court to various charges related to their trafficking scheme that involved shipping untaxed cigarettes in "Chinatown" commercial buses from Virginia to New York.[1] Over a 9 month period, they purchased and shipped between 57,000 and 114,000 cartons, with a value in New York of between $9 and $12 million. Zhu had acquired a business license, so he would purchase his cigarettes in Virginia without paying any tax. A Richmond-area Special Multi-jurisdictional Operational Group had placed Zhu under surveillance in early 2014. Zhu received a 5 year sentence, with all but 6 months suspended; the other defendants received 6 month suspended sentences, with no active time.

On April 2, 2015, Mohamed Seid Ahmed Mohamed was sentenced in federal district court in Richmond, Virginia, to 3 years and 5 months in prison and was ordered to pay $1 million in restitution to the Virginia Department of Taxation.[2] He had pled guilty in September of 2014 to conspiring to commit wire fraud and to trafficking in contraband cigarettes. From June 2011 to January 2014, using a cigarette store he owned in Richmond as a cover, he purchased more than 440,000 cartons of cigarettes and sold most of them to traffickers.

On July 6, 2015, Brooklyn limo driver Hazim Abuhakmeh pled guilty in Hanover Circuit Court to a charge of conspiring to transport untaxed cigarettes out of Virginia, and received a 3 year suspended sentence.[3] He had purchased $55,000 worth of cigarettes from a wholesaler in Virginia. He had a previous misdemeanor conviction in Maryland for trafficking cigarettes. As a result of his Virginia felony conviction, Abuhakmeh faces possible deportation to Jordan.

On July 8-9, 2015, twenty defendants were arrested on indictments issued by New York for cigarette trafficking. Among them were eight Richmond area residents.[4] The defendants were part of an organized gang that arranged for trafficked cigarettes to be sold in the Bronx. The Henrico County Commonwealth's Attorney's Office and Henrico Police played a crucial role in the investigation. One of the Richmond area defendants, Mickel Marzouk, pled guilty in federal court in Richmond to firearms charges related to armed robberies of cigarette distributors. In January 2016 he was sentenced to 32 years in prison and was ordered to pay $150,685 in restitution.[5]

On September 15, 2015, Yinhau "Steven" Chen, a Fredericksburg businessman, pled guilty in federal court in Richmond to conspiracy to launder $12.2 million derived from illegal cigarette trafficking.[6] Between March 2014 to June of 2015, Chen purchased at least $13.8 million worth of cigarettes from wholesalers in Virginia, and then sold them to cigarette traffickers from out-of-state. It was alleged that of his various businesses,

two of them, Infinity Strategic Services and Family Computers, had no purpose other than to serve as funnel accounts for his cigarette purchases and sales.

On September 17, 2015, Kathy Crabtree Farley, the former president of Cherokee Tobacco and Firebird Manufacturing, pled guilty in federal court in Danville, Virginia, to four counts stemming from a 47 count indictment for tax evasion, wire fraud, and violations of the Contraband Cigarette Trafficking Act.[7] Between November 2011 and August 31, 2013, Farley failed to pay $13 million in federal taxes. In January 2016, Farley was sentenced to 60 months in prison and was ordered to pay over $4 million in restitution.[8]

On October 28, 2015, in New York state court, Basel Ramadan was sentenced to 4 to 12 years in prison, and ordered to forfeit $1.2 million.[9] He had been found guilty on 198 counts of enterprise corruption, money laundering, and evading $5.3 million in taxes. Ramadan was the head of a 16 member criminal enterprise that purchased cigarettes in Virginia, transported and stored them in Delaware, and then sold them in New York.

On August 17, 2015, there was an attempted robbery in the parking lot of the Sam's Club at the White Oak Village shopping center in Richmond, Virginia. Multiple shots were fired; the suspects "left in a vehicle with an undisclosed amount of cash."[10]

Conclusion

Virginia's statutes are being used to combat cigarette trafficking, although in general the number of charges and convictions for FY15 was the same as, or slightly lower, than the previous two years. Multi-state and federal coordination between law enforcement agencies is essential to combat trafficking rings[11], and it is good to note that cases involving trafficking are being brought in other state courts and federal court, as well as Virginia. Cigarette trafficking cases are time and resource intensive[12], and the sentences given by courts in Virginia are low, especially compared with the amounts of money generated by the trafficking rings. However, it appears that Virginia currently has adequate criminal statutes to prosecute cigarette traffickers; informal conversations with law enforcement and prosecutors did not reveal any omissions or weaknesses that mandated legislative change for the 2016 General Assembly. In conclusion, law enforcement and prosecutors must remain vigilant on this issue, as cigarette trafficking will continue to be an ongoing criminal problem in Virginia for the foreseeable future.

[1] Bowes, M. (2015, February 23). Trio pleads guilty to trafficking Va. cigarettes to NY on "Chinatown" buses. *Richmond Times-Dispatch*. Retrieved from http://www.richmond.com/news/local/central-virginia/article_7c57020a-87a6-525d-bd4d-e8996519e95b.html; *See also*, 3 people sentenced in Virginia cigarette trafficking case. (2015, February 24). *Newsplex* online. Retrieved from http://www.newsplex.com/home/headlines/3-People-Sentenced-in-Virginia-Cigarette-Trafficking-Case-293862521.html.

[2] Chesterfield man sentenced in cigarette trafficking case. (2015, April 2). *The Washington Times.* Retrieved from http://www.washingtontimes.com/news/2015/apr/2/chesterfield-man-sentenced-in-cigarette-traffickin/.
[3] McKelway, B. (2015, July 6). Brooklyn limo driver escapes prison time in Hanover, but more problems ahead in cigarette scheme. *Richmond Times-Dispatch.* Retrieved from http://www.richmond.com/news/local/crime/article_578ebe6f-6b82-54fc-9509-f6328db2fec7.html.
[4] Green, F. (2015, July 13). Eight Richmond-area residents charged in New York City cigarette trafficking case. *Richmond Times-Dispatch.* Retrieved from http://www.richmond.com/news/local/crime/article_d79534b5-9d5c-549a-972b-3771f119b0b7.html.
[5] Green, F. (2016, January 27). 4 men sentenced in cigarette robberies. Richmond Times-Dispatch. Retrieved from http://www.richmond.com/news/local/crime/article_b6922f81-7067-5afc-9457-68009fa40da7.html.
[6] Green, F. (2015, September 10). Fredericksburg man charged with money laundering in cigarette smuggling case. *Richmond Times-Dispatch.* Retrieved from http://www.richmond.com/news/article_e9fddbfb-da65-5f8f-80fc-6eb83c57f121.html.
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[12] "Details of the nearly two-year [sic] investigation involve confidential informants, GPS tracking devices and lots [of] undercover surveillance." Id.

Missing Persons/Search and Rescue Update

Senate Joint Resolution 64 (SJR 64), patroned by Senator Ryan McDougle, and House Joint Resolution 62 (HJR 62), patroned by Delegate David Albo, were introduced during the Regular Session of the 2014 General Assembly. Both resolutions specifically focused on the current state of readiness of Virginia's law enforcement and search and rescue efforts for rapid and well-coordinated deployment in all missing, endangered, and abducted person cases. Crime Commission staff completed a number of activities to address the resolutions' mandates. Staff recommendations, which were based upon the key findings of the study, focused on (i) reporting and notification, (ii) model policies and practices, (iii) training, (iv) resources, and (v) education and awareness.

A total of twelve recommendations were endorsed by the Crime Commission at its December 2014 meeting. The first four recommendations were combined into an omnibus bill and introduced in both the Virginia Senate and House of Delegates: Senator Ryan McDougle patroned Senate Bill 1184 and Delegate Charniele Herring patroned House Bill 1808 during the 2015 Regular Session of the Virginia General Assembly. Both bills were signed into law by the governor on March 16, 2015, and enacted into law effective July 1, 2015.

> **Recommendation 1**: Statutorily require the creation of a Search and Rescue Coordinator position at the Va. Department of Emergency Management (VDEM) under Va. Code § 44-146.18.

The purpose of Recommendation 1 was two-fold. First, it allowed search and rescue to be defined by Code. Second, it gave law enforcement a designated point of contact to request assistance when needed. It was made clear that nothing in the language of the legislation was to be construed as authorizing VDEM to take direct operational responsibilities away from local or state law enforcement in the course of a search mission; nor did it prevent VDEM from acting as the Search Mission Coordinator when requested to do so by local or state law enforcement. It should be noted that the General Assembly provided $180,000 in funding for this position and additional equipment in a separate budget amendment.

> **Recommendation 2**: Statutorily require the creation of a mechanism for receipt of reports for critically missing adults under a proposed new statute: Va. Code § 15.2-1718.2.

