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**Written Testimony of Jeremiah Mosteller of Due Process Institute
Submitted to Virginia General Assembly's
Senate Judiciary Committee and Social Services Committee
Regarding Policy Proposals for Criminal Justice and Policing Reform in Virginia**

Introduction

On behalf of Due Process Institute, and as a Virginia resident, I am honored to submit written testimony regarding our views on the need for criminal justice and policing reform in the Commonwealth of Virginia. We urge all of Virginia's political leaders to consider the reform proposals presented by any group or individual with good faith because many changes can still be made to improve the fairness and efficacy of our system of justice. I want to thank Senator John S. Edwards and Senator Barbara Favola for their invitation to submit this written testimony and all members of the Judiciary and Social Services Committees for their consideration of our reforms proposals briefly outlined below.

As local and state officials responded to COVID-19 during early 2020, many sought ways to prevent the spread of this virus by reducing their local jail populations.ⁱ These efforts were not restricted to the Northern Virginia or Hampton Roads regions but reflect an agreement among law enforcement leaders across the state that we needed to reduce our jail populations in response to this public health crisis.ⁱⁱ They achieved this by utilizing citations instead of custodial arrest, limiting the number of individuals incarcerated for mere technical violations of probation, and releasing individuals who could be safely supervised in the community or were extremely vulnerable to COVID-19.

These responsible actions caused the state's total jail population to decline by 17 percent yet Virginia has not seen a significant spike in crime rates.ⁱⁱⁱ This experience reaffirms what we have learned from other states and localities who have taken similar actions—reforming our pretrial systems and decreasing our jail populations will not result in the catastrophic outcomes espoused by opponents of such policies.

Ending Presumptive Pretrial Detention

Our justice system is based on the principle that a defendant is protected by the presumption of innocence until the government proves beyond a reasonable doubt that the individual has committed the charged crime.^{iv} The United States Supreme Court has stated that “[i]n our society liberty is the norm, and detention prior to trial or without trial is the carefully limited exception.”^v As the first section of Virginia's bail statute sets forth, pretrial detention is appropriately used to protect our communities when a judge reasonably believes a specific person cannot be released

from custody without representing “an unreasonable danger to himself or the public” or a flight risk.^{vi}

In practice, pretrial detention is now the default response in many of Virginia’s courtrooms. The Commonwealth incarcerates almost 20,000 individuals on any given day in local or regional jails.^{vii} More than 45% of those individuals are simply waiting for their day in court and have not been found guilty of the crime they have been charged with committing.^{viii} These numbers do not show that “liberty is the norm” in Virginia nor that we uphold the principle that an individual is innocent until proven guilty.

These statistics can be explained by the second portion of Virginia’s bail statute, which reflects the complete opposite principle. It imposes a presumption that many individuals must be incarcerated before their trial.^{ix} This provision reverses the burden of proof and unfairly requires an accused person to prove they can safely return to their community before their day in court. While many of the crimes subject to this presumption are of a serious nature, the professionals in our court system are certainly qualified to make careful determinations of whether the specific circumstances in any case warrant pretrial detention. This individualized approach to the question of pretrial detention is especially important given the many negative impacts of pretrial detention on an individual and their family.^x

Virginia took a small, positive step forward in 2020 by adopting reforms that ended a questionable veto power held by Commonwealth Attorneys over the pretrial process and allowing magistrates to conduct pretrial detention hearings for individuals subject to these statutory presumptions.^{xi} This upcoming special session, we urge Virginia to consider additional changes to our laws that will move our pretrial system closer to the principles held by our Founding Generation and enshrined in the tenets of our justice system.

First, we hope that the General Assembly will reconsider reforms that will end all statutory presumptions that bar judges from releasing individuals with or without reasonable conditions, bail, or community supervision. Virginia should join states like Alabama, Arkansas, Idaho, Kentucky, and Tennessee that fully honor the right to pretrial release and require the government to prove an individual falls into the “carefully limited exception” to justify pretrial detention.^{xii} This will not mean that all, or even most, of those accused of the crimes listed in Va. Code § 19.2-120(B) will be released, but it will mean that a judge or magistrate will have the opportunity to analyze a person’s individualized public safety or flight risk in the same manner as someone charged with a similar crime that simply has not been added to this statutory list. The General Assembly should consider and pass these important changes during the upcoming special session so that our law can once again respect the important protections afforded those charged—but not convicted—of a crime.

