United States House Committee on the Judiciary, Subcommittee on Crime, Terrorism, and Homeland Security on Reauthorization of the Innocence Protection Act

September 22, 2009

Peter M. Marone
Director
Virginia Department of Forensic Science

Mr. Chairman and Members of the Committee:

Thank you for inviting me to speak. I am Peter Marone, Director of the Virginia Department of Forensic Science. One of the issues I wish to address is the requirements established in order for a laboratory to receive federal funds to conduct post-conviction testing, specifically what is being discussed here today, the Kurt Bloodsworth Act.

On September 30, 2004, after the existence of cuttings retained in case files was discovered, Governor Warner directed the Virginia Department of Forensic Science (DFS) to review 10% of the case files from 1973-1988 where forensic serological examinations, but no DNA analysis, had previously been conducted on evidence associated (primarily) with sexual assault cases in which the named suspect was eventually charged and convicted of the crime.

Pursuant to the Governor's Directive, the Department of Forensic Science determined that the practice of retaining swabs/cuttings in case files began in 1973 and ended in 1988. The Scientist who first began taping evidence into files worked cases primarily from the Central Laboratory and it was determined that there were approximately 600 boxes containing an estimated 164,000 case files that required a physical search to determine if evidence cuttings might have been retained.

The case files and evidence samples retained by DFS have a documented chain of custody. All case files are kept in a secure, controlled environment within the Department's facilities until they are transferred to the State Records Center, which also has limited access and climate control, for long term retention. This review was ordered because the serology section of the Department was affixing portions of the tested swabs/cuttings to analytical worksheets which were retained in the official case file folders. The swabs/cuttings were and still are securely taped in their respective sample columns. The tape covering the swabs/cuttings appears to be intact and exhibit no apparent sign of having been removed, replaced, altered or otherwise compromised.

The purpose of this review was to locate evidential swabs/cuttings previously retained in the case files that met all the criteria for DNA testing as outlined by Governor Warner. The criteria were:

1. The serologist retained remnants of the evidence originally tested in his/her case files.
2. The serology test result indicated the presence of seminal fluid or blood.

3. There was a suspect listed and a suspect known sample submitted (or DFS has the profile of the suspect in the DNA data bank).
4. The named suspect was eventually charged and convicted for the crime referenced in the Request for Laboratory Examination and it was a sexual assault.

These criteria were expanded by Governor Warner and have been adopted by Governor Kaine to include all felony crimes against the person in addition to cases where the suspect known samples are not in the case file.

The original review by DFS resulted in 284 samples in 31 cases that met Governor Warner's criteria. Among the original thirty-one (31) cases tested, the suspect was found to not be the contributor of the foreign DNA source in six (6) cases. Of those six cases, four (4) listed suspects were found to have been properly convicted based upon other factors as determined by the relevant Commonwealths' Attorney, and in two (2) of the cases the defendant was exonerated. One of these two, a case originating in Alexandria, resulted in the identification of another individual in Virginia's DNA data bank; who has since been convicted.

DFS expanded the search voluntarily to include all of the laboratories in the DFS system because the examiner also worked cases from the other laboratories and other scientists' also retained evidence in their case files. There are approximately 1,451 boxes of files that contain an estimated 534,000 case files. Given the results of the 10% random

review, DFS recommended and the Governor concurred that a complete search of the remaining 90% of such case files for evidence that could be subjected to DNA testing and lead to the eventual exoneration of wrongly convicted individuals must be done. Specifically, those cases in which a defendant was convicted of a crime without the benefit of DNA testing at the time of trial and where such human biological evidence still exists for post-conviction testing.

This project, as massive and significant as it is provided Virginia with a known list of cases, 3,053 cases with biological evidence, 2,209 cases with evidence and a listed suspect, 800 cases where that named suspect was convicted of that crime. Currently, 140 reports have been issued. We had a starting point by identifying cases where evidence existed. Absent such a starting point, agencies have no data from which to proceed. Appropriate cases are identified by anecdotal information or after research by the Innocence Project or request of the individual.

Another issue I would like to address is the selection of types of crimes eligible for federal funding. The current categories are, “murder and non-negligent manslaughter, and forcible rape”. Referring to the Uniform Crime Report by the FBI, forcible rape is defined as carnal knowledge of a female forcibly and against her will. Assaults and attempts to commit rape by force or threat of force are also included; however, statutory rape (without force) and other sex offenses are excluded.

If the crime categories listed in the grant solicitation were to read "violent crime as defined in the Uniform Crime Reporting (UCR) Program, it would encompass almost all of the post-conviction cases with the exception of a few statutory rape cases. It would be appropriate to read the requirements as broadly as possible to allow for more individuals to be eligible for testing for possible elimination.

Below I have provided the definition of aggravated assault as well as the forcible rape criteria. The Uniform Crime Reporting (UCR) Program defines aggravated assault as an unlawful attack by one person upon another for the purpose of inflicting severe or aggravated bodily injury. The Program further specifies that this type of assault is usually accompanied by the use of a weapon or by other means likely to produce death or great bodily harm. Attempted aggravated assault that involves the display of—or threat to use—a gun, knife, or other weapon is included in this crime category because serious personal injury would likely result if the assault were completed. When aggravated assault and larceny-theft occur together, the offense falls under the category of robbery. The UCR Program counts one offense for each female victim of a forcible rape, attempted forcible rape, or assault with intent to rape, regardless of the victim's age. A rape by force involving a female victim and a familial offender is counted as a forcible rape not an act of incest. The Program collects only arrest statistics concerning all other crimes of a sexual nature. The offense of statutory rape, in which no force is used but the female victim is under the age of consent, is included in the arrest total for the sex offenses category. Sexual attacks on males are counted as aggravated assaults or sex offenses, depending on the circumstances and the extent of any injuries.

Mr. Chairman, labs are staffed by truly dedicated individuals who are committed to finding the truth, whether exonerating wrongfully accused or uncovering the guilty.

Thank you again for your consideration and for the opportunity to address the Committee. I will be pleased to answer any of your questions.