2015 Blueprints for Change:
Criminal Justice Policy Issues in Virginia

Preventing Wrongful Convictions in Virginia: Improving the Disclosure of Exculpatory Evidence Possessed by Third Parties

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Issue

Advances in forensic science, investigative methods and other fields have uncovered a number of cases across the U.S. in which individuals have been exonerated after being wrongfully convicted of crimes. According to the National Registry of Exonerations, more than 1,300 exonerations have occurred throughout the U.S. since 1989. Thirty-five of these exonerations occurred in Virginia. In 2013, Virginia was among 10 states with the highest number of exonerations for wrongful convictions.

Several prominent exoneration cases from Virginia have occurred in recent years. In 2011, after serving 27 years in state prison, a man was fully exonerated of rape convictions based on new DNA testing of old evidence. In 2000, another man who served 17 years imprisonment was cleared of rape and murder convictions after DNA testing proved his innocence.

Although Virginia has successfully identified several wrongful convictions and later exonerated the persons convicted, these exonerations are often the result of extraordinary efforts initiated by groups typically outside of the criminal justice system. Additionally, research on exonerations suggests that for each wrongful conviction identified, there are likely others that remain unidentified.

Wrongfully convicting innocent citizens is one of the gravest mistakes that the criminal justice system can make. Not only is a grave injustice committed against the innocent person wrongfully convicted, it is a disservice to the victim of the crime and endangers communities. It allows the guilty to go free and potentially continue victimizing others. Erroneous convictions occur disproportionally among poor and minority populations, which undermines the public trust our criminal justice system must maintain to function effectively.

Numerous studies have shown that a prosecutor's failure to disclose exculpatory evidence in a criminal case is a major factor contributing to wrongful convictions. Exculpatory evidence is any information which may cast doubt on the guilt of the accused, or may affect the credibility of witnesses. Prosecutors are legally obligated to disclose all exculpatory evidence to the defense. Prosecutors may fail to disclose exculpatory evidence for various reasons and in rare cases they may deliberately withhold or suppress evidence. In other cases, evidence is not disclosed due to oversights, mistakes or misunderstandings about disclosure duties and failure to recognize when evidence is exculpatory.

In some cases, prosecutors may be unaware that other individuals possess relevant exculpatory evidence, which they have a duty to disclose. The fact that other parties, which often include law enforcement investigators, forensics analysts, victim/witness programs, and government agencies, may possess information for which prosecutors have no actual knowledge, does not alleviate prosecutors' discovery obligations. Prosecutors have a "nondelegable duty" to locate and disclose *any* such information known to *any* person acting on the government's behalf in a case. However, unlike prosecutors, these other actors are not answerable to the court or the criminal justice system to disclose evidence they alone possess. Despite the best efforts from prosecutors to ascertain the existence of relevant exculpatory evidence, third parties may not understand the significance and potential consequences of withholding such information and continue to withhold important evidence.

In March 2015, the Supreme Court of Virginia published the findings of a special committee appointed by the court to examine Virginia's criminal discovery rules and propose changes for improvement. The committee's principal goal was to propose rule changes that would avoid "trial by ambush" which can

occur when exculpatory evidence disclosure requirements are not met, or exculpatory evidence is withheld until the last moments before trial begins. However, the committee appointed by the court limited its inquiry to the duty of prosecutors to disclose exculpatory information. The committee did not study the process by which exculpatory evidence possessed by other individuals directly involved in the criminal case is shared with prosecutors.

The Harvard Kennedy School Program in Criminal Justice Policy and Management recommends using an "organizational accident model" to engage in a system-wide view of why wrongful convictions happen and how they can be avoided. This model, used in engineering and medicine, views mistakes as inevitable in complex processes involving multiple organizations, people, and steps. To identify where and how to prevent errors, the model avoids blaming a single person or step in a process and instead, it focuses on reviewing the entire process (in this case, the entire trajectory of a criminal case), and identifying where in the process there may be factors contributing to errors.

Due to significant numbers of wrongful convictions involving failure to disclose exculpatory evidence, other states and organizations have developed practices and procedures to help mitigate disclosure errors at all stages of a criminal trial. Some of the practices and procedures include:

I. An "open-file" discovery procedure, in which prosecutors routinely disclose all available evidence, regardless of its source or whether it is considered material to the case. This ensures that all exculpatory evidence is disclosed (with "good cause" exceptions). It also relieves the prosecutor of the tedious, error-prone task of assessing, for every case, each piece of evidence to determine if it may be exculpatory.

II. If an "open-file" discovery policy is not used, prosecutors can develop and enforce a clear, uniform definition of what constitutes exculpatory evidence, where to look for it, and how it should be disclosed. This may take the form of a checklist, such as the checklist developed by the Manhattan District Attorney's Office Conviction Integrity Unit.