Second, in the absence of ending all statutory presumptions, Virginia should explicitly incorporate a provision upholding the right to due process in Va. Code § 19.2-120(B).^{xiii} Unlike many states and the federal system, Virginia law does not require that everyone arrested and held in a correctional facility have a formal hearing to determine whether they will be detained or released.

This is especially concerning for individuals who are denied release under a statutory presumption because the government is not required to prove why their detention before trial is necessary. This amendment should require a formal detention hearing for all individuals arrested or charged with a crime, establish a time length requirement for such hearings to be held, and place the burden of justifying pretrial detention on the Commonwealth Attorney in recognition of the principle of due process.^{xiv}

Ensuring Accountability for Law Enforcement

Recent events like the killings of George Floyd and Breonna Taylor have amplified the call from across the political spectrum to ensure government officials—especially members of law enforcement—can be held accountable for unconstitutional, unethical, or unnecessarily violent actions that harm Americans.^{xv} Past research shows us that solely internal accountability measures consistently fail to hold officers accountable.^{xvi} Moreover, the influence of police unions and associations frequently tie the hands of even the most well-meaning police chiefs and sheriffs from holding officers accountable who violate the constitutional rights of local citizens.

Many assume that if the departments themselves are not holding officers accountable that the victims of these incidents can rectify the harm through our civil legal system. Sadly, this is not true because of a judge-made legal doctrine called qualified immunity. This doctrine bars government officials from being held liable for violating an individual’s constitutional rights unless their conduct violates a “clearly established statutory or constitutional right of which a reasonable person would have known.”^{xvii} This standard requires that the citizen whose constitutional rights have been violated find another case with essentially the same facts where an officer was held liable *even if* the court believes a constitutional violation occurred.

Given that this doctrine is not supported by the text of the U.S. Constitution or the federal statute authorizing citizens to sue government officials, many legal scholars, judges, and advocates question its validity and have called for its repeal or significant reform.^{xviii} Those calls have only intensified in recent months, yet it does not appear that Congress or the U.S. Supreme Court are poised to reform or end this questionable, judge-made doctrine. The Supreme Court has had more than 120 opportunities to review this doctrine since 2005, including failing to accept any of the twelve petitions that addressed the issue this year alone.^{xix} Congress has also seen at least four bills introduced in the last two months that would reform or end qualified immunity but it does not appear that any level of reform will be successful without rigorous bipartisan support by the leadership of both chambers.^{xx}

Even in the face of inaction by our federal government, the General Assembly can still act to ensure Virginia law enforcement officers are appropriately held accountable when they violate the constitutional rights of Virginians. The Commonwealth should join Colorado as one of the first jurisdictions to end the constitutionally problematic barrier qualified immunity poses to holding unethical police officers accountable.^{xxi} The experience of the Colorado General Assembly shows that such reasonable reforms can pass with overwhelming bipartisan support.^{xxii} We hope



members of both parties here in Richmond will support similar legislation and would be honored to work with them to craft and advance a similar reform.

Our law enforcement officers work hard to protect our communities but that does not mean that we should not hold them accountable for unconstitutional, unethical, or unnecessarily violent actions. Their role as a guardian of our communities does not place them above the very laws they risk their lives to enforce every day. For too long, the lack of accountability for bad officers has undermined the ability for good officers to do their jobs by eroding the trust and respect our local departments have worked so hard to gain in their local communities.

Conclusion

The upcoming special session presents a vital opportunity for the General Assembly to adopt reforms that improve fairness and the effective administration of justice. We appreciate this opportunity to present commonsense solutions to two of the most significant problems in Virginia's criminal justice system. Thank you for your leadership to ensure that every individual's constitutional due process rights are respected. For more information about these important issues and our proposed reforms, please do not hesitate to contact me at Jeremiah@idueprocess.com.

Respectfully,

A handwritten signature in black ink that reads "Jeremiah Mosteller".