During the course of the study, staff discovered that the Code did not address missing persons between the ages of 21-60 or those over 60 who did not meet the cognitive impairment criteria for a "missing senior adult." The desire was to afford the same reporting response to those known to be critically missing regardless of age. This legislation also clarified that there would be no waiting period for law enforcement to

accept a critically missing adult report. The new Code section defined what a critically missing adult is and the report to be submitted, which would be the form (SP-67) that is already being used for any missing adult. It should be noted that this legislation did not create a critically missing adult alert system similar to what exists for abducted children (AMBER Alert) or missing senior adults (SENIOR Alert).

> **Recommendation 3:** Amend Va. Code § 9.1-102 to require the Va. Department of Criminal Justice Services (DCJS) to establish and publish model policies for missing children, missing adults, and search and rescue efforts.

Staff found that there was no comprehensive, up-to-date model policy on missing persons or search and rescue for Virginia law enforcement. Law enforcement needed guidance for all types of missing person cases and for the management and coordination of any search and rescue efforts occurring within their jurisdiction. DCJS released its *Model Policy on Missing Persons* and its *Model Policy on Search and Rescue* on October 29, 2015.[1]

> **Recommendation 4:** Amend Va. Code § 9.1-102 to require DCJS to develop training standards for missing persons and search and rescue.

Staff also found that some of the training standards for this subject needed to be updated. Further, staff discovered that there is very limited training for emergency communication officers, law enforcement recruits, command staff, investigators, and other first responders in regards to search and rescue training. Limited availability of trainings is due to the lack of sufficient staff and resources needed to host the trainings. Fortunately, VDEM, the Virginia State Police and the Virginia Association of Volunteer Rescue Squads have well-established search and rescue training curricula that can easily be modified and adopted by DCJS for Virginia's first responders.

Recommendations 5 and 6 were endorsed by the Crime Commission and funded by the General Assembly.

> **Recommendation 5:** Create a Search and Rescue Coordinator position at the Va. State Police (VSP).

The Virginia State Police's Search and Rescue Coordinator is now a full time position that oversees their existing Search and Recovery Team of approximately 20 highly trained search and rescue personnel, coordinates their Tactical Field Force of approximately 300 members for sustainability during searches, supervises VSP search missions and maintains all training records and requests for training. The General Assembly provided funding in the amount of $180,000 to support this position.

> **Recommendation 6:** Increase available resources for search and rescue missions at VDEM and VSP.

In order to provide search and rescue first responders with much needed resources for search missions, funding was included within the $180,000 allocated to both VDEM and VSP for equipment needs.

Recommendations 7 and 8 were endorsed by the Crime Commission, but were ultimately not funded by the General Assembly.

> **Recommendation 7:** Create an additional FTE position at the VSP's Missing Children Clearinghouse to assist with responsibilities of training, record keeping, compliance, and technical assistance to law enforcement agencies in reporting missing persons.

The Clearinghouse's caseload has increased enormously since 1985; however, they have been provided with little-to-no additional resources or staffing. An extra position would allow for them to provide additional training in the field, update the missing adult web page more regularly, and to fully implement already-developed prevention programs to school-aged children and their parents.

> **Recommendation 8:** Create two regional Search and Rescue Coordinator positions at VDEM to provide a regional response for missions and training needs.

Additional positions would have assisted VDEM in meeting the training demands from the field. Currently, they have to conduct trainings primarily on weekends, since they rely on volunteer adjunct instructors. It is difficult to keep up with the demands of training while still being responsible for responding to search missions.

Recommendations 9, 10, 11 and 12 were handled via letter request.

> **Recommendation 9:** Request VSP to examine programmatic efforts to provide immediate notification to VDEM when a critically missing child or adult is entered into VCIN.

Staff wanted to ensure that VDEM was being made aware of <u>all</u> critically missing persons entered into VCIN. VDEM was only receiving monthly summary reports for missing children. Immediate notification of reports that could potentially result in a search and rescue mission is imperative for awareness and preparedness. The categories of missing persons reported to VDEM would be limited to the classifications of "endangered," "involuntary," and "disability," which are the ones that would be most critical for VDEM to be aware. Crime Commission was advised that these programmatic efforts were completed as of April 2015.

> **Recommendation 10:** Request Crime Commission staff to facilitate convening DCJS, VDEM, VSP, Virginia Sheriffs' Association (VSA), Virginia Association of Chiefs of Police (VACP), and others to create a detailed checklist for Virginia's first responders.

Staff recognized that a model policy needs to be general enough to apply to all types of law enforcement agencies across the state. However, it was also important that a more detailed checklist be developed and made available to all of Virginia's first responders for guidance. In order to fulfill this recommendation, staff convened a formal work group in May 2015, to further discuss the issue and to identify any gaps where

additional guidance to agencies was most needed. The work group was comprised of over 30 representatives with specific knowledge of missing person cases and/or search and rescue efforts. Representatives from the following agencies participated: Association of Public-Safety Communications Officials (APCO), Commonwealth's Attorney's Services Council, DCJS, Federal Bureau of Investigation's Child Abduction Rapid Deployment Team, National Association to PROTECT Children & PROTECT, National Center for Missing and Exploited Children (NCMEC), a search and rescue expert/consultant, Virginia Association of Volunteer Rescue Squads, Virginia Department of Aging and Rehabilitation Services, VDEM and their Search and Rescue Unit, Virginia Department of Juvenile Justice, Virginia Department of Social Services, Virginia law enforcement agencies, the Virginia State Police's Search and Recovery Team, Missing Children Information Clearinghouse, High Technology Crimes Division, and Public Relations Division, the Virginia Victim Assistance Network, and the families of missing or abducted children and adults

The work group developed and approved three checklists and questionnaires to assist law enforcement in incidents possibly requiring a search and rescue effort: *Law Enforcement Hasty Search Checklist for Missing Person Searches; Law Enforcement Relative Urgency Assessment Tool For Missing Persons;* and, *Law Enforcement Search and Rescue Questionnaire for Missing Persons.* These documents were also taken into consideration by DCJS when developing the model policies and updated training standards for consistency.[2]

> **Recommendation 11:** Request DCJS to create a resource guide for the families of missing persons and make available online.

One concern that staff heard repeatedly in the field was that the families of missing persons do not often have adequate resources or information available to them in these types of cases. Law enforcement also indicated that they would like to have an additional resource to provide to families. The second half of the work group meeting in May 2015 was dedicated to this topic. DCJS published its *Virginia Missing Person Family Resource Guide* in May 2016, which is available on their website.[3]

> **Recommendation 12:** Coordinate with VSA and VACP to promote law enforcement awareness. Staff will be presenting at both of their annual training conferences in 2015.

Both Associations kindly afforded staff the opportunity to speak at their annual conferences. Staff presented at the VACP Conference on August 31, 2015, and at the VSA Conference on September 15, 2015. Staff provided an overview of the study, an update on the status of each recommendation, and copies of all three checklists developed by the work group.

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[1] *See* http://www.dcjs.virginia.gov/cple/sampleDirectives/ for both model policies.
[2] *See* Appendix at http://www.dcjs.virginia.gov/cple/sampleDirectives/ for checklists and questionnaires.
[3] *See* https://www.dcjs.virginia.gov/victims/documents/missingpersonguide_brochure.pdf.

Stalking

Executive Summary

During the Regular Session of the 2015 General Assembly, House Bill 1453 (HB 1453)[1] and Senate Bill (SB 1297)[2] were introduced by Delegate Jackson Miller and Senator Donald McEachin, respectively. Both bills sought to expand the crime of stalking by amending Virginia Code § 18.2-60.3. As introduced, both bills used essentially identical language. Senate Bill 1297 was substantially amended in the nature of a substitute in the Senate Courts of Justice Committee before it passed the Senate. Both bills were left in the House Courts of Justice Committee, and a letter was sent to the Crime Commission, asking for them to be reviewed.

As presently codified in the Code of Virginia, in order to be guilty of the crime of stalking, the defendant must intend to place the victim, or know or reasonably should know that the victim would be placed in fear of death, sexual assault or bodily injury.[3] Under the proposed language of both HB 1453 and SB 1297, the defendant must only intend that the victim feel coerced, intimidated or harassed, and not necessarily fear death, sexual assault, or bodily injury. As amended, Senate Bill 1297 also adds a *mens rea* of malice to the new crime of making the victim feel coerced, intimidated or harassed, and requires that the conduct be such "that would cause a reasonable person to suffer severe emotional distress."

