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The Virginia Criminal Sentencing Commission
April 6, 1998
Meeting Minutes

Members Present:

Judge Gates, G. Steven Agee, Judge Bach, Jo Ann Bruce, Mark Christie, Frank Ferguson, Judge Honts, Henry Hudson, Judge Johnston, Lane Kneedler, William Petty, Reverend Ricketts and Bobby Vassar

Members Absent:

Peter Decker, Judge McGlothlin, Judge Newman and Judge Stewart

The meeting commenced at 10:05 a.m. with Judge Gates asking the Commission members to approve the minutes from the last meeting.

Agenda

I. Approval of Minutes

Approval of the minutes from the November 10, 1997 meeting was the first item on the agenda.

The Commission unanimously approved the minutes.

The second item on the agenda was the 1998 General Assembly Actions. Judge Gates then asked Dr. Kern to discuss this agenda item.

II. 1998 General Assembly Actions

Dr. Kern remarked that in the Annual Report, the Commission made five specific recommendations to the General Assembly. One of these recommendations involved guidelines revisions and the other four involved changes to the Code of Virginia. In short, Dr. Kern reported that the latter four recommendations resulted in the introduction and passage of the necessary legislation. He noted that during the legislative session he presented the Annual Report and recommendations before both the House and Senate Courts of Justice Committees as well as the Public Safety Subcommittee of the Senate Finance Committee. Dr. Kern said that these committees were very pleased with the work of the Commission and its recommendations.

One of the Commission's recommendations (House Bill 694) was an amendment to §17-234 of the Code that deals with the membership of the Commission. This bill amended the Code to require one-time appointments to the Sentencing Commission for staggered terms and to remove the current restriction on two appointment terms for current members in order to ensure some degree of membership continuity. This recommendation also included a provision that would provide statutory language

addressing the appointment of a Commission Vice-Chairman. This revision was adopted by the legislature without a single negative vote.

The second recommendation (House Bill 695) was an amendment to §19.2-298.01 (C) of the Code that deals with Sentencing Guidelines worksheets. The Commission proposed an amendment to this section that added language that makes it clear that if there is not concurrence of the accused, the court and the attorney for the Commonwealth with regard to the prosecutor preparing the worksheet, that the court *shall* instruct the probation officer to prepare the forms. This amendment would ensure that sentencing guidelines forms are always presented to the judge in cases tried upon a plea of guilty, including cases subject to a plea agreement. This recommendation passed without opposition in the Senate but received two negative votes in the House.

The third recommendation of the Commission (Senate Bill 180) proposed an amendment to §17-237 of the Code to eliminate the clause that restricts the period of time that is considered when scoring prior criminal record for certain convicted felons. This proposal was offered to ensure that the guidelines forms are completed in a fair and accurate fashion. The fact that the criminal history record keeping system does not typically contain the information required to apply the 16 year rule creates a situation where a worksheet scoring rule cannot be reliably and consistently applied. Dr. Kern said that the provisions of the “16 year rule” are rarely applied. This bill passed in the Senate with only four negative votes and with no opposition in the House.

The Commission also proposed a modification (Senate Bill 357) to §19.2-298.01 of the Code to clearly state that the sentencing guidelines forms are open records and shall not be sealed upon entry of the sentencing order. Dr. Kern said that the Commission always felt that these forms should be open for inspection. This bill also passed both the House with only one negative vote and the Senate without opposition. Dr. Kern noted that during the floor discussion in the House of Delegates on this bill that Delegate Robinson offered an amendment which would have required appellate review of any case which represented a guidelines departure but did not contain a written departure reason. Delegate Robinson observed that, from his own experience, judges were not always following the law and stipulating a written departure reason when their sentence was not within the guidelines. He felt that judges should be held accountable to some review when they do not follow the law. A number of other Delegates spoke during the floor discussion on this matter and expressed sympathy for Delegate Robinson’s concern yet did not demonstrate support for an appellate review process. Delegate Moran, who had spoken to Dr. Kern on this matter, concluded the debate on this matter by observing that the Sentencing Commission already had mechanisms in place to return guidelines forms to judges when departure reasons were missing and that the Commission should continue to have the authority to curb abuses of this type. Delegate Robinson’s amendment was defeated on a voice vote and the original Commission proposal was then adopted. In summary, Dr. Kern felt that the Commission should know that the House of Delegates did express concern over the fact that judges were not always stipulating departure reasons, as the Code requires.

