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Virginia Innocence Coalition Testimony Supporting HB 2196

The Innocence Project at University of Virginia (UVA) School of Law, Mid-Atlantic Innocence Project (MAIP) and national Innocence Project make up the Virginia Innocence Coalition, which advocates for policies that address and prevent wrongful convictions.

The Virginia Innocence Coalition supports House Bill 2196. We thank Delegate Mullin and the Virginia Freedom of Information Act Council for considering this legislation.

Police Misconduct has been a factor in 35% of the over 2,600 exonerations revealed in the United States to date.¹ Virginia's Freedom of Information Act (FOIA) is supposed to empower citizens to hold public officials accountable. However, FOIA gives police agencies discretion on releasing officer disciplinary records, which in practice results in few disclosures. Lack of transparency perpetuates a culture of secrecy that systematically and pervasively shields police misconduct. The public does not know whether police departments are handling complaints against officers effectively or not. Virginia should provide public access to police disciplinary records to build trust with communities and ensure misconduct isn't allowed to perpetuate.

The Problem

Police officers committed misconduct in 35% of the over 2,600 exoneration cases that have been revealed in the United States.² Examples include witness tampering, misconduct in interrogations, fabricating evidence, concealing exculpatory evidence and perjury at trial. Keeping misconduct records secret hides bad actors from public scrutiny and further creates distrust with communities who have no way of knowing whether complaints are appropriately addressed. Public access to police internal affairs files not only benefits the public, but can expose disparities in discipline - particularly for women and officers of color who may be punished more harshly than white male counterparts. There is also a financial cost to the public when taxpayers are left footing the bill for police misconduct and wrongful conviction lawsuits, both of which can result from keeping misconduct secret.

Police credibility affects every phase of a case - including initial police interactions, investigations, and trials. When a factfinder is denied information about a police witness's prior misconduct or dishonesty, assessment of an officer's credibility becomes nearly impossible and results in manifest injustice. Often, prosecutors, defense attorneys, judges, and juries are unaware of the misconduct histories of police officers whose credibility is critical in criminal matters. Factfinders should know whether an officer has a record of lying on the witness stand, planting evidence, or coercing defendants so they can make more accurate judgments about innocence and guilt.

¹ Gross, Possley, Roll & Stephens, "Government Misconduct and Convicting the Innocent: The Role of Prosecutors, Police and Other Law Enforcement." *National Registry of Exonerations*, Sept. 1, 2020.

https://www.law.umich.edu/special/exoneration/Documents/Government_Misconduct_and_Convicting_the_Innocent.pdf

² Gross, Possley, Roll & Stephens, "Government Misconduct and Convicting the Innocent: The Role of Prosecutors, Police and Other Law Enforcement." *National Registry of Exonerations*, Sept. 1, 2020.

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Police departments investigate themselves; thus, it is critical that the public trust their decision making and trust that misconduct is appropriately handled. This was underscored recently when it was revealed that Norfolk Police Lt. William K. Kelly, the second in command in Internal Affairs, contributed to the defense fund of Kyle Rittenhouse, who has been charged with murdering protesters. Kelly offered Rittenhouse the message, “You’ve done nothing wrong, Every rank and file police officer supports you. Don’t be discouraged by actions of the political class of law enforcement leadership.”³ This calls into question former Lt. Kelly’s — and Norfolk’s — oversight of misconduct allegations.

Outside of this egregious example, departments rarely substantiate complaints. A 2020 report by the ACLU of Maryland found only 8% of external complaints, including resident complaints, were sustained.⁴ We learned from the record of Derek Chauvin and of the officer who murdered Eric Garner, and many others, that these officers had misconduct histories with many complaints of “unsubstantiated” but not “unfounded” complaints. Civil litigation often uncovers significant issues with the investigations that took place.