To examine how frequently the crime of stalking is charged in Virginia, and how often convictions occur, staff received data from the Virginia Criminal Sentencing Commission for the number of charges and convictions under subsections (A), (B) and (C) of Virginia Code § 18.2-60.3 for FY11 through FY15. Subsection (A) is the crime of misdemeanor stalking; subsection (B) is the crime of a second offense of stalking committed within five years of a previous conviction for stalking, if the defendant also has been convicted of (i) an assault offense involving the victim, (ii) domestic battery, or (iii) violation of a protective order; and, subsection (C) is the crime of a third or subsequent offense of stalking committed within five years of a previous conviction for stalking. The data revealed that there were few charges and convictions under subsections (B) and (C) during that time frame. Charges under subsection (A) were far more common during that time period; however, there was a significant difference between the number of charges and the number of convictions under this subsection at the district courts level, revealing that many misdemeanor stalking charges do not result in a criminal conviction.

All 50 states have enacted stalking laws, which criminalize otherwise lawful behavior, if it is done in such a manner as to cause fear of assault, or emotional distress, on the part of the victim. While all states have recognized the need to criminalize obsessive, repetitive behavior that results in a victim feeling legitimate feelings of terror, or even extreme stress, 20 states including Virginia have created their statutes in such a way that, at least according to their strict wording, the victim must feel they are at a

reasonable risk of an actual assault. The other 30 states only require that the victim be placed in "emotional distress," or suffer "emotional harm."

In a review of the different statutory means of defining the crime of stalking, it was noted that three states include provisions related to the victim actually informing the stalker that further contact is not desired. In Maryland, in order to be convicted of the crime of harassment (a less serious charge than stalking), the victim must have given the defendant a reasonable warning or request to stop. In North Dakota and Washington, contacting or following the victim after having been given notice that no further contact is desired, creates a *prima facie* inference that the defendant intended to stalk, or harass or intimidate, the victim. An approach similar to this was ultimately adopted as a recommendation by the Crime Commission.

At the September 2015 Crime Commission meeting, staff presented members of the Commission with five policy options in regard to amending the stalking statute. The options were not mutually exclusive and members were advised that a combination of the options could be incorporated into an amended statute. The members discussed the various options and directed staff to prepare draft legislation for the next meeting.

At the October 2015 Crime Commission meeting, staff presented members of the Commission with three draft versions of possible stalking legislation. The members of the Commission preferred the version that created this *prima facie* evidence concept: when the defendant receives actual notice that the victim does not wish to be contacted or followed, additional contact or following is evidence that the defendant intended to place the victim in reasonable fear of death, criminal sexual assault, or bodily injury. The members voted unanimously to include the phrase "or reasonably should have known that [the victim] was placed in reasonable fear of death, criminal sexual assault or bodily to himself or a family or household member." The Commission then voted unanimously to endorse this version with the amended language.

At the December 2015 Crime Commission meeting, staff presented members of the Commission with a single policy option based on the vote at the October 2015 Crime Commission meeting:

> **Policy Option 1:** Should a *prima facie* presumption be added to the stalking statute? If a defendant receives actual notice that the victim does not want to be contacted or followed, continued conduct means either that the defendant intended to place the victim, or reasonably should have known that the victim would be placed in, reasonable fear of death, sexual assault or bodily injury.

The Commission voted unanimously to approve Policy Option 1. Based on this policy option, Senator Bryce E. Reeves introduced SB 339 and Delegate Robert B. Bell introduced HB 752 during the 2016 Regular Session of the General Assembly. House Bill 752 was also patroned by Delegates Jennifer McClellan, Jason S. Miyares and Margaret B. Ransone. The two bills were identical as introduced.

After being amended in the Senate, and then re-amended in the House, SB 339 was passed by the legislature as introduced, and was signed into law by the governor. House Bill 752 was amended in the Senate; the House accepted those amendments, and the bill was enrolled. The governor proposed amending the enrolled bill to make it identical to the version that was originally introduced; this amendment was accepted by both the House and the Senate on April 20, 2016. Ultimately, both bills were enacted into law as introduced.

Background

During the Regular Session of the 2015 General Assembly, House Bill 1453 (HB 1453) and Senate Bill (SB 1297) were introduced by Delegate Jackson Miller and Senator Donald McEachin, respectively. Both bills sought to expand the crime of stalking by amending Virginia Code § 18.2-60.3. Currently, the elements of stalking require that a person "…on more than one occasion engages in conduct directed at another person with the intent to place, or when he knows or reasonably should know that the conduct places, that other person in reasonable fear of death, criminal sexual assault, or bodily injury to that other person or to that other person's family or household member."[4]

As introduced, both bills used essentially identical language, which read: "…or who on more than one occasion engages in conduct directed at another person with the intent to coerce, intimidate or harass, or when he knows or reasonably should know that the conduct coerces, intimidates, or harasses, that other person or that other person's family or household member." House Bill 1453 would have added this new language to the statute in the form of a new subsection, while SB 1297 would have incorporated this language into the statute's existing subsection A, which is the subsection that defines the actual crime of stalking.[5]

Senate Bill 1297 was substantially amended in the nature of a substitute in the Senate Courts of Justice Committee before it passed the Senate. The substitute version replaced the language of "…engage in conduct with the intent to coerce, intimidate, or harass…" with "…on more than one occasion **maliciously** engages in conduct directed at another person that would cause a reasonable person **to suffer severe emotional distress** with **the intent to coerce, intimidate or harass**, or when he knows or reasonably should know that the conduct coerces, intimidates, or harasses, that other person."

Both bills were left in the House Courts of Justice Committee, and a letter was sent to the Crime Commission, asking for them to be reviewed.

Analysis of HB 1453 and SB 1297

The new language of HB 1453 is very broad in terms of the activities that would constitute a crime of stalking. Under existing law, the defendant must intend that the

victim fear death, sexual assault or bodily injury. Under the language of this bill, the defendant must only intend that the victim feel coerced, intimidated or harassed.

The word "harass" is not defined in the Code of Virginia. However, the phrase "to coerce, intimidate, or harass" is used in four existing criminal statutes: use of profane, threatening, or indecent language over the telephone;[6] unlawfully disseminating nude photos,[7] computer harassment;[8] and, publishing a person's identifying information.[9] A review of these four statutes reveals that all of them are more narrowly focused than the broad language contemplated by HB 1453.

In the statutes criminalizing use of profane, threatening, or indecent language over the telephone[10] and computer harassment,[11] there is a requirement that the illegal speech be obscene or that a threat be communicated. These statutes have been upheld because they involve more than just speech; i.e., they have been upheld as they also involve threats or harassment.[12] For example, in the case of Perkins v. Commonwealth, the Court of Appeals of Virginia upheld Va. Code § 18.2-427, the statute criminalizing profane, threatening, or indecent language over the telephone, stating that the statute "proscribes conduct and not speech….the legislature intended to address harassing conduct as the evil to be proscribed…[t]his construction is not strained and removes protected speech from within the statute's sweep."[13] Similarly, in Barson v. Commonwealth, the Supreme Court of Virginia upheld Va. Code § 18.2-152.7:1, the statute making it a crime to harass someone through the use of a computer, holding that the statute required both harassment and the use of obscene language.[14]

For the crime of unlawful dissemination of nude photos, there is a specific *mens rea* requirement of malice.[15] The crime of publishing a person's identifying information does not involve threats, obscenity, or malice, but it is limited to the strictly defined action of publishing identifying information or identifying a person's residence, with the intent to coerce, intimidate or harass.[16] This requirement is similar to the Virginia statute prohibiting a person from causing a telephone to ring with the intent to annoy another;[17] in both statutes, the precisely defined actions of the defendant serve to prevent the statute from being unconstitutionally vague.

In contrast with those four existing statutes, HB 1453 does not list any specific actions that are prohibited. Under the bill, any activity undertaken with the intent to harass would become a crime. In light of the Barson and Perkins decisions, the proposed language of HB 1453 might survive vagueness and overbreadth constitutional challenges. However, in individual cases ("as applied"), if the statute were applied to non-threatening speech or other First Amendment activities, it likely would not be upheld.

It should further be noted that the General Assembly has implied in the Virginia Code that stalking and harassing are different activities. The General Assembly has banned an applicant from purchasing a firearm from a dealer if that applicant is "…subject to a court order restraining the applicant from harassing, stalking, or threatening the applicant's child or intimate partner…"[18] While there would not be a direct contradiction in the Virginia Code if HB 1453 were passed, it would be slightly awkward

to have one statute that implies harassing and stalking are different actions, and another statute that defines "to harass" as an action of "stalking."