III. Providing statewide guidance to prosecutors on best practices and procedures to ensure all exculpatory evidence is disclosed. Some states have adopted specific, mandatory practices and procedures which must be followed by all prosecutors in the state. Other states have developed guidance which can be adapted to best fit the needs and practices of each prosecutor's office.

IV. Developing mandatory training on disclosure requirements and practices for prosecutors, defense attorneys, law enforcement, victim/witness programs, forensic labs, and judges.

V. Utilizing an electronic evidence tracking system that is specifically designed to ensure that all evidence, including exculpatory evidence from all sources, is properly tracked and disclosed.

VI. Developing a process (sometimes called a "scheduling order") whereby the court sets a date by which all exculpatory evidence must be made available to the defense. This may help to reduce failure to provide evidence, and prevent future litigation stemming from disagreements or misunderstandings about whether the prosecutor has met all discovery obligations.

VII. Developing a "discovery certificate" which is filed with the court and attested to by all parties that all disclosure responsibilities have been fulfilled.

VIII. Developing a database to track information, pursuant to *Brady v. Maryland*, 373 U.S. 83 (1963), and *Giglio v. United States*, 405 U.S. 150 (1972), about informants, witnesses, and criminal justice personnel with whom the justice system has engaged and/or expect to engage with in the future.

This Blueprints for Change session provided an opportunity for stakeholders to examine these and other activities within the criminal justice system and to explore current practices for identifying and divulging exculpatory evidence by all parties in order to reduce the likelihood of such errors occurring in the future.

Policy Questions

1. What are the current practices in prosecutors' offices to identify, whether formally or informally, exculpatory evidence possessed by other parties, including law enforcement agencies, victim/witness advocacy programs and other government or private agencies such as forensic labs and social services?

2. What are the current practices of other parties to recognize and share exculpatory evidence with prosecutors?

3. What can prosecutors and other parties do individually and collectively to ensure better identification, communication and sharing of information? Would the practices and procedures described in subsections I through VIII improve information sharing?

4. How would additional incentives or consequences on other parties who fail to divulge exculpatory evidence with prosecutors improve the Commonwealth's compliance with disclosure duties?

5. How can the various branches of state government encourage local prosecutors and other parties to adopt policies and procedures to improve the sharing of exculpatory evidence?

Discussion

The discussion began with opening comments by three speakers with extensive experience in the courtroom: Mr. Cary Bowen, Esquire; the Honorable Michael R. Doucette, Lynchburg City Commonwealth's Attorney; and the Honorable Walter S. Felton, Jr., Chief Judge Retired, Court of Appeals of Virginia. These three speakers provided the group with an overview of exculpatory evidence issues from the perspective of a defense attorney, a prosecutor, and a judge.

Following these comments, Blueprints participants were invited to respond and raise any other topics for discussion they felt were relevant to understanding and improving disclosure of exculpatory evidence in the justice system. These discussions led to a consensus that several interrelated facets of the justice system must be examined to improve how exculpatory evidence is now viewed and used in the system:

Attitude and Ethics

Participants agreed first and foremost that the 'win-at-any-cost' attitude of some participants in the trial court system must be changed. Although the trial court system is based on an adversarial approach, the goal of the system must be finding the truth in a case rather than which side wins or loses. Until this is changed, ensuring full disclosure of all evidence will be challenging. Trials must be viewed by law enforcement, defense attorneys, prosecutors and others within the system as fact-finding endeavors rather than win-or-lose contests.

Similarly, Virginia's approach to improving the disclosure of evidence and avoiding disclosure errors must be viewed as a way to improve the judicial system as a whole; not as a way of blaming any single actor in the system, such as law enforcement, prosecutors or defense attorneys. Wrongful convictions usually are not due to a single mistake; rather, they result from wrongful actions throughout the system. One member noted the example of current difficulties dealing with Brady disclosures. Although Brady is central to lawful disclosure, Brady violations are such a toxic topic they are rarely discussed because there is too much emphasis on affixing blame rather than solving the problems that lead to failures to disclose.

Avoiding wrongful convictions is not just a matter of ethics; it is also a practical matter. If an innocent person is convicted, the guilty person likely remains at large, thereby continuing to endanger the public. If the guilty perpetrator is eventually caught, the victims and their families will potentially suffer through additional trials, the state will spend more time and resources appealing cases and providing restitution to the wrongly convicted individual, and public confidence in the justice system is eroded.

Education and Training

There was broad consensus that changes in ethics and attitude – as well as practices concerning the disclosure of exculpatory evidence – will require education and training. Various participants stressed this education should begin early in the training of law enforcement, prosecutors, defense attorneys and others involved in investigations and trials and be consistently updated and revisited throughout these participants' careers.

