

ADVOCACY TOOLKIT:

Bringing Smart Justice to Prosecutions





Dear Activist:

Thank you for volunteering for the ACLU of Virginia! We are immensely grateful for your support and willingness to advocate for prosecutorial reform in the Commonwealth. It is our hope that this toolkit will empower you to reach out to your family, friends, colleagues, acquaintances and even strangers to raise awareness and activism around these issues. With your help, we can increase accountability for independent, elected Commonwealth's attorneys (CAs) throughout Virginia!

If you read our 2016 report, "[Unparalleled Power](#)," we believe you will agree that locally elected CAs are the most powerful players in our state's criminal justice system, but also historically among the most obstinate opponents of common-sense reforms that would help reduce the number of people who are wrapped up in the system and incarcerated.

CAs are the key to criminal justice reform and ending over-incarceration. Virginia's draconian sentencing law – from mandatory minimums to the abolition of parole to jury sentencing – fundamentally shift influence over outcomes from judges to prosecutors. Only CAs have the authority to decide how many charges a person will face at trial, and whether the charges are ones that carry mandatory minimum sentences. Because the vast majority of criminal cases are resolved by plea bargains, a prosecutor is more likely to decide a criminal defendant's sentence than a judge or jury.

These are critical issues that affect individuals, families and communities all across Virginia. With relatively few checks on their authority and the ability to lobby aggressively for changes to laws they don't like, CAs have unparalleled power over Virginia's criminal justice system.

This toolkit provides an overview of the issues, fact sheets, sample social media posts, and talking points for you to use in your activism. Importantly, we provide a list of recommended action steps, such as meeting with your local prosecutor and candidates for that office to find out where they stand and attempt to influence them.

Please report back using the form that is available on our website's action center. The form will ask you to provide your name and let us know what action you took and when. It will also allow you to provide feedback and any suggestions you may have for us! Your comments will keep us informed, and tell us how we can improve.

Again, thank you for your activism! Should you have any questions, do not hesitate to contact us by email at action@acluva.org.



OVERVIEW

For the first time in a generation, America has turned a spotlight on its criminal justice system.

Events in Virginia and across the country have sparked conversations about racial injustices, mental illness, the failure of the War on Drugs, and the enormous, unnecessary cost of mass incarceration.

Despite the emerging national consensus and the widespread support among Virginians for criminal justice reform, one group has consistently resisted change: Virginia's prosecutors. For years, Commonwealth's attorneys (CAs) have opposed common-sense reforms to Virginia's criminal justice system. Instead, Virginia's prosecutors have lobbied the General Assembly to ramp up the failed War on Drugs.

There is one group of people who can act as a check on the enormous power of CAs: the registered voters of Virginia. The CA for each city and county in Virginia is popularly elected every four years.

Unfortunately, both in Virginia and across the United States, the vast majority of prosecutors run unopposed. Most voters don't seem to know who CAs are, what they do, or the enormous power they have. Likewise, some prosecutors have grown accustomed to getting reelected without having to campaign. Paul Ebert was first elected Commonwealth's attorney for Prince William County in 1968. Last year, the 77-year-old Ebert drew his first re-election challenger since the 1980s. Ebert told the Washington Post that having to run for reelection was "demeaning" and made him feel "almost like I'm a beggar."

Add a prosecutor's immense power to the public's lack of awareness, and the result is a group of public officials who are largely unaccountable to the residents and taxpayers they serve. Using data from the Virginia Department of Elections website, we found that between 2005 and 2015, 72 percent of all Commonwealth's attorney elections in Virginia were uncontested. These uncontested elections deny the public a critical opportunity to question the most powerful decision makers in our criminal justice system. Instead of handing incumbent prosecutors re-election every four years, Virginians should use these elections to force prosecutors to answer important questions about criminal justice policy.

In Virginia, where the state government spends more than \$1 billion a year on corrections, there is significant appetite for reforming the criminal justice system. A December 2015 poll conducted by Prison Fellowship and the Charles Koch Institute found:

75% of Virginians believe the Commonwealth's prison system costs too much.