Like HB 1453, the substitute version of SB 1297 uses the phrase "coerce, intimidate, or harass." Senate Bill 1297 also adds a *mens rea* of malice and it requires that the conduct be such "that would cause a reasonable person to suffer severe emotional distress."
The term "emotional distress" is used in civil cases, such as the tort of intentional infliction of emotional distress. However, this term is not used in Virginia in any criminal statute that defines a criminal act. The term "emotional distress" itself is not defined in Title 18.2 of the Code of Virginia. The term appears only once in Title 18.2, in the declaration of policy against the picketing of dwelling places, where it is noted that "…the practice of picketing before or about residences and dwelling places causes emotional disturbance and distress to the occupants…"[19]

The term "emotional distress" is used only two other times in the Code of Virginia. Both of these references appear in Title 38.2 (Insurance).[20] Likewise, the phrase "severe emotional trauma" is used five times throughout the Code of Virginia, but does not occur in Title 18.2.[21] It would be extremely problematic to create a new crime that involves the infliction of "emotional distress," without providing a clear definition of what that term specifically means.[22]

Virginia Charge and Conviction Data

Staff requested data from the Virginia Criminal Sentencing Commission relating to the following charges and convictions: Va. Code § 18.2-60.3(A)—stalking with intent to cause fear of death, assault or injury; Va. Code § 18.2-60.3(B)—stalking 2nd conviction within 5 years with a prior assault or protective order conviction; and Va. Code § 18.2-60.3(C)—stalking 3rd conviction/subsequent conviction within 5 years of first conviction.

Analysis of the data found that there were few charges and convictions under Va. Code § 18.2-60.3(B). At the General District Court level there was one charge in FY14 and one charge in FY15 under this specific Code section. Neither of those charges resulted in a conviction. There were no charges or convictions under this specific Code section in the Circuit Court or the Juvenile and Domestic Relations District Court during FY14-FY15.

Data relating to charges and convictions for stalking under Va. Code § 18.2-60.3(A) and § 18.2-60.3(C) are detailed in Tables 1 and 2.

Table 1: Va. Code § 18.2-60.3(A) Stalking Data, FY11-FY15

Total Charges*	FY11	FY12	FY13	FY14	FY15**
General District Court	699	529	430	348	402
J&DR Court	316	271	254	213	217
Circuit Court	16	9	17	14	13
Total Convictions*	**FY11**	**FY12**	**FY13**	**FY14**	**FY15****
General District Court	122	97	78	56	73
J&DR Court	59	53	60	34	37
Circuit Court	9	4	9	7	13

Source: Supreme Court of Virginia- General District, J&DR, and Circuit Court Case Management Systems data provided by Virginia Criminal Sentencing Commission. * Fiscal year in which charge was concluded. ** Data do not include charges that were still pending at the end of FY15. Note: J&DR data only includes adults whose charges were handled in J&DR.

Table 2: Va. Code § 18.2-60.3(C) Stalking Data, FY11-FY15

Total Charges*	FY11	FY12	FY13	FY14	FY15**
General District Court	1	1	2	1	0
J&DR Court	0	0	0	0	0
Circuit Court	8	0	1	0	0
Total Convictions*	**FY11**	**FY12**	**FY13**	**FY14**	**FY15****
General District Court	0	0	0	0	0
J&DR Court	0	0	0	0	0
Circuit Court	4	0	1	1	1

Source: Supreme Court of Virginia- General District, J&DR, and Circuit Court Case Management Systems data provided by Virginia Criminal Sentencing Commission.* Fiscal year in which charge was concluded. ** Data do not include charges that were still pending at the end of FY15. Note: J&DR data only includes adults whose charges were handled in J&DR.

Legal Overview of Other States' Stalking Statutes

All 50 states have passed a law criminalizing stalking or stalking-like behavior. Some states refer to this crime as "harassment." In a few of those states, "stalking" is a separate and more severe crime than "harassment."

Upon review of the laws of the other 49 states, it was determined that 19 states are like Virginia, in that they require an intent that the victim fear an act of violence, such as a fear of death, bodily injury, bodily restraint or destruction of property.[23]

The other 30 states include some type of emotional harm or distress element as part of their stalking statutes, but allow a conviction even if the victim never felt physically threatened or was placed in fear of assault. Approximately 24 of these states allow a person to be found guilty of stalking if they engage in behavior that causes the victim to suffer "emotional harm" or "severe emotional distress."[24] The remaining six states use language that indicates that something more than "severe emotional distress" is necessary for a conviction, even though a specific fear of bodily harm is not required. For example, Alabama requires that the course of conduct "cause material harm to the mental or emotional health of the other person."[25] Statutes in Michigan, Oklahoma, and Tennessee all require "harassment" of another that would cause a reasonable person to feel "terrorized, frightened, intimidated, threatened, harassed, or molested," and that actually causes the victim to feel "terrorized, frightened, intimidated, threatened, harassed, or molested."[26] In all three of these states, "harassment" is defined as conduct that would cause a reasonable person to suffer "emotional distress," and that actually causes the person to suffer "emotional distress;" in turn, "emotional distress" is defined as "significant mental suffering or distress."[27] The fifth state, Minnesota, defines stalking as conduct which causes the victim to feel "frightened, threatened, oppressed, persecuted, or intimidated."[28] Lastly, the sixth state, Ohio, allows a person to be guilty of stalking if he causes the victim to believe "that the offender will cause physical harm…or cause mental distress to the other person."[29] However, "mental distress" is defined as "any mental illness or condition that involves some temporary substantial incapacity; [or] any mental illness or condition that would normally require psychiatric treatment, psychological treatment, or other mental health services," whether or not the victim received such services.[30]

As a general observation, even if a state, by statute, requires a "fear of bodily injury" for a stalking conviction, disturbing or egregious conduct can suffice, even though the facts of the case indicate there was never any direct or indirect threat made. For example, in an Iowa case, State v. Evans, the defendant's conviction was upheld after he repeatedly asked the victim if he could photograph her feet, discovered where she lived, made eight or nine phone calls to her residence, made three unannounced visits to her residence, and approached the victim several times in public.[31] This is similar to the case law in Virginia. In Frazier v. Commonwealth, a conviction for stalking was upheld even though the defendant never made any threats; the victim told the defendant she was married, was not interested in him, and was still forced to move to unpublished addresses on two occasions in an unsuccessful attempt to avoid his persistent following.[32]

The statutory requirements for a stalking or harassment conviction in some states are remarkably broad. For instance, Texas allows a conviction if the defendant, on more than one occasion and pursuant to the same scheme or course of conduct, knowingly engages in conduct that causes the other person to feel "harassed, annoyed…embarrassed, or offended."[33] In New York, a person is guilty of harassment in the second degree if he "repeatedly commits acts which alarm or seriously annoy such other person and serve no legitimate purpose."[34] In South Carolina, the crime of

harassment consists of "a pattern of intentional, substantial, and unreasonable intrusion into the private life…that serves no legitimate purpose."[35]

There are four general methods by which some states, which have broad definitions of "stalking" or "harassment," limit the scope of the crime:

(i) Eight states add a requirement that the activity "serve no legitimate purpose;"[36]
(ii) Five states specifically exempt picketing activities;[37]
(iii) Nine states exempt "constitutionally protected activities," or, in Illinois, "free speech or assembly that is otherwise lawful";[38] and,
(iv) Five states specifically list the activities which can be the basis of stalking.[39] Examples of specifically listed activities include: "repeatedly follows, approaches, contacts, places under surveillance, or makes any form of communication;"[40] engage in a "course of conduct involving pursuit, surveillance or non-consensual contact…without legitimate purpose;"[41] engage in "repeated acts of nonconsensual contact;"[42] or threatens, "follows, monitors or pursues," "returns to the property of another," "repeatedly makes telephone calls, sends text messages," "repeatedly mails," or "knowingly makes a false allegation against a peace officer."[43] In North Dakota, the crime of harassment is specifically limited to communicating "in writing or by electronic communication a threat to inflict injury on any person, to any person's reputation, or to any property; "mak[ing] a telephone call anonymously or in offensively coarse language; mak[ing] repeated telephone calls or other electronic communication…with no purpose of legitimate conversation; or communicat[ing] a falsehood…and caus[ing] mental anguish."[44]

A number of other states similarly list examples of specific activities, but they are qualified by an expression such as "but not limited to," thus broadening the scope of the statute. For example, the crime of stalking in New Jersey is defined as "repeatedly committing harassment," a fairly broad term, or:

> repeatedly maintaining a visual or physical proximity to a person; directly, or indirectly through third parties, or by any action, method, device, or means, following, monitoring, observing, surveilling, threatening, or communicating to or about, a person, or interfering with a person's property; … repeatedly conveying...verbal or written threats.[45]

In Louisiana, stalking:

> shall include but not be limited to the intentional and repeated uninvited presence of the perpetrator at another person's home, workplace, school, or any place which would cause a reasonable person to be alarmed, or to suffer emotional distress as a result of verbal or behaviorally implied threats of death, bodily injury, sexual assault, kidnapping, or any other statutory criminal act…[46]