The final recommendation (Senate Bill 364) by the Commission was designed to permit probation officers and Commonwealth's attorneys to photocopy or receive photocopies of petitions and disposition information on juvenile criminal records in order to accurately and expeditiously prepare sentencing guidelines worksheets. This modification would ensure that probation officers and prosecutors have timely access to juvenile records and enhance the accuracy of the information used in preparing the worksheets. This bill passed without opposition in both the House and Senate.

Dr. Kern asked the members if they had any questions regarding the General Assembly Session. He summarized that all bills proposed by the Commission passed and they should become new laws on July 1. Judge Johnston added that a representative of the Commission should attend the upcoming Annual Judicial Conference to brief the judges on these changes. Dr. Kern said he has requested a time slot at this meeting but was given a time during the business meeting which is not a prime time spot. He remarked that many judges leave early and would miss the briefing. As an alternative, Dr. Kern had contacted Walter Felton, former Executive Director of the Commonwealth's Attorneys' Training Council, and current Deputy Counselor to the Governor, who was already on the agenda for this meeting to brief judges on new legislation. Dr. Kern mentioned that Mr. Felton would be willing to add our revisions to his presentation. The Commission members agreed that this would make good sense and ensure that all judges would hear about the new changes.

Dr. Kern then spoke about legislation that passed that might affect the Commission in some way. The first and only bill that Dr. Kern thought would affect the Sentencing Commission is Senate Bill 317 also known as the Drug Assessment Bill. Judy Philpott from the Crime Commission spoke to the Commission about this matter at the last Commission meeting in November. This piece of legislation would require a pre-sentence investigation (PSI) on all convicted felons and some categories of convicted misdemeanants and juvenile crimes. A standardized drug assessment form would also accompany the PSI. This bill instructs the Sentencing Commission to provide technical assistance in an implementation workgroup. Mr. Petty asked if the PSI is required in all felony cases. Dr. Kern said this new legislation does require that a PSI be filled out in all such cases. The requirement of PSI's in all felony cases would be effective on July 1, 1999.

Dr. Kern then spoke about the number of prison bed space impact statements that were prepared on proposed legislation. The Commission produced 132 impact reports on drafted legislation. Half of these proposed bills (n=66) were attempts to create one or more new crimes and 20% were bills that proposed new misdemeanors (n=13). About 40% of the proposed legislation would raise the penalty structure for existing crimes. Nearly 10% of the legislation introduced new mandatory minimum penalties. Most of the proposed legislation did not lend itself to using simulation-model technology due to the lack of information in the criminal justice data base (e.g. new crimes for which there is no information, and redefining a misdemeanor as a felony). The Commission constructed simulation models for the ten pieces of legislation (8%) that were suitable for simulation analyses.

Judge Gates asked Ms. Farrar-Owens from our staff to discuss the next item on the agenda, Sentencing Guidelines Compliance Report.

III. Sentencing Guidelines Compliance Report

Ms. Farrar-Owens presented a series of charts to summarize the compliance rate patterns and trends. She explained that the presentation was condensed and a complete compliance update was in the packets distributed to each member. The analysis in the packets included all cases received through March 30.

Overall Sentencing Guidelines Compliance: Ms. Farrar-Owens commented that overall compliance with the guidelines was nearly 76%. The aggravation rate was reported as 13% and the mitigation rate, 11%. She noted that the Commission has received 42,269 cases to date.

Compliance by Offense: Ms. Farrar-Owens observed that compliance rates within offense groups range from a high of 83% in the larceny offense group to a low of 62% among the sexual assault offenses. She mentioned that at the November meeting, she reported a compliance rate for kidnapping of just over 59%. Kidnapping and sexual assault have had the lowest compliance rates of all the offense groups for quite sometime. Just in the last couple months, compliance in kidnapping cases has gone up almost four percentage points, to nearly 63%. This has happened because nearly all the kidnapping cases received since the first of the year have been in compliance with the guidelines.