The Impact on Wrongful Convictions

To date, 17 Virginians have been exonerated of crimes they were wrongfully convicted of in part due to police misconduct.⁵ Several of them were wrongfully convicted in part due to the misconduct by Robert Glenn Ford; the extent of his misconduct is still not fully known. In the case of the “Norfolk Four,” four innocent sailors - Eric Wilson, Danial Williams, Joseph Dick and Derek Tice - spent between 11 and 18 years in prison for a rape and murder they did not commit. Former Detective Robert Glenn Ford used coercive interrogation tactics that resulted in their false confessions and withheld evidence confirming an alibi witness and pointing to a different perpetrator. Before the Norfolk Four case, Ford had been demoted for extracting a false confession in another case. Today, he is completing his federal sentence. Norfolk has refused to do an audit of Ford’s cases and has blocked the efforts of others to do the same. The Norfolk Police Department routinely denies requests for files of cases involving Ford. The Innocence Project at UVA School of Law has filed four wrongful conviction claims and is currently investigating two other cases involving Detective Ford. Without disciplinary and personnel records, innocence organizations cannot conduct a thorough review to determine the full extent of wrongful convictions caused by Ford.

Ford is not the only law enforcement officer whom we have found through our work to have repeated instances of misconduct. The UVA Innocence Project is currently seeking the exoneration of a man who has been conditionally pardoned by Governor Northam. The officer involved in his wrongful conviction (now deceased) has a 70+ page disciplinary report, and UVA’s investigation revealed that he lied under oath in the case; however, they have been unable to gain access to any portion of that report. In yet another exoneration, the case of Beverly Monroe, the federal district court noted that tactics of the officer “were deceitful, manipulative, and inappropriate.” That officer is central to a wrongful conviction case currently pending in federal court. We cannot allow misconduct to remain secret. The stakes are too high for Virginians, and no more innocent people should lose their liberty due to misconduct that is allowed to continue in secret.

³ Washington Post, April 2021, t retrieved from: <https://www.washingtonpost.com/nation/2021/04/21/norfolk-police-kyle-rittenhouse-donation/>

⁴ American Civil Liberties Union of Maryland. *Chasing Justice - Addressing Police Violence and Corruption in Maryland*, 5. (2021 January 19). Accessible: <https://www.aclu-md.org/en/publications/chasing-justice-addressing-police-violence-and-corruption-maryland>

⁵ A complete list of exonerations in Virginia can be found here: <https://www.law.umich.edu/special/exoneration/Pages/detailist.aspx?View={FAF6EDDB-5A68-4F8F-8A52-2C61F5BF9EA7}&FilterField1=ST&FilterValue1=VA>

The Solution

Virginia should make all complaints of police misconduct publicly available. It is critical that all complaints be made available to ensure the public can have trust that complaints were appropriately addressed. Ensuring that all complaints are made available not only offers the public faith in the process but prevents an unintended incentive to deeming complaints unsubstantiated, which could occur if only some complaints were made public and not all. In June 2020, New York repealed a law that kept police misconduct records secret. The newly available records show that one of the primary detectives in the case of the Exonerated 5 had at least 64 civilian complaints filed against him, only 11 of which were substantiated; more than 20% of those complaints were filed before his participation in the wrongful convictions of the Exonerated 5.⁶

Nationally, 13 states allow complete public access to police disciplinary records. Law enforcement in Florida and Ohio, states with public access to police disciplinary records, attest that policing is improved with transparency, not harmed. Virginia took a step in the right direction by passing recent reforms to improve access to police misconduct by Commonwealth Attorneys, increase transparency for police departments when hiring, and addressing issues related to decertification in instances of serious misconduct. While laudable, these reforms leave the public in the dark and do nothing to build the public's trust that police misconduct is appropriately addressed. These reforms also minimally impact the role of misconduct in criminal matters; the reforms rely on information being turned over to Commonwealth's Attorneys, and the Commonwealth's Attorneys then identifying exculpatory information to be released to the defense - creating a multi-step process, with layers of judgment calls, that does not guarantee all system players will be made aware of an officer's full disciplinary history. These reforms are important progress, but still leave significant room for misconduct to hide. Finally, while these reforms may help prevent future miscarriages of justice, they do not address the misconduct that has already led to innocent people sitting behind bars today.

Making police disciplinary records transparent will help weed out bad actors, strengthen confidence in law enforcement, and help recruit and retain good officers. HB 2196 appropriately balances redacting personal information with transparency. This bill is foundational to building trust with communities and ensuring wrongful convictions are revealed and prevented.

⁶ Det. Robert Nugent; New York Civil Liberties Union. "NYPD Misconduct Complaint Database."
<https://www.nyclu.org/en/campaigns/nypd-misconduct-database>