It also includes "the intentional and repeated following or harassing of another person," and "harassing" is defined as "the repeated pattern of verbal communications or nonverbal behavior without invitation which includes but is not limited to making telephone calls, transmitting electronic mail, sending messages via a third party, or sending letters or pictures."[47]

In New Hampshire, stalking involves engaging in a "course of conduct," that "may include, but not be limited to, any of the following acts or a combination thereof":

(i) Threatening the safety of the targeted person or an immediate family member.
(ii) Following, approaching, or confronting that person, or a member of that person's immediate family.
(iii) Appearing in close proximity to, or entering the person's residence, place of employment, school, or other place where the person can be found…
(iv) Causing damage to the person's residence or property…
(v) Placing an object on the person's property, either directly or through a third person, or that of an immediate family member.
(vi) Causing injury to that person's pet; or to a pet belonging to a member of that person's immediate family.
(vii) Any act of communication…[48]

Maine is unique among the states in that its stalking statute provides specific details in defining how the victim's life may have been affected. The victim must reasonably suffer emotional distress or serious inconvenience; "serious inconvenience" is defined as:

> that a person significantly modifies that person's actions or routines in an attempt to avoid the actor or because of the actor's course of conduct. "Serious inconvenience" includes, but is not limited to, changing a phone number, changing an electronic mail address, moving from an established residence, changing daily routines, changing routes to and from work, changing employment or work schedule or losing time from work or a job.[49]

It should be noted that three states include in their statutes either a requirement that the victim specifically tell the stalker or harasser that he or she wishes to be left alone, or allow a legal inference to be made if the stalker continues with his behavior after having received such a request. In Maryland, a conviction for harassment requires that the defendant first have received "a reasonable warning or request to stop by or on behalf of" the victim.[50] In North Dakota, attempting to contact or follow the victim after being given actual notice that the victim does not want to be contacted or followed is *prima facie* evidence that the defendant intended to stalk the victim.[51] In Washington, it is *prima facie* evidence that the defendant intended to intimidate or harass the victim if he continued to contact or follow after being given actual notice that the person did not want to be contacted or followed.[52]

Conclusion

All 50 states have enacted stalking laws, which criminalize otherwise lawful behavior, if it is done in such a manner as to cause fear of assault, or emotional distress, on the part of the victim. While all states have recognized the need to criminalize obsessive, repetitive behavior that results in a victim feeling legitimate feelings of terror, or even extreme stress, 20 states including Virginia have created their statutes in such a way that, at least according to their strict wording, the victim must feel they are at a reasonable risk of an actual assault. The other 30 states only require that the victim be placed in "emotional distress," or suffer "emotional harm."

Analyzing the 30 states which have a more expansive definition of what "stalking" is, it appears that there are four methods by which some of the states limit, by their statutes, the scope of what constitutes criminal behavior; i.e., make clear that stalking consists of more than causing embarrassment or mild distress due to social ineptness or awkward social interaction by the defendant. One way, utilized by eight states, is to simply state that the behavior of the defendant must "serve no legitimate purpose." Another five states exempt picketing activities from the crime of stalking. Nine states exempt "constitutionally protected activities." Five states specify, with fairly precise detail, the exact behaviors or activities that constitute stalking; e.g., following, communicating, repeatedly approaching at place of work or school, repeatedly calling or texting. Many states also use this concept of exactly defined behaviors, but then broaden it with verbiage so that stalking "includes, but is not limited to" a given list of activities.

In a review of the different statutory ways of defining the crime of stalking, it was noted that three states include provisions related to the victim actually informing the stalker that further contact is not desired. In Maryland, in order to be convicted of the crime of harassment (a less serious charge than stalking), the victim must have given the defendant a reasonable warning or request to stop. In North Dakota and Washington, contacting or following the victim after having been given notice that no further contact is desired, creates a *prima facie* inference that the defendant intended to stalk, or harass or intimidate, the victim. (An approach similar to this was ultimately adopted as a recommendation by the Crime Commission).

At the September 2015 Crime Commission meeting, staff presented members of the Commission with a variety of policy options in regard to amending the stalking statute. Staff suggested that if Virginia were to modify its stalking statute by adding the language contained in HB 1453 or SB 1297 as introduced, ("…engage in conduct with the intent to coerce, intimidate, or harass…"), the scope of the new language could be narrowed in a number of ways. Staff presented the following options to the Crime Commission, with the caveat that the options were not mutually exclusive and that a variety of the options could be incorporated into the amended statute.

Policy Option 1: Should a *mens rea* of malice be added?

This was done in the substitute version of SB 1297.

Policy Option 2: Should specific activities that constitute coercion or harassment be listed?

For example: *follow, place under surveillance, communicate after being asked to cease all contact, repeatedly return to property where victim is likely to be found, mail or place letters or other items on victim's property*, etc. If this Policy Option is chosen, should the list of activities be exclusive, or only be a list of examples? ("including, but not limited to, the following…").

Policy Option 3: Should a *serious inconvenience* element be added?

Serious inconvenience could be defined as "resulting in the person significantly modifying their actions or routines, including, but not limited to, changing a phone number, changing an electronic mail address, moving from an established residence, changing daily routines, changing routes to and from work, changing employment or work schedule, or losing time from work or a job."

Policy Option 4: Should constitutionally protected or otherwise legitimate activity be specifically excluded?

Options could include: (i) "No legitimate purpose;" and/or, (ii) Constitutionally protected activity is excluded; and/or, (iii) Otherwise lawful picketing is excluded.

Policy Option 5: Should an element of "severe emotional distress" be added, with the term further being defined as: (i) "Significant harm to mental health;" and/or, (ii) "Any mental illness or condition that would normally require psychiatric treatment or counseling, whether or not received"?

This is similar to what was done in the substitute version of SB 1297.

Following the presentation of the Policy Options, Crime Commission members discussed and deliberated the various options. The Commission requested that staff prepare versions of draft legislation that encompassed their suggestions. One possibility was to utilize SB 1297 as introduced, and add a *prima facie* presumption; if the defendant contacted or followed the victim after having been given actual notice that no further contact was desired, there would be a *prima facie* presumption that the defendant intended to coerce, intimidate or harass the victim. Another possibility was a variation on this concept, but the presumption would only apply to coercion or intimidation, and if the basis for the offense was an allegation of harassment, the defendant must have been given actual notice that the victim desired no further contact in order for there to be a conviction. The third possibility was to not change the elements of stalking at all, but incorporate a *prima facie* presumption; if the defendant contacted or followed the victim after having been given actual notice that no further contact was desired, there would be a *prima facie* presumption that the defendant intended to place the victim in reasonable fear of death, criminal sexual assault, or

bodily injury. The Commission requested that the possible draft legislation be presented at the next meeting.

At the October 2015 Crime Commission meeting, three draft versions of possible stalking legislation were presented to the members. The three versions were as follows:

> **Version 1:** Makes it a crime to, on more than one occasion, engage in any conduct with the intent to coerce, intimidate or harass another (SB 1297 as introduced). If the defendant attempts to contact or follow the victim, after having been given actual notice that the person did not want to be contacted or followed, his actions shall be *prima facie* evidence that he intended to coerce, intimidate or harass.
>
> **Version 2**: Makes it a crime to, on more than one occasion, engage in any conduct with the intent to coerce, or intimidate another. If the defendant attempts to contact or follow the victim, after having been given actual notice that the person did not want to be contacted or followed, his actions shall be *prima facie* evidence that he intended to coerce or intimidate. Also makes it a crime to, on more than one occasion, engage in any conduct with the intent to harass another. To be guilty, the defendant MUST have received actual notice that the victim did not wish to be contacted or followed.
>
> **Version 3:** The elements of stalking are not changed. However, if the defendant is given actual notice that the victim does not wish to be contacted or followed, and he does, it is *prima facie* evidence that he intended to place the person in reasonable fear of death, criminal sexual assault or bodily injury.

The members of the Crime Commission preferred Version 3 of the draft legislation. The Commission asked staff to include additional language in Version 3: (i) the *prima facie* evidence concept should include instances where the person reasonably should know that their behavior could place another person in reasonable fear of death, criminal sexual assault or bodily injury, and (ii) the *prima facie* evidence concept should apply to conduct toward the alleged victim or towards another member of the victim's family or household. The Commission voted unanimously to endorse Version 3 with the included language.

At the December 2015 Crime Commission meeting, staff presented a single policy option to members based on the discussion and endorsement of Version 3 of the draft legislation from the previous meeting. The option presented was as follows:

> **Policy Option 1:** Should a *prima facie* presumption be added to the stalking statute if a defendant receives actual notice that the victim does not want to be contacted or followed? Such continued conduct means either that the defendant intended to place the victim, or reasonably

should have known that the victim would be placed in, reasonable fear of death, sexual assault or bodily injury.