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- ⁱ Daniel Berti, *Virginia's jail population falls 17% as officials strive to avoid the spread of COVID-19*, Prince William Times (May 2020), https://www.princewilliamtimes.com/news/virginias-jail-population-falls-17-as-officials-strive-to-avoid-the-spread-of-covid-19/article_bb16b304-8172-11ea-add1-4f538c639186.html (Prince William jail population reduced by 20% or 150 individuals); ARLnow, *Some Arlington Inmates Freed Amid Continued Coronavirus Concerns*, ARLnow (May 2020), <https://www.arlnow.com/2020/05/07/some-arlington-inmates-freed-amid-continued-coronavirus-fears/> (Arlington jail population reduced by 25-30%); James Cullum, *Police Responding to Fewer Calls Amid Pandemic, Jail Population Down*, ALXNOW (April 2020), <https://www.alxnow.com/2020/04/14/police-responding-to-fewer-calls-amid-pandemic-jail-population-down/> (Alexandria local jail population reduced by 44%); Nathaniel Cline, *Number of inmates at Loudoun's detention centers dropping amid COVID-19 pandemic*, Loudoun Times-Mirror (April 2020), https://www.loudountimes.com/news/number-of-inmates-at-loudouns-detention-centers-dropping-amid-covid-19-pandemic/article_b20087e2-80c6-11ea-bfb2-efca6b52dca2.html (Loudoun County detention center population reduced by almost 20%); Max Thornberry, *RSW jail population is down; no COVID-19 cases*, The Northern Virginia Daily (April 2020), https://www.nvdaily.com/nvdaily/rsw-jail-population-is-down-no-covid-19-cases/article_241a317e-4cbb-5c07-bb12-4430cf844aa7.html (Rappahannock-Shenandoah-Warren County Regional Jail reduced population by 26%); Allison Brophy, *Culpeper Jail population reduced by more than half amid coronavirus*, Culpeper Star-Exponent (April 2020), https://starexponent.com/news/culpeper-jail-population-reduced-by-more-than-half-amid-coronavirus/article_a7031cce-95e2-55fe-ae91-120dffdbdc7.html (Culpeper Jail reduced its population to half given COVID-19—from 80-90 on average to 43 individuals); Evan Goodenow, *Most inmates released early due to pandemic remain free*, The Winchester Star (April 2020), https://www.winchesterstar.com/coronavirus/most-inmates-released-early-due-to-pandemic-remain-free/article_2d6fd207-e6ff-5a4f-a960-dc4c0732af47.html (Northwestern Regional Adult Detention Center—serving Clarke, Fauquier, Frederick, and City of Winchester—reduced its population by 20%); Miranda Baines, *Population dwindles at Halifax County jail during COVID-19 pandemic*, The Gazette-Virginian (April 2020), http://www.yourgv.com/coronavirus/population-dwindles-at-halifax-county-jail-during-covid-19-pandemic/article_475bd84a-87f8-11ea-9b90-c7506f8778a0.html (Halifax County Adult Detention Center reduced its population by more than 18%); Brad Zinn, *Expert: Middle River Regional Jail is vulnerable to COVID-19 outbreak*, News Leader (March 2020), <https://www.newsleader.com/story/news/local/2020/03/27/middle-river-regional-jail-has-shed-nearly-100-inmates-combat-virus/2919154001/> (Middle River Regional Jail—which serves Staunton, Waynesboro, Harrisonburg, Augusta County, and Rockingham County—reduced its population by almost 10%).
- ⁱⁱ Virginia Beach Sheriff's Office, *VBSO COVID-19 preparations, response and cancellations*, Virginia Beach Sheriff's Office (July 2020), <https://www.vbso.net/coronavirus> (reporting that Virginia Beach is seeking to reduce the local jail population by 300); CJ Paschall, *Albemarle-Charlottesville Regional Jail reports zero inmate cases of COVID-19*, NBC 29 WVIR (June 2020), <https://www.nbc29.com/2020/06/01/albemarle-charlottesville-regional-jail-reports-zero-inmate-cases-covid-19/> (reporting that the Albemarle-Charlottesville Regional Jail released 90 individuals to home