Habitual Traffic: Ms. Farrar-Owens then spoke about the impact of changes in the habitual traffic offender statute. This particular alteration, she remarked, was not a change in the guidelines but a revision in the Code of Virginia that was recommended by the Commission and passed by the General Assembly in 1996. This modification allows judges to suspend the 12 month mandatory minimum incarceration term and sentence offenders to detention center, diversion center or boot camp in cases where the judge feels an alternative sanction is appropriate. Of the 588 habitual traffic cases sentenced since July 1, 1996, only 10% have had the mandatory minimum sentence suspended and been sentenced to one of the alternative sanctions. Because of its potential impact on Virginia's prison population, the Commission will be closely monitoring the impact of this change. She said that not that many habitual offenders are receiving one of these alternatives.

Drug Guidelines: Ms. Farrar-Owens then focused on the modifications to the guidelines that took effect last year. A significant change to the guidelines starting July 1 was the addition to the drug guidelines of a factor accounting for the quantity of cocaine involved in a sales offense. She said that the factor has two parts. First, the offender who sells less than one gram of cocaine and has no prior felony record ends up with a dual recommendation: either the traditional prison recommendation (usually 7 to 16 months)

or detention center. The judge has the option to do either and be in compliance with the guidelines.

The Commission has received 229 cases of first-time felons convicted of selling a gram or less of cocaine. These cases were targeted for the dual option guideline recommendation of either traditional incarceration or Detention Center Incarceration. In 15% of these cases, judges have opted for incarceration in a detention center. In 6% of these drug cases it appeared that the boot camp incarceration program was selected. Approximately 12% of these drug felons received no incarceration and 4% received incarceration of six months or less. The remaining 60% of these first-time cocaine sellers received traditional incarceration of seven months or more. The Commission will continue to study the impact of this change to drug guidelines over the next year.

The other part of the guidelines revisions dealing with cocaine centered on the larger quantity cases. For offenders who sell one ounce or more of cocaine, the recommendation is increased by three years and for offenders who sell ½ lb. or more, the recommendation is increased by 5 years. The guideline recommendations are enhanced for offenders selling the largest amounts of cocaine. Forty-nine offenders have received the new enhancement. Compliance in these cases is only 55%, with nearly all the departures being sentenced below the guidelines. The mitigation rate is 35%. Ms. Farrar-Owens then presented information concerning the reasons judges cite when sentencing below the guidelines in these larger quantity cases (n=17). In 29.4% of the mitigation cases, judges noted the offender's cooperation with the authorities for imposing a term below the guidelines. She said that the Commission will continue to closely monitor these cases.

Sex Offenses Against Children: Recent guidelines revisions also added a factor to the sexual assault guidelines for crimes in which the victim was younger than 13 years old at the time of the offense. The addition of this factor increases the likelihood that offenders who commit sex crimes against the very young will be recommended for incarceration, particularly prison. Ms. Farrar-Owens continued by saying that we have received 106 sexual assault cases since July 1, 1997 that involved victims younger than 13. Judges have complied with the new sentence recommendation at a rate of nearly 63% compared to the 61% prior to the change. Compliance is up by only 2% but the departure pattern for these crimes has now reversed itself – previously the departures were mostly aggravated in nature, now they are largely mitigated. Mr. Ferguson asked if all sexual assault cases were included in the comparison or if the analysis was only examining cases with young children as victims. She responded that all sexual assault cases were included in the analysis. Ms. Farrar-Owens then presented information concerning the reasons judges cite when sentencing below the guidelines in these sexual assault cases (n=28). In 21.4% of the mitigation cases, judges noted the offender's potential for rehabilitation and weak evidence in the case as an explanation for imposing a term below the guidelines.

Ms. Farrar-Owens then continued by saying that she would like to briefly discuss the issue of guidelines worksheets received by the Commission which require departure explanations but do not have them. As Dr. Kern mentioned earlier, there was interest

expressed on the part of some legislators to attach some kind of penalty or oversight function for a judge's failure to enter a reason when sentencing outside the guidelines. When the truth-in-sentencing laws took effect, judges were for the first time required to provide a written reason when departing from the guidelines. It took some time for the judges to adjust to this new requirement.