The Commission voted unanimously to approve Policy Option 1. Based on this policy option, Senator Bryce E. Reeves introduced SB 339 and Delegate Robert B. Bell introduced HB 752 during the 2016 Regular Session of the General Assembly. House Bill 752 was also patroned by Delegates Jennifer McClellan, Jason S. Miyares and Margaret B. Ransone. The two bills were identical as introduced.

After being amended in the Senate, and then re-amended in the House, SB 339 was passed by the legislature as introduced, and was signed into law by the governor on March 29, 2016.[53] House Bill 752 was amended in the Senate; the House accepted those amendments, and the bill was enrolled. The governor proposed amending the enrolled bill to make it identical to the version that was originally introduced; this amendment was accepted by both the House and the Senate on April 20, 2016.[54] Ultimately, both bills were enacted into law as introduced.

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[1] H.B. 1453, 2015 Gen. Assem., Reg. Sess. (Va. 2015).
[2] S.B. 1297, 2015 Gen. Assem., Reg. Sess. (Va. 2015).
[3] VA. CODE ANN. § 18.2-60.3(A) (2015). If the defendant's actions place the victim in fear that a family or household member will be subject to death, criminal sexual assault, or bodily injury, that also suffices for a conviction.
[4] VA. CODE ANN. § 18.2-60.3(A) (2015).
[5] Subsections (B) and (C) create heightened penalties if the offense is a second or subsequent offense, and the defendant has also been convicted of certain crimes within the previous five years, or the offense is a third or subsequent offense committed within five years.
[6] VA. CODE ANN. § 18.2-427 (2015).
[7] VA. CODE ANN. § 18.2-386.2(A) (2015).
[8] VA. CODE ANN. § 18.2-152.7:1 (2015).
[9] VA. CODE ANN. § 18.2-186.4 (2015).
[10] *Supra* note 6.
[11] *Supra* note 8.
[12] *See* Perkins v. Commonwealth, 12 Va. App. 7 (1991); *see also* Barson v. Commonwealth, 284 Va. 67 (2012).
[13] Perkins v. Commonwealth, 12 Va. App. 7, 14 (1991).
[14] Barson v. Commonwealth, 284 Va. 67 (2012).
[15] *Supra* note 7.
[16] *Supra* note 9. Arguably, any activity that is done with the intent to coerce, intimidate, or harass, is done with a degree of maliciousness, but the statute does not specify that a *mens rea* of malice must be proven.
[17] VA. CODE ANN.. § 18.2-429(A) (2015).
[18] VA. CODE ANN. § 18.2-308.2:2(A) (2015).
[19] VA. CODE ANN. § 18.2-418 (2015). Note that this declaration of public policy is a separate statute from the one where the actual crime of picketing a dwelling is delineated.
[20] VA. CODE ANN. §§ 38.2-508(7)(a), 38.2-5002(B) (2015).
[21] VA. CODE ANN. §§ 18.2-67.9(B)(3), 22.1-276.01(A), 63.2-1521(C)(3), 63.2-1522(B)(1)(g), 63.2-1523(B)(1)(g) (2015).

[22] Without a clear definition, the appellate courts would be forced to define the term, and along with that, the parameters of the new crime. With so many possible definitions possible—the regular dictionary definition, adopting the definition used in case law from the area of torts, a more technical psychiatric definition, etc.—it is difficult to know in advance how severe the victim's emotional injuries would have to be in order for the crime to have been committed.

[23] For purposes of this analysis, the "lowest" level of stalking was used when evaluating the states. If a state had a misdemeanor crime of stalking that did not involve a threat of bodily injury, and a felony crime of stalking that did require such a threat, that state was not counted. If a state had separate crimes of harassment and stalking, only the stalking statute was analyzed. The states are Alaska, ALASKA STAT. § 11.41.270 (2015); Arizona, ARIZ. REV. STAT. § 13-2923 (Lexis Advance 2015); Arkansas, ARK. CODE ANN. § 5-71-229 (2015); California, CAL. PENAL CODE § 646.9 (Deering 20015); Connecticut, CONN. GEN. STAT. § 53-a-181e (2015); Georgia, GA. CODE ANN. § 16-5-90 (2015); Indiana, IND. CODE ANN. § 35-45-10-1 (Lexis Advance 2015); Iowa, IOWA CODE § 708.11 (2015); Kansas, KAN. STAT. ANN. § 21-5427 (2015); Kentucky, KY. REV. STAT. ANN. § 508.150 (Lexis Advance 2015); Mississippi, MISS. CODE ANN. § 97-3-107 (2015); Nebraska, NEB. REV. STAT. ANN. § 28-311.03 (Lexis Advance 2015); Nevada, NEV. REV. STAT. ANN. § 200.575 (Lexis Advance 2015) (while the Nevada stalking statute allows for someone to be guilty if the victim feels "harassed," the separate crime of "harassment" clearly involves creating a fear of assault in the victim; NEV. REV. STAT. ANN. § 200.571 (Lexis Advance 2015)); New Hampshire, N.H. REV. STAT. ANN. § 633:3-a (Lexis Advance 2015); North Carolina, N.C. GEN. STAT. § 14-277.3A (2015); Oregon, OR. REV. STAT. § 163.732 (2015); South Carolina, S.C. CODE ANN. § 16-3-1700(C) (2015); Vermont, VT. STAT. ANN. tit. 13 § 1061 (2015); and Washington, WASH. REV. CODE § 9A.46.110 (Lexis Advance 2015).

[24] The 24 states are Colorado, COLO. REV. STAT. § 18-3-602 (2015); Delaware, DEL. CODE ANN. tit. 11, § 1312 (2015); Florida, FLA. STAT. ANN. § 784.048 (Lexis Advance 2015); Hawaii, HAW. REV. STAT. ANN. 711-1106.5 (Lexis Advance 2015); Idaho, IDAHO CODE ANN. § 18-7906 (2015); Illinois, 720 ILL. COMP. STAT. 5/12-7.3 (Lexis Advance 2015); Louisiana, LA. REV. STAT. ANN. § 14:40.2 (2015); Maine, ME. REV. STAT. tit. 17-A, § 210-A (2015); Maryland, MD. CODE ANN., CRIM. LAW § 3-802 (Lexis Advance 2015); Massachusetts, MASS. GEN. LAWS ch. 265, § 43 (Lexis Advance 2015); Missouri, MO. REV. STAT. § 565.225 (2015); Montana, MONT. CODE ANN. § 45-5-220 (2015); New Jersey, N.J. STAT. REV. STAT. § 2C:12-10 (2015); New Mexico, N.M. STAT. ANN. § 30-3A-3 (Lexis Advance 2015); New York, N.Y. PENAL LAW § 120.45 (Consol. 2015); North Dakota, N.D. CENT. CODE § 12.1-17-07.1 (2015); Pennsylvania, 18 PA. CONS. STAT. § 2709.1 (2015); Rhode Island, R.I. GEN. LAWS § 11-59-2 (2015); South Dakota, S.D. CODIFIED LAWS § 22-19A-1 (2015); Texas, TEX. PENAL CODE ANN. § 42.072 (Lexis Advance 2015); Utah, UTAH CODE ANN. § 76-5-106.5 (Lexis Advance 2015); West Virginia, W. VA. CODE ANN. § 61-2-9a (Lexis Advance 2015); Wisconsin,WIS. STAT. § 940.32(2) (2015); and, Wyoming, WYO. STAT. ANN. § 6-2-506 (2015).

[25] ALA. CODE § 13A-6-90.1 (Lexis Advance 2018).

[26] MICH. COMP. LAWS SERV. § 750.411h(d) (Lexis Advance 2015); Okla. Stat. Ann. tit. 21, § 1173(A) (2015); TENN. CODE ANN. § 39-17-315(a)(4) (2015).

[27] MICH. COMP. LAWS SERV. § 750.411h(b), (c) (Lexis Advance 2015); OKLA. STAT. ANN. tit. 21, § 1173(F)(1), (F)(3) (2015); TENN. CODE ANN. § 39-17-315(a)(2), (a)(3) (2015). There is some degree of subjectivity in categorizing the 50 states' stalking laws in this manner. For example, Wisconsin also allows a person to be convicted of stalking if they engage in a course of conduct that causes the victim to "suffer serious emotional distress." WIS. STAT. § 940.32(2) (2015). However, "serious emotional distress" is defined as "to feel terrified, intimidated, threatened, harassed, or tormented." WIS. STAT. § 940.32(1)(a)(10)(d) (2015). While this definition appears to indicate extreme behavior is needed in order to allow for a conviction, the word "harassed" is a less serious adjective than the others, suggesting that mere annoyance or irritation could suffice. There is a crime of harassment in Wisconsin, but the elements of this offense similarly indicate that simple annoying behavior might be sufficient for a conviction: "engages in a course of

conduct or repeatedly commits acts which harass…and which serve no legitimate purpose." WIS. STAT. § 947.013 (2015). This is why Wisconsin was not grouped with the six states that appear to require more than "emotional distress" in order for a conviction.