confinement in response to COVID-19); Baines, *supra* note i; Goodenow, *supra* note i; Thornberry, *supra* note i; Brophy, *supra* note i; James Scott Baron, *Some non-violent inmates released from area jails amidst coronavirus pandemic*, The Free Lance—Star (March 2020), https://fredericksburg.com/news/crime_courts/some-non-violent-inmates-released-from-area-jails-amidst-coronavirus/article_53423ed4-81da-5d13-9353-f66eco377b65.html (noting that Hanover County, Stafford County, and Central Virginia Regional Jail in Orange County were attempting to reduce their jail populations); Zinn, *supra* note i; Kerri O'Brien, *Area jails releasing inmates to prevent COVID-19 outbreak behind bars*, ABC 8 News (March 2020), <https://www.wric.com/news/virginia-news/area-jails-releasing-inmates-to-prevent-covid-19-outbreak-behind-bars/> (stating that the Pamunkey Regional Jail—serving Hanover County, Carolina County, and the Town of Ashland—released individuals from the facility as a response to COVID-19 and that the Richmond Justice Center and Henrico County Sheriff were looking to release certain individuals to home confinement); City of Norfolk Sheriff, *COVID-19 Management*, City of Norfolk Sheriff (March 2020), <https://norfolk-sheriff.com/index.php/coronavirus/2821-norfolk-city-jail-operations> (noting that the sheriff was working with court leaders to reduce the jail population by more than 300 individuals); See also Nelson Bunn, *Prosecutors Balance Public Safety with Compassion in Response to COVID-19*, National District Attorneys Association (April 2020), <https://medium.com/@ndaajustice/prosecutors-balance-public-safety-with-compassion-in-response-to-covid-19-2167a652fa82>; Joint Statement from Elected Prosecutors on COVID-19 and Addressing the Rights and Needs of Those in Custody (March 2020) (on file with Fair and Just Prosecution), <https://fairandjustprosecution.org/wp-content/uploads/2020/03/Coronavirus-Sign-On-Letter.pdf>.
- ⁱⁱⁱ Berti, *supra* note i; See e.g. Williamsburg Police Department, *Police Department Monthly Operating Report*, City of Williamsburg (July 2020), <https://dashboards.mysidewalk.com/williamsburg-va/police-department-81feae0e52b8>; Magdala Louissaint, *Lynchburg police see decrease in violent crime during COVID-19 outbreak*, WSLs 10 News (April 2020), <https://www.wsls.com/news/local/2020/04/21/lynchburg-police-see-decrease-in-violent-crime-during-covid-19-outbreak/>; Kenny Jacoby, Mike Stucka and Kristine Phillips, *Crime rates plummet amid the coronavirus pandemic, but not everyone is safer in their home*, USA Today (April 2020), <https://www.usatoday.com/story/news/investigations/2020/04/04/coronavirus-crime-rates-drop-and-domestic-violence-spikes/2939120001/>.
- ^{iv} *United States v. Booker*, 543 U.S. 220 (2005); *In re Winship*, 397 U.S. 358 (1970); *Coffin v. United States*, 156 U.S. 432 (1895) (stating that the presumption of innocence until proven guilty is “axiomatic and elementary, and its enforcement lies at the foundation of the administration of our criminal law.”).
- ^v *United States v. Salerno*, 481 U.S. 739 (1987).
- ^{vi} Va. Code § 19.2-120(A) (2020).
- ^{vii} Office of the Secretary of Public Safety and Homeland Security, *Report on the Offender Population Forecasts (FY2020 to FY2025)*, Secretary of Public Safety and Homeland Security (October 2019), <https://vadoc.virginia.gov/media/1458/vadoc-offender-population-forecasts-2020-2025.pdf>.
- ^{viii} Estimate based on the most recent data available. See Christian Hendrickson, et al., *Incarceration Trends in Virginia*, Vera Institute of Justice (2018), <https://www.vera.org/downloads/pdfdownloads/state-incarceration-trends-virginia.pdf>.
- ^{ix} Va. Code § 19.2-120(B) (2020).