Ms. Farrar-Owens displayed a chart that shows that in the first year of the truth-in-sentencing guidelines, about 1 of every 10 departure cases was received without a departure reason. These were entered into the database but sent back to each judge with a request for a departure explanation. If and when the forms were returned, the reason was added to the data base record. Because of the increasing number of worksheets being received starting in 1996, staff decided not to automate the worksheets with missing departure reasons until we had returned them to the field and had received all the information that was required. Our research assistant, Carolyn, reviews the worksheets when they come in. She has sent back less than 1% of the departure cases, or 1 of every 100, because the reason is missing. Ms. Farrar-Owens noted that the problem of missing departure explanations is diminishing over time as judges become more familiar with the new process and legal requirements.

She continued by observing that there is another side to the issue of sending back problem work sheets to the courts. About three of every four problem work sheets that Carolyn has to send back are due to the absence of sentence information on the back of the cover sheet. These cases are sent back to the clerk of the court so that the sentence information can be entered on the form. This, she stated, is the largest problem we have and, in size, dwarfs the number of cases with missing departure reasons. She felt that cooperation from the field has not been as great as it should be in terms of correcting and returning the forms to the Commission in a timely fashion. This is particularly true when the forms are sent back to the clerk. The staff has now instituted a new tracking system by which we will be able to track all problem cases sent back to the courts. She said this new system will generate a monthly report that will tell us which cases are still outstanding so we can send a follow-up letter asking that those cases be corrected and returned as quickly as possible. Mr. Kneedler asked Ms. Farrar-Owens if she felt that the number of cases received in January and February of 1998 would increase at least to the previous year total. She said that the number of cases should eventually total about the same.

Judge Gates then asked Ms. Jones to discuss the next item on the agenda, an update on the Risk Assessment Project.

IV. Offender Risk Assessment Project - Status Report

Dr. Kern initiated the discussion on this item by saying that the Commission did ask Circuit 22 to participate in the Risk Assessment Project. After meeting with the judges,

probation officers and the Commonwealth's attorneys, this circuit has agreed to become the fourth pilot circuit in the study. He said that this circuit officially started participating in the project in March. Dr. Kern also observed that the offender risk assessment program in Fairfax was recently profiled in the Washington Post. He mentioned that the Commission has received a lot of positive feedback from that article. The United States Deputy Attorney General saw the article and called for more information as did a number of other criminal justice system professionals from around the nation. Dr. Kern then introduced Ms. Jones who has been taking the lead on this project.

Ms. Jones began by reporting that four judicial circuits have agreed to serve as pilot jurisdictions: Circuit 5, (the cities of Franklin and Suffolk and the counties of Southampton and Isle of Wight), Circuit 14 (Henrico), Circuit 22 (Danville, the counties of Pittsylvania and Franklin) and Circuit 19 (Fairfax). Implementation of the risk assessment project began on December 1, 1997 except for Circuit 22, which started the study last month. She said that an informal telephone survey was conducted with judges, probation officers and Commonwealth's attorneys. This survey helped the Commission get some feedback about the perceptions of justice system officials in the pilot program sites. She spoke with 14 persons (9 judges, 3 probation chiefs, and 2 Commonwealth's attorneys) in the three participating circuits. In general, the risk assessment project seems to be working well in that there were no complaints about additional work load. Several judges from Henrico expressed a concern about the number of drug addicted offenders receiving drug treatment in the detention centers. These judges felt that the treatment in the detention centers is too short and that the option of releasing the offender back into the community was not viable either. One of the judges felt that offenders were doing more pre-trial time while waiting for the pre-sentence investigation report to be completed. The probation chiefs mentioned that, in their subjective opinion, some of the good candidates for alternative punishment were scoring over 10 on Section D of the risk assessment form and not being recommended for alternatives. The Commonwealth's attorneys who responded reported a concern that ordering a pre-sentence investigation (PSI) in these cases requires extra time and is unnecessary if the offender is going to be recommended for no incarceration. Ms. Jones did notify the participants of this survey that the National Center for State Courts would also be conducting a more complete evaluation of the risk assessment project in the near future.