75% percent of Virginians believe that prisons ought to prioritize rehabilitation.

72% of Virginians believe judges should have more freedom to use forms of punishment other than prison.

3-1 (64 percent to 21 percent) Virginians support reinstating a system of parole. (Virginia abolished parole in 1995.)



WHAT IS A COMMONWEALTH'S ATTORNEY?

A Commonwealth's attorney is the top prosecutor in a city or county. A prosecutor is a law enforcement official and an attorney who represents the interests of the Commonwealth in a criminal case. A prosecutor has an ethical duty to seek justice in every case, whether that means putting a violent person behind bars, listening to the wishes of a crime victim, or dismissing charges against an innocent defendant.

The Virginia Constitution requires that Commonwealth's attorneys be elected by voters every four years. State law requires that each CA be a member of the Virginia State Bar, and that the person reside in the city or county he or she will serve for at least 30 days before the election.

Once elected, a CA appoints assistant prosecutors to help carry out the duties of the office. These obligations include the prosecution of all felony criminal offenses in the city or county, and the enforcement of all forfeiture actions. Felony offenses range from murder, rape, and robbery to drug possession and thefts of more than \$200, as well as arguably petty offenses like signing a job application for a state job that includes misinformation. CAs typically handle most misdemeanor prosecutions as well, though they are not required to do so.

Prosecutors are also bound by ethical obligations, the Virginia Constitution, and the United States Constitution. For example, a prosecutor cannot ethically prosecute a case that is not supported by probable cause, nor coerce a defendant who does not have a lawyer into taking a plea agreement.

The Due Process Clause of the Fourteenth Amendment of the U.S. Constitution prohibits prosecutors from withholding certain information from criminal defendants if the information is favorable to the defendant.



PROSECUTORIAL DISCRETION

With these responsibilities, however, comes enormous power. From the beginning of a criminal case to the end result, CAs have unparalleled authority to decide outcomes. Moreover, for a variety of reasons, prosecutors are rarely sanctioned for ethical or constitutional violations. The result is undeniable: in the criminal justice system, a prosecutor has far more power than any other public official.

These vast powers give prosecutors the ability to affect nearly every part of Virginia's criminal justice system. In Virginia, CAs have the power to:

- Decide whether a criminal case will go to trial.
- Determine whether a defendant is charged with a misdemeanor or a felony offense.
- Influence a defendant's decision to have a trial or plead guilty by determining the number and seriousness of the charges the defendant will face at trial.
- Insist that a defendant be kept in jail before trial without bail.
- Choose whether an arrested child is diverted to community-based supervision, placed before a judge in juvenile court, or prosecuted as an adult.
- Elect a jury trial over the objection of a defendant.
- Decide whether to charge a capital offense and seek the death penalty.
- Withhold basic information about a criminal case from the defense, such as police reports, witness lists, and witness statements, until the day of trial.
- Decide whether to prosecute police officers for unjustified shootings and excessive use of force.
- Lobby members of the General Assembly and the governor for or against changes to the law.

Commonwealth's attorneys are rarely questioned about their oversized influence on criminal justice policy. Because nearly three-fourths of all CA elections are uncontested, Virginia voters seldom have the option of removing a CA from office.

A major problem with uncontested elections is that they are unlikely to produce robust debates about a candidate's worthiness for office or the policies the candidate supports. Voters have little incentive to engage in an election with a foregone conclusion.



CA'S ROLES IN VIRGINIA'S STAGNANT REFORM CLIMATE

In addition to the broad discretion CAs have in the courts, they also lobby lawmakers for and against changes to laws establishing crimes and the procedures that govern their prosecution and setting the punishment for violations. On a wide range of criminal justice issues, the Virginia Association of Commonwealth's Attorneys (VACA) makes its views known to the executive and legislative branches of Virginia's state government. When the General Assembly considers a bill that impacts the criminal justice system, VACA may poll its membership – the 120 elected CAs throughout the Commonwealth – to decide whether to support or oppose the bill.