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- ^x Will Dobbie, et al., *The Effects of Pretrial Detention on Conviction, Future Crime, and Employment: Evidence from Randomly Assigned Judges*, 108 Am. Econ. Rev. 201 (2018); Léon Digard and Elizabeth Swavola, *Justice Denied: The Harmful and Lasting Effects of Pretrial Detention*, Vera Institute of Justice (April 2019), <http://www.safetyandjusticechallenge.org/wp-content/uploads/2019/04/Justice-Denied-Evidence-Brief.pdf>; The Annie E. Casey Foundation, *A Shared Sentence: The Devastating Tool of Parental Incarceration on Kids, Families and Communities*, The Annie E. Casey Foundation (April 2016), <http://www.aecf.org/m/resourcedoc/aecf-asharedsentence-2016.pdf>.
- ^{xi} H.B. 1462, 2020 Gen. Assemb., 2020 Reg. Sess. (Va. 2020).
- ^{xii} See Ala. Const. art. 1 § 16 (2020); Ark. Const. art 2 § 8 (2020); Idaho Const. art. 1 § 6 (2020); Ky. Const. § 16 (2020); Tenn. Const. art. 1 § 15 (2020); Ala. Code § 15-13-108 (2020); Ark. Code. § 16-84-110 (2020); Idaho Cod. § 19-2903 (2020); Tenn. Code § 40-11-102 (2020).
- ^{xiii} Similar reforms have been suggested by the Virginia Department of Criminal Justice Services since 2013. See Kenneth Rose, A “New Norm” For Pretrial Justice in the Commonwealth of Virginia: Pretrial Risk-based Decision Making, Virginia Department of Criminal Justice Services (December 2013), <https://www.dcjs.virginia.gov/sites/dcjs.virginia.gov/files/publications/corrections/new-norm-pretrial-justice-commonwealth-virginia.pdf>.
- ^{xiv} See 18 U.S.C 3142(f) (requiring a formal detention hearing for individuals charged with crimes falling under a federal statute containing a presumption against pretrial release similar to the one located in Virginia law).
- ^{xv} See e.g. David Savage, *Supreme Court is faulted for shielding police officers from excessive-force claims*, Los Angeles Times (June 2020), <https://www.latimes.com/politics/story/2020-06-04/supreme-court-is-faulted-for-shielding-police-officers-from-excessive-force-claims>; Nick Sibilla, *Court Rejects Qualified Immunity For Cops Who Shot A “Motionless” Black Man 22 Times*, Forbes (June 2020), <https://www.forbes.com/sites/nicksibilla/2020/06/11/court-rejects-qualified-immunity-for-cops-who-shot-a-motionless-black-man-22-times/#63fe6a079d29>; Ed Chung, *Beyond the Status Quo: Police Reform Must Bring About Meaningful Accountability*, Center for American Progress (June 2020), <https://www.americanprogress.org/issues/criminal-justice/news/2020/06/10/486024/beyond-status-quo-police-reform-must-bring-meaningful-accountability/>; Andrew Ford, *I Cover Cops as an Investigative Reporter. Here Are Five Ways You Can Start Holding Your Department Accountable*, ProPublica (June 2020), <https://www.propublica.org/article/i-cover-cops-as-an-investigative-reporter-here-are-five-ways-you-can-start-holding-your-department-accountable>; Paul Stern, *Hold Police Accountable by Changing Public Tort Law, Not Just Qualified Immunity*, Lawfare (June 2020), <https://www.lawfareblog.com/hold-police-accountable-changing-public-tort-law-not-just-qualified-immunity>; America Civil Liberties Union, *Why is it so Hard to Hold Police Accountable?