Mr. Vassar asked if the judge could sentence an offender to time served since the offender waited in jail for the completion of the PSI. Ms. Jones responded that at the point of conviction the judge could sentence the offender or order a PSI. The PSI can take several weeks or months depending on the jurisdiction. Judge Gates added that when the offender goes through a preliminary hearing without making bond and, the offender finally reaches the court, the amount of time served awaiting trial could be as much as sixty days. When the offender does reach court, the judge would probably sentence him to time served but, due to risk assessment, a PSI must be ordered and the offender would likely go back to jail to wait for the report. Mr. Vassar asked if the judge could waive the PSI in these types of cases. Judge Gates said that the Commission may want to consider that option after the completion of the pilot project. Judge Honts

referred to the new legislation (SB317) which will require that a PSI be completed in all cases after July 1, 1999. Given this legislative act, Judge Honts felt that the Commission would not have to be concerned with this matter in the future. He observed that offenders that do not make bond would have to spend extra time in jail awaiting their PSI.

Ms. Jones then reported on the number of risk assessment cases the Commission has received since implementation. Between December 1, 1997, through March 31, 1998, the Commission received 339 risk assessment cases. The majority of the cases (54%) were received from Circuit 19 while Circuit 5 (21%) and Circuit 14 (25%) submitted close to the same number of worksheets. She also added that the cases are evenly split between and drug and larceny, together comprising 80% of the cases with fraud crimes comprising the remainder. Of the total worksheets completed in drug, larceny, and fraud cases, only 161 had Section D of the Risk Assessment form scored while 178 cases were not scored. Among these latter cases the guidelines recommendation was probation/no incarceration in the great majority (n=142). The intent of the risk assessment program is to target offenders who would be recommended for prison or jail incarceration. The remaining 36 cases where a risk assessment form was not completed were ineligible due to a prior violent record, current violent offense or a drug offense involving the sale, distribution, or possession with intent, etc. of cocaine of a combined quantity of one ounce or more. Among the 161 cases that were evaluated on risk assessment, 71% had a risk assessment score of 10 or more and were not recommended for an alternative sanction. Thus, only 29% of the eligible non-violent felons who were evaluated by the risk assessment instrument were recommended for an alternative program. Ms. Jones added that of the 47 cases that were recommended for alternative punishment only 21 received an alternative sanction. Accordingly, Ms. Jones observed that judges in the pilot sites were not rotely following the risk assessment recommendations. Ms. Jones also pointed out that of the cases where a risk assessment form was filled out and the offender was not recommended for an alternative, there was a small percentage of cases (15%) where offenders still received an alternative sanction.

Ms. Jones then presented information concerning the types of alternative punishments being selected by judges in the pilot sites. For the time period December 1, 1997, through March 31, 1998, the most frequently used alternative sanction was the detention center incarceration program followed by drug treatments, community service, diversion center incarceration, jail sentence instead of prison, first offender program and electronic home monitoring. In the 17 cases where an alternative was chosen despite a negative recommendation on the risk assessment scale, judges were most apt to choose a jail sentence instead of a prison sentence the majority of the time. Ms. Jones cautioned the members that this analysis is based on a small number of cases and that a more complete picture would emerge at future meetings.

Ms. Jones then discussed information concerning the reasons judges cite when sentencing outside of the risk assessment recommendation. She added that judges are not required by law to give a reason when they depart from the recommendation made by the risk assessment component of the guidelines. When judges choose not to sentence an offender to an alternative punishment, they cited no explanation in 13 cases. In four of

the departure cases, judges noted that the offender refused to enter the alternative program.

Ms. Jones then presented a chart that illustrated how the non-violent felons in the pilot sites had scored on the risk assessment instrument. Completion of Section D resulted in the recommendation for alternative punishment in 37% of the fraud and drug cases. Judges selected alternative punishments more often in fraud cases. Only 16% of the larceny cases were recommended for alternatives with 8% actually receiving an alternative sanction.