The Association assigns members to monitor the legislature throughout the General Assembly session and individual CAs frequently lobby members of the General Assembly both during the session and between sessions. Legislators are often eager to hear what prosecutors have to say about bills that will affect the criminal justice system. Even when VACA does not take a position on a particular bill, legislators may ask a Commonwealth's attorney to weigh in on it anyway. Because legislators value their opinions, CAs can and do have a significant impact on which criminal justice bills become law.

Given that CAs could play an important role in improving our criminal justice system, here are some key issues in Virginia about which voters ought to ask prosecutors and candidates for election to the office. On each issue, prosecutors can and have had a dramatic impact on criminal justice outcomes by exercising their prosecutorial discretion, lobbying for changes to laws, or both.



CRIMINAL JUSTICE REFORM 101

CIVIL ASSET FORFEITURE:

In Virginia, the police can stop you and seize your money (or property) if they have reason to believe that you're selling drugs.

If a prosecutor can show a court that your money has a substantial connection to the felonious sale of drugs, the Commonwealth can take your money.

In Virginia, the government can take your money even if you're never convicted of a crime. Since July 1991, law enforcement agencies have taken in more than \$106 million through the Commonwealth's asset forfeiture program. This abusive practice offends the basic American notion of innocent until proven guilty. In other states, legislatures have taken action to curb this practice, such as by requiring a criminal conviction before any forfeiture can occur. Virginia's CAs have vigorously opposed the conviction requirement for asset forfeitures. While they make several arguments for keeping the status quo, the prosecutors' position on asset forfeiture deserves skepticism, especially when they argue that they "need" to be able to forfeit property as a way to "get" someone for whom they don't have a case that establishes a criminal violation beyond a reasonable doubt. When the Commonwealth takes money through asset forfeiture in drug cases, local law enforcement and CA offices get to keep a chunk of the profits.

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QUESTIONS FOR YOUR COMMONWEALTH'S ATTORNEY CANDIDATES



CIVIL ASSET FORFEITURE



Do you support a conviction requirement for asset forfeitures?



Would you use assets seized through civil forfeiture to fund your office?



ACLU
AMERICAN CIVIL LIBERTIES UNION
of VIRGINIA

CRIMINAL JUSTICE REFORM 101

THE DEATH PENALTY:

QUESTIONS FOR YOUR COMMONWEALTH'S ATTORNEY CANDIDATES



THE DEATH PENALTY

Do you support a repeal of the death penalty?



Would you seek the death penalty in eligible cases, including for intellectually disabled and mentally ill people?

CAs have the sole authority to decide whether to seek the death penalty for cases in their jurisdictions. While an average of more than 20 capital murder cases per year are brought across the Commonwealth, there has not been a death sentence in Virginia since 2011. Most capital murder cases no longer go to trial; as one Richmond law professor put it, “Virginia’s death penalty functions primarily as a bargaining chip in a plea negotiation process that resolves most capital litigation with sentences less than death.”

Virginia’s prosecutors rarely obtain a death sentence in capital murder cases, but they still use the death penalty as a tool to bully

defendants into pleading guilty in exchange for a sentence of life without parole. Because Virginia’s death penalty laws fail to protect the innocent, the intellectually disabled, and the mentally ill from being convicted, and because the punishment is arbitrarily applied based on where the crime was committed or who the victim is rather than the seriousness of the offense, and because the method of execution cannot meet constitutional standards, the ACLU advocates for the total abolition of the death penalty. If all of Virginia’s 120 CAs believed that the death penalty was no longer worth its enormous cost to society and decided never to seek capital murder charges, they could end Virginia’s death penalty tomorrow.

“Virginia’s death penalty functions primarily as a bargaining chip in a plea negotiation process that resolves most capital litigation with sentences less than death.”

CRIMINAL JUSTICE REFORM 101

CRIMINAL DISCOVERY:

If you're charged with a crime in Virginia, you do not have the right to see any official police reports before your trial. You and your attorney do not have the right to see a list of the witnesses who will testify against you, or what those witnesses have said. This is trial by ambush, because your attorney will not have the proper tools to advise or defend you.