[28] MINN. STAT. § 6.09-749 (1) (2015).

[29] OHIO REV. CODE ANN. § 2903.211(A)(1) (Lexis Advance 2015).

[30] OHIO REV. CODE ANN. § 2903.211(D)(2) (Lexis Advance 2015). By way of comparison, in Utah, a person is guilty of stalking if he engages in a course of conduct that would cause a reasonable person "to suffer other emotional distress;" emotional distress being defined as "significant mental or psychological suffering, whether or not…counseling is required." UTAH CODE ANN. §§ 76-5-106.5(2); 76-5-106.5(1)(d) (Lexis Advance 2015). Because Utah does not require incapacity, or that the mental stress be of a sort that would normally require psychiatric or psychological treatment, it was not included with the six states that require more than "emotional distress" for a conviction, in this informal classification.

[31] State v. Evans, 671 N.W.2d 720 (Iowa 2003).

[32] Frazier v. Commonwealth, 2007 Va. App. LEXIS 285 (July 31, 2007).

[33] TEX. PENAL CODE ANN. § 42.072 (Lexis Advance 2015).

[34] N.Y. PENAL LAW § 240.26 (Consol. 2015).

[35] S.C. CODE ANN. § 16-3-1700(A) (2015).

[36] Florida, FLA. STAT. ANN. §784.048 (Lexis Advance 2015); Hawaii, HAW. REV. STAT. ANN. 711-1106.5 (Lexis Advance 2015); Maryland, MD. CODE ANN., CRIM. LAW § 3-802 (Lexis Advance 2015); Missouri, MO. REV. STAT. § 565.225 (2015); New Mexico, N.M. STAT. ANN. § 30-3A-3 (Lexis Advance 2015); New York, N.Y. PENAL LAW § 120.45 (Consol. 2015); South Carolina, S.C. CODE ANN. § 16-3-1700(C) (2015); South Dakota, S.D. CODIFIED LAWS § 22-19A-1 (2015).

[37] Delaware, DEL. CODE ANN. tit. 11, § 1312 (2015); Illinois, 720 ILL. COMP. STAT. 5/12-7.3 (Lexis Advance 2015); New Jersey, N.J. STAT. REV. STAT. § 2C:12-10 (2015); New York, N.Y. PENAL LAW § 120.45 (Consol. 2015); Wyoming, WYO. STAT. ANN. § 6-2-506 (2015).

[38] Florida, FLA. STAT. ANN. § 784.048 (Lexis Advance 2015); Idaho, IDAHO CODE ANN. § 18-7906 (2015); Maryland, MD. CODE ANN., CRIM. LAW § 3-802 (Lexis Advance 2015); Missouri, MO. REV. STAT. § 565.225 (2015); North Dakota, N.D. CENT. CODE § 12.1-17-07.1 (2015); South Carolina, S.C. CODE ANN. § 16-3-1700(C) (2015); South Dakota, S.D. CODIFIED LAWS § 22-19A-1 (2015); West Virginia, W. VA. CODE ANN. § 61-2-9a (Lexis Advance 2015); Illinois, 720 ILL. COMP. STAT. 5/12-7.3 (Lexis Advance 2015).

[39] Colorado, COLO. REV. STAT. § 18-3-602 (2015); Hawaii, HAW. REV. STAT. ANN. 711-1106.5 (Lexis Advance 2015); Idaho, IDAHO CODE ANN. § 18-7906 (2015); Minnesota, MINN. STAT. § 6.09-749 (1) (2015); North Dakota, N.D. CENT. CODE § 12.1-17-07 (2015).

[40] COLO. REV. STAT. § 18-3-602 (2015).

[41] HAW. REV. STAT. ANN. 711-1106.5 (Lexis Advance 2015).

[42] IDAHO CODE ANN. § 18-7906 (2015). This is the broadest of the "specific activities" states, although any form of stalking that did not involve contact would not be covered by the statute.

[43] MINN. STAT. § 6.09-749 (1) (2015).

[44] N.D. CENT. CODE § 12.1-17-07 (2015). Interestingly, North Dakota also has a separate crime of stalking, which while broadly defined ("an intentional course of conduct… which frightens,") specifically includes "the unauthorized tracking of…movements or location through the use of a global positioning device or other electronic means that would cause a reasonable person to be frightened, intimidated or harassed and which serves no legitimate purpose." N.D. CENT. CODE § 12.1-17-07.1 (2015).

[45] N.J. STAT. REV. STAT. § 2C:12-10 (2015).

[46] LA. REV. STAT. ANN. § 14:40.2 (2015).

[47] Id.

[48] N.H. REV. STAT. ANN. § 633:3-a (Lexis Advance 2015).

[49] ME. REV. STAT. tit. 17-A, § 210-A(2)(E) (2015).

[50] MD. CODE ANN., CRIM. LAW § 3-803 (Lexis Advance 2015);
[51] N.D. CENT. CODE § 12.1-17-07.1(1)(c)((2))(3) (2015).
[52] WASH. REV. CODE § 9A.46.110(4) (Lexis Advance 2015).
[53] 2016 Va. Acts ch. 545.
[54] 2016 Va. Acts ch. 745.

Statute of Limitations for Sexual Crimes Against Minors

Executive Summary

During the Regular Session of the 2015 General Assembly, Senator R. Creigh Deeds introduced Senate Bill 1253, which would have increased the statute of limitations for certain misdemeanor sexual offenses committed against a victim who was a minor at the time of the offense. The bill was referred to the Senate Finance Committee. The bill was left in Committee, and a letter was sent by the Committee requesting that the Crime Commission review the bill.

The focus of SB 1253 was to increase the statute of limitations of six misdemeanor sexual offenses to one year after the victim reached the age of majority. The general rule in Virginia is that the statute of limitations for a misdemeanor offense is one year. The Virginia Code contains numerous exceptions to the general rule.

Crime Commission staff reviewed current Virginia law on the statute of limitations and the Virginia Code sections impacted by Senate Bill 1253. Staff also reviewed the laws of the surrounding states of Kentucky, Maryland, North Carolina, Tennessee and West Virginia to determine whether those jurisdictions had crafted legislation regarding the statute of limitations for misdemeanor sexual offenses against minors.

The Crime Commission reviewed the study findings at its September 2015 meeting. As a result of the study effort, the Crime Commission endorsed the following policy option at its September 2015 meeting and unanimously voted its favor at its December 2015 meetings:

> **Policy Option 1:** Should the statute of limitations for certain misdemeanor sex offenses, where the victim is a minor, be increased from 1 year to no later than 1 year after the victim turns 18 years of age?

Identical bills bearing the recommendation of the Crime Commission were introduced in both the Senate and the House of Delegates during the Regular Session of the 2016 General Assembly. The bills passed the General Assembly and were signed by the governor.

Background

During the Regular Session of the 2015 General Assembly, Senator R. Creigh Deeds introduced Senate Bill 1253 (SB 1253). This bill stemmed from a request for legislation by the Commonwealth's Attorney for Alleghany County as a result of sexual assault claims against an elder at a church. The Commonwealth was able to prosecute the elder

for multiple felonies against minors; however, the statute of limitations had tolled on a number of the misdemeanor sexual offenses the elder had committed against some of the minors.[1]

Senate Bill 1253 would have increased the statute of limitations for certain misdemeanor sexual offenses to be prosecuted if the victim was a minor at the time of the offense. The bill specifically provided that the statute of limitations for certain misdemeanor sexual offenses against minors would be increased to "…no later than one year after the victim reaches majority." If enacted, SB 1253 would increase the statute of limitations for six offenses under Virginia law:

(i) Carnal knowledge of an inmate, parolee, probationer, detainee, or pretrial or posttrial offender;[2]
(ii) Sexual battery;[3]
(iii) Infected sexual battery;[4]
(iv) Sexual abuse of a child under 15 years of age;[5]
(v) Attempted sexual battery;[6] and,
(vi) Penetration of mouth of child with lascivious intent.[7]

Currently the statute of limitations for these offenses is one year.[8]

Virginia Law

There is no statute of limitations for the prosecution of a felony offense in Virginia. Generally the prosecution of a misdemeanor offense must commence within one year of the date of the occurrence of the offense.[9] Virginia law includes a number of exceptions to this general rule.