Ms. Jones concluded her presentation by saying that the score totals on evaluated offenders on Section D ranged from a low score of 3 to a high of 24. The median score was 12. The Commission adopted the cutoff score of 9 based on findings that offender's with this score or below could be expected to have a 12% risk of recidivism within three years.

Judge Gates thanked Ms. Jones for her presentation and then asked Mr. Kauder, Principal from VisualResearch, to discuss the next item on the agenda, the Offender Risk Assessment Project - Evaluation Grant Proposal.

V. Offender Risk Assessment Project - Evaluation Grant Proposal

Mr. Kauder proposed to the members a practitioner-researcher partnership between the Sentencing Commission and the National Center for State Courts (NCSC). The partnership would develop and execute a comprehensive research evaluation study guided by three primary goals: 1) to evaluate the development of an empirically based risk assessment instrument, 2) to evaluate the implementation, use, and effectiveness of the instrument and 3) to establish a database and methodology for a complete follow-up study on recidivism for offenders diverted through risk assessment use. He said that this project has the active support of the Virginia judiciary. The partners view this evaluation as a critical sentencing and corrections research project that has far-reaching practitioner and policy implications for state and local agencies. No other structured sentencing system embodies an empirically-based risk assessment process that is tied directly to prison populations and explicit diversion thresholds while still considering the full range of intermediate sanctions available with due regard for public safety concerns. The proposed evaluation will test how this has been accomplished, what have been the measurable outcomes of the effort, what problems have surfaced during implementation, and what the direct and broader implications are for the justice system. The 24-month cost of this project is \$237,787 and is being completely funded by a grant from the National Institute of Justice.

VI. Sentencing Guidelines Revision Study

Dr. Kern began discussion on this item by noting that much more work was required to prepare the presentence investigation data base for re-analysis to study the need for guidelines revisions. He reminded the Commission that the Department of Corrections had completely revised their data entry protocol for this data system and that numerous errors in test data runs had been detected by our staff. Our staff was still working closely with the Department of Corrections to check the data base to ensure its accuracy and completeness. Once the staff is convinced the data base is reliable, Dr. Kern said our staff will prepare it for our new analysis. This analysis would proceed by examining those offense groups with the lowest compliance rates (violent crimes) and those that have been targeted for special analysis (larceny – embezzlement cases). Dr. Kern expressed hope that this new analysis could proceed by mid-summer.

VII. Miscellaneous Items

Dr. Kern initiated discussion on a number of miscellaneous items. He noted that a request had come to him from Frank Green, a reporter with the Richmond Times-Dispatch, for access to the Commission's data base. Mr. Green had expressed a desire to obtain information on judge specific compliance rates. Dr. Kern had told Mr. Green that the Commission was meeting soon and he would present the request at that time.

Judge Gates noted that it had always been the position of the Commission that there would be no compiling of data on judge specific compliance rates. He observed that the Attorney General's office had advised the Commission that we were under no obligation to compile such data and release it to the public. Mr. Petty, however, stated that he felt that a request for the data base was different from a request to compile data and that, under current law, the Commission would have a very difficult time denying such access when requested. Judge Gates asked Mr. Ferguson for his input on such a request. At this time (11:50 am), Mr. Ferguson made a motion for the Commission to go into an executive session to discuss the issue of data base access and compilation of judge specific compliance information. The executive session lasted for approximately 25 minutes. Upon resumption of the meeting, Lane Kneedler noted that the executive session included a discussion solely on the matter for which the session was called.

Judge Gates next asked Dr. Kern to cover a number of miscellaneous items left on the agenda.

Dr. Kern introduced the new research associate, Linda Birtley. She will oversee the grant-funded project to develop a proposal for a new juvenile sentencing database.

With no further business, Judge Gates then asked the Commission to discuss future meeting dates for 1998. Dr. Kern said that the Sentencing Commission meeting schedule for 1998 was June 22, September 28 and November 16.

Judge Gates then told the Commission members that Dr. Kern would have surgery tomorrow to remove his left kidney. He continued by saying that Dr. Kern would be out on medical leave for at least two weeks.

With no further business on the agenda, the Commission adjourned at 12:20 p.m.