Virginia's restrictive criminal discovery rules created the system of trial by ambush by allowing CAs to withhold critical information from the defense. Recent exonerations of innocent defendants who spent decades in prison show, however, that justice is better served when more information is shared, not less. Some CAs recognize this important principle and share as much information as they can. The result, however, is that whether a person has access to basic information about a criminal case depends on where he or she is being prosecuted. For years, many CAs have resisted efforts to reform Virginia's criminal discovery rules. Rather than wait for more of these cases, CAs should take the lead in reforming Virginia's criminal discovery rules.

QUESTIONS FOR YOUR COMMONWEALTH'S ATTORNEY CANDIDATES



Justice is better served when more information is shared, not less.

CRIMINAL JUSTICE REFORM 101

MARIJUANA LAWS:

QUESTIONS FOR YOUR COMMONWEALTH'S ATTORNEY CANDIDATES



MARIJUANA LAWS



Does prosecuting people for marijuana possession make our community safer, or would time and resources be better spent on more serious crimes?



NOT A CRIME

Will you support the decriminalization of marijuana at the next General Assembly session?

Since 2012, four states and the District of Columbia have legalized the possession of marijuana. Fifteen other states have decriminalized marijuana, which takes the possession of the drug out of the criminal justice system by making it a civil infraction – like a parking ticket.

As state marijuana laws go, Virginia's are among the harshest. A first offense of marijuana possession can result in 30 days behind bars and a \$500 fine. A second offense is a Class 1 misdemeanor, punishable by up to 12 months in jail and a \$2,500 fine. Possession of more than half an ounce of marijuana with the intent to sell or distribute

it is a Class 5 felony, punishable by up to 10 years in prison. Marijuana laws disproportionately impact black people, even though blacks and whites use marijuana at roughly the same rate. In Virginia, for example, blacks are 3.3 times more likely to be arrested for marijuana possession than white people. In some localities, the ratio is greater than 7 to 1.

Marijuana laws disproportionately impact black people, even though blacks and whites use marijuana at roughly the same rate.

CRIMINAL JUSTICE REFORM 101

FELONY LARCENY THRESHOLD:

In Virginia, theft of property valued at more than \$200 is a felony, punishable by up to 20 years in prison. This amount, known as the grand larceny threshold, is the lowest in the nation (tied with New Jersey), and has not changed since 1980.

CAs have the sole discretion whether to seek a felony or a misdemeanor conviction for theft. A felony conviction is permanent, and the consequences are significant. Upon conviction, a person with a felony loses the right to vote, the right to serve on a jury, and the right to seek public office. A felony conviction can mean the end of federal benefits, such as public housing or student loans. A person with a felony conviction also faces serious barriers to employment, such as the ability to seek certain business licenses.

According to an American Bar Association website, a grand larceny conviction in Virginia carries 74 of these collateral consequences. Other states have raised their larceny thresholds without any measurable effect on theft rates. An increase in the larceny threshold is good for public safety because it helps keep nonviolent offenders out of the state prison system, allows for community-based responses that are more likely to prevent recidivism, and prevents the imposition of legal and political disabilities associated with a felony conviction. Such disabilities make us all less safe by giving the person convicted fewer real opportunities to get a job and reengage with the community a positive way.

QUESTIONS FOR YOUR COMMONWEALTH'S ATTORNEY CANDIDATES

\$200

GRAND LARCENY
THRESHOLD



Would you seek felony convictions for all people who steal more than \$200 worth of property?



Would you support increasing Virginia's felony larceny threshold, and if so by how much?



CRIMINAL JUSTICE REFORM 101

OTHER QUESTIONS FOR YOUR COMMONWEALTH'S ATTORNEY CANDIDATES:

- Do you support bringing back parole as an incentive for prisoners to rehabilitate themselves?
- At what age do you believe it's appropriate to try a juvenile as an adult? Why, and for which offenses?
- Would you recommend that a juvenile defendant be sentenced to life without parole?
- Do you support the use of mandatory minimum sentences?
- Would you allow offenders to use drug court?
- Would you support the creation of diversion programs that would allow defendants with substance abuse problems to get treatment instead of being charged with a crime?
- Would you support the creation of mental health diversion centers that would allow defendants with mental illnesses to get treatment in a secure facility instead of being charged with a crime?
- Would you prosecute a police officer who shot an unarmed person?