*, America Civil Liberties Union (June 2020), <https://www.aclu.org/news/criminal-law-reform/why-is-it-so-hard-to-hold-police-accountable/>; David Guenther, *Completing the Fix for Police Accountability*, Mackinac Center for Public Policy (June 2020), <https://www.mackinac.org/completing-the-fix-for-police-accountability/>; D.J. Trice, *Here’s why cops can’t be held accountable*, Star Tribune (June 2020), <https://www.startribune.com/here-s-why-cops-can-t-be-held-accountable/570998142/>; David Atkins and Dante Atkins, *Democratic Mayors and City Councils Must Hold Police Accountable*, Washington Monthly (June 2020), <https://washingtonmonthly.com/2020/06/06/democratic-mayors-and-city-councils-must-step-up-to-hold-police-accountable/>; Letter from ProgressNow Colorado, et al. to Colorado General Assembly on Colorado Lawmakers Must Pass Legislation to Hold Police Accountable (June 2, 2020) (on file with ProgressNow Colorado), available at <https://progressnowcolorado.org/2020/06/02/colorado-lawmakers-must-pass-legislation-to-hold-police-accountable/>; German Lopez, *How to reform American police, according to experts*, Vox (June 2020), <https://www.vox.com/2020/6/1/21277013/police-reform-policies-systemic-racism-george-floyd>; Jessica Kelley, *Qualified Immunity: Lawmakers Must do what SCOTUS Declined*, R Street Institute (June 2020), <https://www.rstreet.org/2020/06/18/qualified-immunity-lawmakers-must-do-what-scotus-declined/>.
- ^{xvi} Mara Gottfried and Sarah Horner, *How often do arbitrators reinstate fired cops? Just under half the time*, Twin Cities Pioneer Press (June 2019), <https://www.twincities.com/2019/06/23/how-often-do-arbitrators-reinstate-fired-cops-just-under-half-the-time/>; Kimbriell Kelly, *Police chiefs are often forced to put officers fired for misconduct back on the streets*, Washington Post (2017), <https://www.washingtonpost.com/graphics/2017/investigations/police-fired-rehired/>; Jennifer Bjorhus and MaryJo Webster, *Convicted but Still Policing*, StarTribune (October 2017), <https://www.startribune.com/minnesota-police-officers-convicted-of-serious-crimes-still-on-the-job/437687453/>.
- ^{xvii} *Harlow v. Fitzgerald*, 457 U.S. 800 (1982).
- ^{xviii} 42 U.S. Code § 1983; See e.g. *Zadeh v. Robinson*, 928 F.3d 457, 479-80 (5th Cir. 2019), cert. denied June 15, 2020; Alan Chen, *The Intractability of Qualified Immunity*, 93 Notre Dame L. Rev. 1937 (2017-2018); America Civil Liberties Union, *supra* note xv; Clark Neily, *An Unqualified Injustice*, Cato Institute (January 2018), <https://www.cato.org/publications/commentary/unqualified-injustice>.
- ^{xix} Lawrence Hurley and Andrew Chung, *Supreme Court rejects cases over ‘qualified immunity’ for police*, Reuters (June 2020), <https://www.reuters.com/article/us-usa-court-qualified-immunity/supreme-court-rejects-cases-over-qualified-immunity-for-police-idUSKBN23M1YH>; Andrea Januta and Jackie Botts, *Taking the measure of qualified immunity: How Reuters analyzed the data*, Reuters (May 2020), <https://www.reuters.com/investigates/special-report/usa-police-immunity-methodology/>; Jordan S. Rubin, *Justices Turn Down Trio of Qualified Immunity Doctrine Cases (2)*, Bloomberg Law (May 2020), <https://news.bloomberglaw.com/us-law-week/justices-wont-hear-trio-of-cases-on-qualified-immunity-doctrine>.
- ^{xx} Ending Qualified Immunity Act, S. 4142, 116th Cong. (2020); Reforming Qualified Immunity Act, S. 4036, 116th Cong. (2020); George Floyd Justice in Policing Act of 2020, H.R. 7120, 116th Cong. (2020); Ending Qualified Immunity Act, H.R. 7085, 116th Cong. (2020).
- ^{xxi} Colorado’s Law Enforcement Integrity and Accountability Act permits individuals to bring claims against a police officer who violates their constitutional rights under Colorado law and specifically notes that “qualified immunity is not a defense to liability.” See Enhance Law Enforcement Integrity Act, S.B. 217, 72nd General Assembly, 2020 2nd Reg. Sess. (2020).
- ^{xxii} The bill passed with a 52-13 margin in the Colorado House and a 32-1 margin in the Colorado Senate. See Colorado General Assembly, *Enhance Law Enforcement Integrity*, Colorado General Assembly (2020), <https://leg.colorado.gov/bills/sb20-217>.