The misdemeanor offenses currently exempted from the general rule include:[10] petit larceny;[11] attempt to produce an abortion;[12] practicing law without a license;[13] placing a child for adoption without a license;[14] committing fraud in connection with the Virginia Unemployment Compensation Act;[15] discharge, dumping or emission of toxic substances;[16] Building Code violations under Virginia Code § 36-106;[17] violation of any professional or occupational license requirements;[18] violation of any professional licensure requirement imposed by a locality;[19] malfeasance in office;[20] violation of the Condominium Act;[21] illegal sale or purchase of wild animals;[22] tax evasion;[23] cruelty to non-agricultural animals;[24] unlawfully taking a nude video or photo of another;[25] violation of the Campaign Finance Disclosure Act;[26] violation of the Computer Crimes Act or an offense involving identity theft;[27] falsifying patient medical records;[28] and, desertion of a spouse or child or for neglect or refusal to provide support and maintenance for a spouse or child.[29]

The statute of limitations is tolled if a person has fled from justice or concealed themselves to avoid arrest.[30]

Legal Review of Surrounding States

Staff reviewed the laws of surrounding states to determine whether they had statutes of limitations applicable to misdemeanor sexual offenses against minors that are longer than for misdemeanors, generally. Two states, Kentucky and Maryland, have increased their usual statutes of limitations for misdemeanors if the misdemeanor involves the sexual abuse of a minor.

Kentucky has a one year statute of limitations for all misdemeanor offenses except for offenses involving the sexual abuse of a minor.[31] A prosecution for a misdemeanor offense involving the sexual abuse of a minor in Kentucky must commence within five years after the victim attains the age of eighteen (18) years.[32] Maryland has a one year statute of limitations on misdemeanor offenses but includes a number of exceptions within the statute.[33] One such exception in Maryland is a three year statute of limitations from the date of the occurrence of the offense for the sexual abuse of a minor student by a person in a position of authority.[34]

North Carolina, Tennessee and West Virginia do not extend their usual statutes of limitations for misdemeanors in instances where the sexual abuse of a minor has occurred. North Carolina has, in practice, a two year statute of limitations for all misdemeanors.[35] Tennessee has a one year statute of limitations for nearly all misdemeanor offenses.[36] West Virginia has a one year statute of limitations for all misdemeanor offenses except for perjury.[37]

Conclusion

Statutes of limitations in criminal prosecutions provide a balance between the need to ensure that justice is served and the right of a criminal defendant to have a prompt resolution of the case and the ability to access and present evidence on his behalf. The United States Supreme Court has noted that statutes of limitations "…protect individuals from having to defend themselves against charges when the basic facts may have become obscured by the passage of time and to minimize the danger of official punishment because of acts in the far-distant past."[38] The Court further reasoned that the imposition of a statute of limitations may "…have the salutary effect of encouraging law enforcement officials promptly to investigate suspected criminal activity."[39]

The determination of whether to extend the statute of limitations for misdemeanor sexual offenses against minors is a policy question. The general rule in Virginia is that the statute of limitations for a misdemeanor offense is one year. Numerous exceptions to this general rule exist under current Virginia law.

As a result of the study effort, the Crime Commission endorsed the following policy option at its September 2015 meeting and unanimously voted in favor at its December 2015 meeting.

Policy Option 1: Should the statute of limitations for certain misdemeanor sex offenses, where the victim is a minor, be increased from 1 year to no later than 1 year after the victim turns 18 years of age?

Identical bills bearing the recommendation of the Crime Commission were introduced in both the Senate and the House of Delegates during the Regular Session of the 2016 General Assembly. Senator R. Creigh Deeds introduced Senate Bill 354. Delegates Charniele L. Herring and C. Todd Gilbert introduced House Bills 510 and 769, respectively. Senate Bill 354 and House Bill 510 were passed by the General Assembly and were signed by the governor. House Bill 769 was left in the House Courts of Justice Committee.

[1] The background on the origins of the legislation was provided by Senator R. Creigh Deeds during his statement at the Crime Commission meeting on September 29, 2015.
[2] VA. CODE ANN. § 18.2-64.2 (2015).
[3] VA. CODE ANN. § 18.2-67.4 (2015).
[4] VA. CODE ANN. § 18.2-67.4:1 (2015).
[5] VA. CODE ANN. § 18.2-67.4:2 (2015).
[6] VA. CODE ANN. § 18.2-67.5(C) (2015).
[7] VA. CODE ANN. § 18.2-370.6 (2015).
[8] VA. CODE ANN. § 19.2-8 (2015).
[9] Id.
[10] Id. (All of the exceptions are listed in this code section).
[11] The statute of limitations for petit larceny is five years from the date of the offense.
[12] The statute of limitations for an attempt to produce an abortion is two years from the date of the offense.
[13] The statute of limitations for practicing law without a license is two years after the discovery of the offense.
[14] The statute of limitations for placing a child for adoption without a license is one year after the date of the filing of the petition for adoption.
[15] The statute of limitations for fraud in connection with the Virginia Unemployment Compensation Act is three years from the date of the offense.
[16] The statute of limitations for the discharge, dumping or emission of toxic substances is three years from the date of the offense.
[17] The statute of limitations for Building Code violations under Virginia Code § 36-106 is one year after discovery of the offense, provided that such discovery occurs within two years of the date of initial occupancy or use after construction of the building or structure, or the issuance of a certificate of use and occupancy for the building or structure, whichever is later. However, prosecutions relating to the maintenance of existing buildings or structures shall commence within one year of the issuance of a notice of violation.
[18] The statute of limitations for violation of any professional or occupational license requirements is one year from discovery of the offense, but no later than five years from the date of the offense.
[19] The statute of limitations for violation of any professional licensure requirement imposed by a locality is one year from discovery of the offense, but in no case later than five years from the date of the offense.
[20] The statute of limitations for malfeasance in office is two years from the date of the offense.
[21] The statute of limitations for violations of the Condominium Act is three years from the date of the offense.

[22] The statute of limitations for illegal sales or purchases of wild birds, wild animals and freshwater fish is three years from the date of the offense.
[23] The statute of limitations for tax evasion related offenses under Title 58.1 is three years from the date of the offense unless a longer period is otherwise prescribed.
[24] The statute of limitations for cruelty to non-agricultural animals is five years from the date of the offense.
[25] The statute of limitations for unlawfully taking the videographic or still image of any nonconsenting person is five years from the date of the offense.
[26] The statute of limitations for a violation of the Campaign Finance Disclosure Act is one year from the discovery of the offense but in no case more than three years after the date of the offense.
[27] The statute of limitations for a violation of the Virginia Computer Crimes Act or for identity theft under Virginia Code § 18.2-186.3 is the earlier of either five years after the commission of the last act in the course of conduct constituting the violation of the article or one year after the existence of the illegal act and the identity of the offender are discovered by the Commonwealth, by the owner, or by anyone else who is damaged by such violation.
[28] The statute of limitations for falsifying patient records is three years from the date of the offense.
[29] There is no statutory time limitation for prosecutions for desertion of a spouse or child or for neglect or refusal or failure to provide for the support and maintenance of a spouse or child.
[30] VA. CODE ANN. § 19.2-8 (Lexis Advance 2015).
[31] KY. REV. STAT. ANN. § 500.050(2) (Lexis Advance 2015).
[32] KY. REV. STAT. ANN. § 500.050(3) (Lexis Advance 2015).
[33] MD. CODE ANN., CTS. & JUD. PROC. § 5-106 (Lexis Advance 2015).
[34] MD. CODE ANN., CTS. & JUD. PROC. § 5-106(z) (Lexis Advance 2015).
[35] N.C. GEN. STAT. § 15-1 (2015). While there is a stated exception for "malicious misdemeanors," this verbiage is vestigial, and case law has made the phrase, practically speaking, irrelevant. *See* State v. Brewer, 258 N.C. 533 (1963); State v. Frisbee, 142 N.C. 671 (1906). For all intents, misdemeanor prosecutions in North Carolina, (and this includes all sexual misdemeanors), must be commenced within 2 years, unless there is a specific statute of limitations listed in an individual misdemeanor statute; e.g., N.C. GEN STAT. § 105-236(9) (2015) (prosecution for failure to file a tax return must be commenced within six years).
[36] TENN. CODE ANN. § 40-2-102(a) (2015). *But see* TENN. CODE ANN. §§ 40-2-102(a), 40-2-102(b), 62-18-120(g) (2015) (Tennessee law includes exceptions to the one year statute of limitations for misdemeanor gaming offenses, criminal impersonation accomplished through the use of a fraudulently obtained driver license, and land surveying without a license).
[37] W. VA. CODE ANN. § 61-11-9 (Lexis Advance 2015).
[38] Toussie v. United States, 397 U.S. 112, 114-115 (1970).
[39] Id. at 115.