Learn About Your Commonwealth's Attorney Candidates

- 1  The Commonwealth's Attorneys' Services Council, which trains and provides support to CAs, has an online tool that can help you identify your local prosecutor. It provides the name, contact information, and website for every CA in Virginia, searchable by name or locality. Write a letter to the editor of your local newspaper to raise public awareness
- 2  Ask to meet with your Commonwealth's attorney and any opposition candidates to ask the questions included in this toolkit. If you are unsuccessful arranging a meeting, send them an email or letter documenting your questions and asking for a written response.
- 3  It may be helpful to organize a group of voters interested in criminal justice reform and ask for a meeting on behalf of the group, or organize a candidates' forum.

Be a Commonwealth's Attorney for a Day:

Here are examples of decisions your district attorney faces every day. What would you do?

A 40-year-old man is arrested for stealing a car and selling it to support his drug habit. The car was recovered and returned to the owner. He has been arrested a few times in the past for petty theft, but this is his most serious offense to date. He has a debilitating addiction to crack cocaine and steals in order to get money to pay for drugs. What would you do?

- ☐ Charge him with the lowest offense, which will require him to pay restitution. More importantly though, send him to a community drug rehabilitation program to give him the treatment and support needed to cure his dependency on crack cocaine
- ☐ Pursue maximum felony charge of grand larceny, which carries up to a 20 year prison sentence

Advocate for Criminal Justice Reform

- 1** ▶ If your CA or opposing candidates offer policies or practices that you don't agree with, ask them to change their positions. Let them know you won't be voting for them unless they do.
- 2** ▶ Talk to other attorneys in your area. Seek out and support candidates to run for CA who support common-sense criminal justice reform.
- 3** ▶ Write letters to the editor of your local newspaper that discuss the need for criminal justice reform and inform the public of your candidates' policies that you agree or disagree with.
- 4** ▶ Talk about the same issues on your social media accounts.
- 5** ▶ Vote, and encourage others to do the same.

Be a Commonwealth's Attorney for a Day:

Here are examples of decisions your district attorney faces every day. What would you do?

A habitually homeless man suffers from acute mental illness and in a fit of psychosis, attacks someone walking by. The attack resulted in some injuries to the passerby, including a broken finger.

- ☐ Pursue the maximum felony charge which carries a 20 year prison sentence plus a potential life sentence for severely and permanently injuring this person
- ☐ Pursue a misdemeanor charge and require mental health treatment with a goal of helping the man stabilize his mental illness, establishing ongoing care and acquire housing

FAQs:

1. Who are Commonwealth's attorneys?

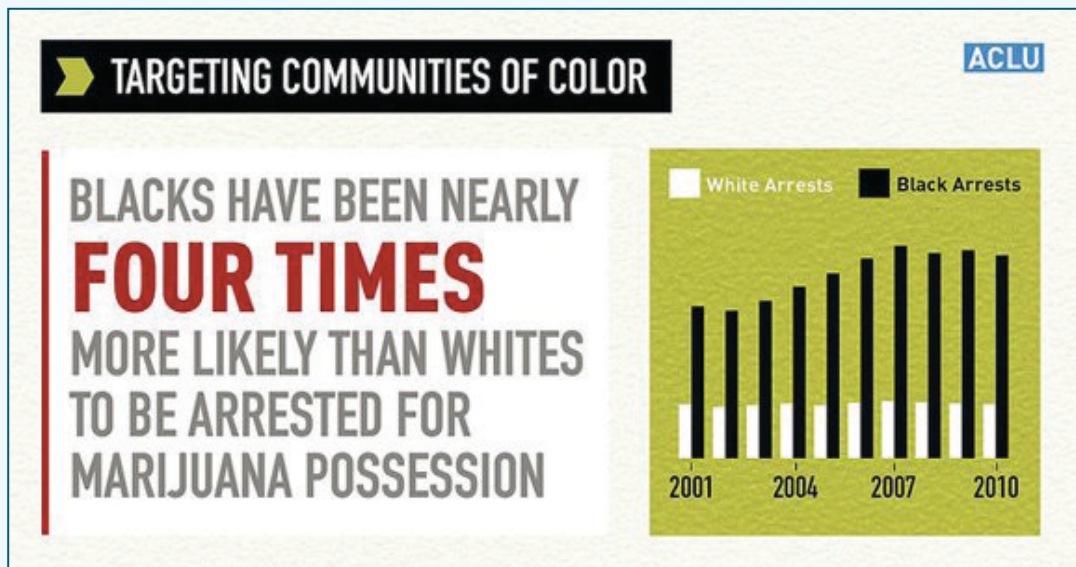
A Commonwealth's attorney is the top prosecutor in a city or county. A prosecutor is a law enforcement official and an attorney who represents the interests of the Commonwealth in a criminal case. The Virginia Constitution requires that Commonwealth's attorneys be elected by voters every four years. State law requires that each CA be a member of the Virginia State Bar, and that the person reside in the city or county for at least 30 days before the election.

2. What do Commonwealth's attorneys do?

Once elected, a CA appoints assistant prosecutors to help carry out the duties of the office. These obligations include the prosecution of all felony criminal offenses in the city or county, and the enforcement of all forfeiture actions. Felony offenses range from murder, rape, and robbery to drug possession and thefts of more than \$200, as well as arguably petty offenses like signing a job application for a state job that includes misinformation. CAs typically handle most misdemeanor prosecutions as well, though they are not required to do so.

3. What does it mean that Commonwealth's attorneys have "unparalleled power"?

With these responsibilities, however, comes enormous power. From the beginning of a criminal case to the end result, CAs have unparalleled authority to decide outcomes. Moreover, for a variety of reasons, prosecutors are rarely sanctioned for ethical or constitutional violations. The result is undeniable: in the criminal justice system, a prosecutor has far more power than any other public official.



FAQs:

4. What are some of the criminal justice reform issues Commonwealth's attorneys could help with?

Civil asset forfeiture, which is the law enforcement practice of seizing money or property that is suspected of being used in the commission of a crime but for which there has been no conviction. Police departments and Commonwealth's attorneys use these funds to pad their budgets. It is often referred to as "policing for profit."

Felony larceny threshold, meaning the value of stolen property that would make a thief eligible to face a felony charge – which includes possible prison time, loss of voting and other rights, and other life-changing consequences – instead of a misdemeanor. Virginia's threshold is \$200, the lowest in the country, and it hasn't been increased since 1985.

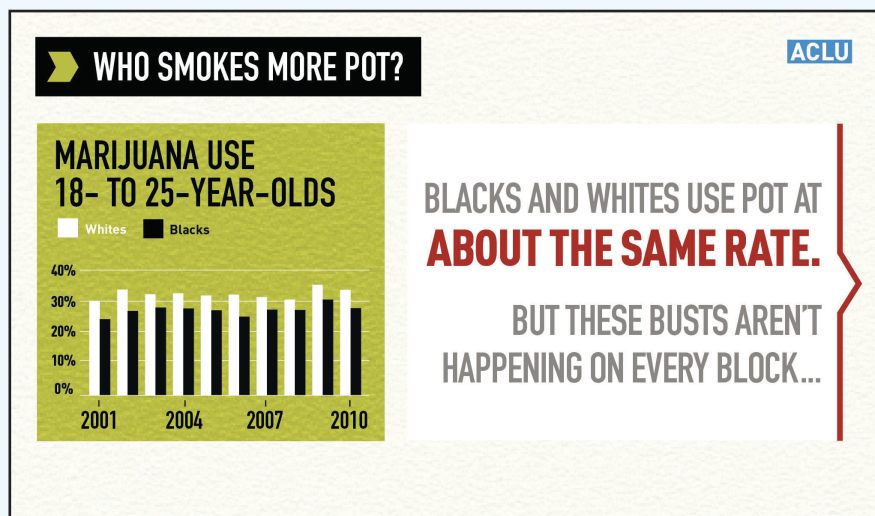
Criminal discovery, which is the process of a person accused of a crime, through their attorney, finding out what evidence the state has against them. In Virginia, there is no requirement that prosecutors share information such as police reports and witness statements before trial. It's called "trial by ambush."