As one participant noted, 'Commonwealth's Attorney's office managers should keep this in front of their staff all the time.' Another participant noted that law enforcement training on the need for disclosing and sharing exculpatory evidence should not be limited a brief mention in basic law enforcement academy training – it should be reinforced with ongoing in-service training.

Others noted that education on the importance of full disclosure and 'getting it right the first time' needs to be provided to elected officials, who often set the tone for others working in Virginia's justice system. These officials need to be educated about why it is more important to work toward a system that is 'right on crime' rather than one that is 'tough on crime.'

In addition to starting early and being ongoing, there was consensus that education and training be multi-disciplinary. Full and open disclosure of exculpatory evidence is the responsibility of all parties in the justice system which handles or evaluates evidence. This includes law enforcement, prosecutors, defense attorneys, judges, as well as any others who, even if not directly involved in a case, may have knowledge of evidence relevant to the case. Therefore, whenever possible, training on exculpatory

evidence should be done jointly with these groups. The primary issue with exculpatory evidence is that it needs to be openly disclosed and *shared* among everyone involved in a case. The most effective education and training will bring these groups together, so everyone can understand their disclosure responsibilities to one another. It was also suggested that such joint training may help reduce the costs involved in providing such training.

Improving Investigatory and Trial Processes Related to Evidence

There was consensus that an 'open records' processes approach offers promise for reducing errors due to a failure to disclose exculpatory evidence. An open records policy avoids errors made when law enforcement or prosecutors attempt to limit disclosure to evidence that is deemed "material" to the case, since it eliminates the error-prone process of deciding what evidence is considered material and not material. Furthermore, an open records policy should be applied to all cases, not just cases involving serious crimes.

Several participants pointed out that an open records policy would be a large improvement, but that it is not a total solution. An open records policy requires trust between all parties involved. Opening evidence files will only be successful if all parties involved believe that all relevant evidence is in the files. Under the current pervasive 'win at any cost' practices, there is pressure on parties in the case to omit from the actual file evidence they feel may cast doubt on their case.

One way to reduce the pressure to withhold evidence in cases is to eliminate the practice of individuals "owning" cases. Participants noted that when an investigator or a prosecutor assumes ownership of a case, pride and ego can limit their ability to see the case objectively. They may develop tunnel vision which causes them to overvalue evidence that supports their case, and avoid or dismiss (or conceal) exculpatory evidence which casts doubt on their case. The philosophy and practice should be that the case belongs to the Commonwealth, not to the investigator or prosecutor assigned to the case.

There also was consensus that if practices and procedures for dealing with exculpatory evidence are improved, these should not only be used in training and education, but they also should be documented as model or best practices and made available throughout Virginia's justice system.

A participant also suggested that one method for avoiding the use of testimony which may be deemed unreliable and exculpatory is to make justice officials more aware of how brain development issues can impact the credibility of eyewitness testimony. It may be useful to provide information to these officials on the careful work needed when asking questions of, or interpreting answers from, person of different ethnicities, minors and those with mental disabilities. Similarly, it may be useful to provide information and guidance on the exculpatory information issues raised when dealing with informants, jailhouse "snitches," and with law enforcement and other criminal justice personnel who may have histories that would cast doubt on the credibility of information they provide in a case.

Encouraging more use of audio and/or video recording of interrogations, confessions, etc., was also suggested as a way to help improve the gathering of information and assessing both the validity of interrogation methods and the credibility of persons being interrogated.

Providing Resources

There was broad consensus that a lack of resources for Commonwealth's Attorneys' offices, indigent defense and other parts of the justice system contributes to many kinds of case errors, including failure to disclose exculpatory evidence. Simply put, errors are more frequent when people do not have enough time to adequately gather, review and assess the materials and evidence involved in a case. An open records policy, which would make more evidence available, may not help if there are not adequate personnel and time to properly review the evidence.

One participant emphasized the need for more resources for indigent defense attorneys, stating that the resources now provided to them are "pathetic." Although indigent defense attorneys should be looking for exculpatory evidence, their caseloads are often so great they cannot devote sufficient time for this critical effort. Wrongful convictions are too great a risk in an underfunded system.

Another proposed approach to dealing with resource issues and overtaxed workloads was developing caseload standards for Commonwealth's Attorneys and indigent defenders.

Participants also suggested that the Commonwealth provide resources for an electronic system to identify and track evidence.

Follow-Up to the Blueprints Session

One member of the Blueprints panel suggested that the ideas presented during this session were valuable and should be further reviewed by a follow-up panel, which would examine whether or not any of the proposed ideas should be considered for legislative proposals. A major purpose of the follow-up panel would be to thoughtfully craft the language for any legislative proposals, to avoid the types of mistakes that can be made when legislation is hastily drafted.

Attendees

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Mr. Cary Bowen, *Esquire*

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Virginia Indigent Defense Commission

Jane Chambers
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Harold Clarke
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The Honorable
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