The death penalty, which is when a person accused of certain crimes such as killing a police officer is executed by the state. Commonwealth's attorneys have sole discretion as to whether capital murder charges are brought against anyone.

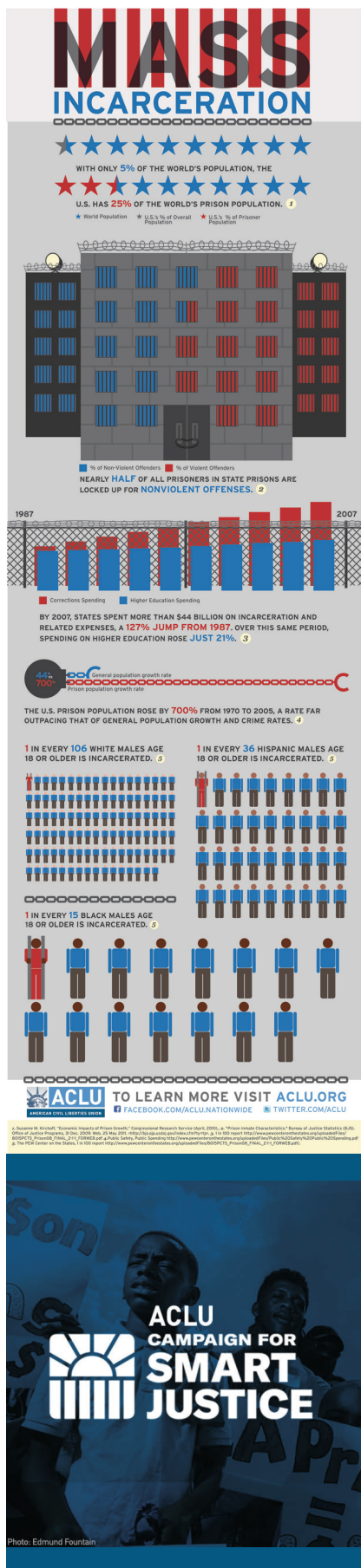
Less prosecution of low-level crimes such as simple marijuana possession, which disparately affects African-Americans in Virginia by a 3-to-1 ratio on average – as high as 7-to-1 in some localities – even though usage rates are roughly the same for blacks and whites.

2. What can I do?

First, learn who your Commonwealth attorney is and what their positions are on these and other important criminal justice issues. Find out when elections for this office are held in your locality. Advocate for better candidates who support criminal justice reforms on your social media platforms and through traditional media. Seek out new candidates so CAs don't run unopposed. Vote.



WHAT YOU CAN DO:



Sample Letter to Your Commonwealth Attorney Candidates

DATE

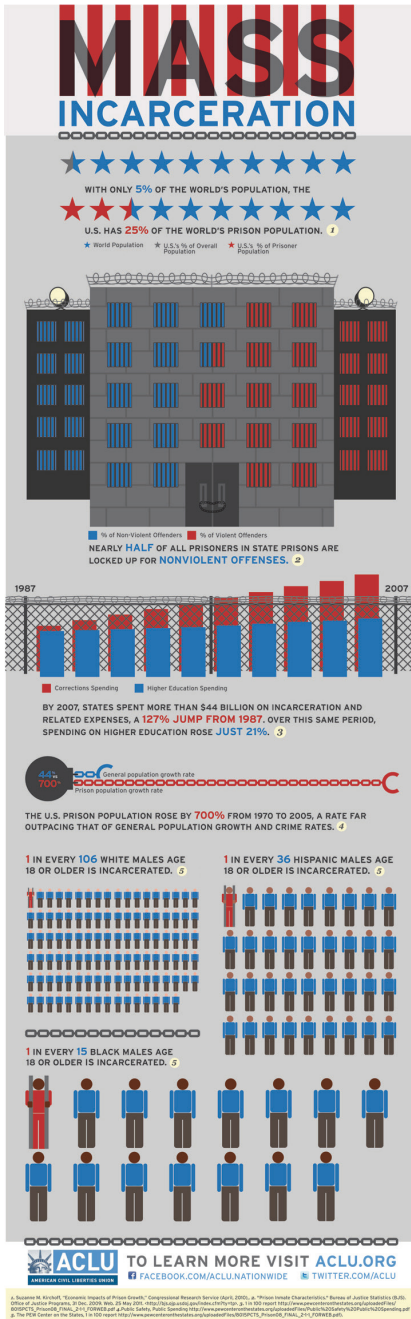
Dear _____

I am a voting resident of [locality]. I am very concerned about the state of the criminal justice system in Virginia, specifically that we are incarcerating too many people through bad laws and practices over which only the local, elected prosecutor has any influence. I would like to request a meeting with you to discuss these issues, including civil asset forfeiture, the felony larceny threshold, the death penalty, criminal discovery, and prosecution of low-level offenses such as marijuana possession. Like most voters, I make my decisions about for whom I cast a ballot based on the positions of the candidates. I would like to be well-informed, and to help others make informed decisions as well. Please let me know when you have availability to meet, and thank you in advance for your consideration of this request.

Sincerely,

YOUR NAME

WHAT YOU CAN DO:



Sample Letter to the Editor

To the editor:

Many people are unaware that local, elected prosecutors – known as Commonwealth's attorneys – have unparalleled power over the criminal justice system. They decide whether to charge someone with a crime, what those charges will be, whether to have a jury trial even if the defendant doesn't want one, whether low-level crimes should be prosecuted, and whether to share information with a person's lawyer before trial. It's time these officials started working toward criminal justice reform instead of measuring success by how many of our friends, neighbors and children they lock up. I hope every voter will research our candidates for Commonwealth's attorney and vote only for a candidate committed to reform.

YOUR NAME

SAMPLE SOCIAL MEDIA POSTS

For Twitter:



72% of Va's local prosecutors ran for election unopposed from 2005-15. Let's round up some competition. @acluva bit.ly/VACAs



Locking people up doesn't mean local prosecutors are doing a good job. We need criminal justice reform. @acluva bit.ly/VACAs



Your local prosecutor has unparalleled power over the criminal justice system. Who's yours? @acluva bit.ly/2kipBal



Where does your local prosecutor stand on criminal justice reform? Find out who they are and ask them. @acluva bit.ly/2kipBal



What can you do to persuade your local prosecutor to support criminal justice reform? @acluva has answers. bit.ly/VACAs

For Facebook:



I just found out that Commonwealth's attorneys are some of the most powerful yet untouchable officials in the criminal justice system. Learn more about them from the ACLU of Virginia at bit.ly/VACAs.



Virginia's local elected prosecutors seem to think that locking more people up means they are doing a good job. I think we should be helping people more and putting fewer behind bars. Learn more at bit.ly/VACAs.



Commonwealth's attorneys have a lot of influence over the state legislature when it comes to sensible criminal justice reform. Let's let them know what needs to be done. bit.ly/VACAs



I am shocked to learn that 72 percent of local prosecutors, who have great power over families and communities when it comes to putting people behind bars, were elected unopposed from 2005-15. It's time for some new Commonwealth's attorneys who understand criminal justice reform is badly needed. The ACLU of Virginia has answers at bit.ly/VACAs.



Commonwealth's attorneys put our friends, neighbors and family members behind bars every day but resist common-sense efforts to reform the criminal justice system. This has to stop! Find out more from the ACLU of Virginia at bit.ly/VACAs.