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The Virginia Criminal Sentencing Commission
September 28, 1998
Meeting Minutes

Members Present:
Judge Gates, G. Steven Agee, Judge Bach, Jo Ann Bruce, Frank Ferguson, Judge Honts, Henry Hudson, Judge Johnston, Lane Kneedler, Judge McGlothlin, William Petty, Reverend Ricketts, Judge Stewart and Bobby Vassar

Members Absent:
Mark Christie, Peter Decker, and Judge Newman

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

Agenda

Approval of Minutes

Approval of the minutes from the July 31, 1998 meeting was the first item on the agenda. The Commission unanimously approved the minutes.

The second item on the agenda was a report on the Evaluation Work Plan for the Risk Assessment Project. Judge Gates asked Dr. Brian Ostrom from the National Center for State Courts to discuss this item on the agenda.

Evaluation Work Plan: Risk Assessment Component

Dr. Ostrom announced to the Commission that the grant request for federal funds from the Justice Department to support an independent evaluation of the risk assessment project was approved and the money has been received. He said the grant award establishes a practitioner-researcher partnership between the Sentencing Commission and the National Center for State Courts (NCSC). The grant project is scheduled to cover two years. The members were given a two-page overview of the project that included an abstract and details of the seven key tasks of the evaluation. Mr. Ostrom said that he and his colleague, Neal Kauder, would discuss the seven tasks.

The first task is a meeting between the partners to finalize the evaluation methods and goals. The partners will meet early in the project to review the progress of the pilot study, review potential sources, and finalize the strategy for evaluating the pilot project. Mr. Ostrom said that staff from the NCSC has planned to meet with several staff from the Sentencing Commission in October to discuss the project.
Mr. Kauder discussed the second task which is to evaluate the process by which the initial risk assessment instrument was developed. This process evaluation will begin

with NCSC project staff conducting a critical appraisal of the methodology used by the Sentencing Commission in the building the risk assessment instrument. This will involve an evaluation of the construction sample, the selection and coding of potential predictors, the weighting procedure, and the selection of the cut-off point between low and high risk offenders.

The third task is to conduct an evaluation of the pilot test of the risk assessment instrument in various judicial circuits in Virginia. This part of the process evaluation will involve three distinct tasks. Dr. Ostrom said that this task will take the most time and resources. The task is to gather substantially more information than currently available on offender placement into alternative punishment programs (e.g., specific substance abuse treatment, vocational training, etc.); conduct a detailed follow-up analysis of participant success and failure; and assess the effectiveness of the risk assessment tool in measuring the probability of success (i.e., not re-offending). The fourth task will examine the judicial use and assessment of the instrument. This part of the study will involve more qualitative data and involve interviews with judges and probation officers. The fifth task will evaluate the workload implications for probation officers if it is decided to implement statewide the risk assessment instrument.

Mr. Kauder discussed the sixth task that involves the development of a methodology and baseline database for evaluating the predictive validity of the risk assessment instrument. The time constraints of the current grant award (two years) and the nature of the criterion variable (which requires a three-year follow-up to assess recidivism) preclude a definitive statement as to the predictive validity of the risk assessment tool. He said as a consequence the current research will develop a database containing the information needed to conduct a comprehensive test of the predictive validity of the instrument and also conduct a preliminary analysis (a one-year follow-up) of the predictive validity of the instrument. He said that there is also the possibility that a grant continuation will be awarded by the Justice Department to facilitate a more thorough review of the recidivism issue.

Dr. Ostrom concluded with a discussion of the last task that is the preparation of the work products. The Virginia risk assessment experiment represents the first of its kind in the nation and there is likely to be considerable nationwide interest in the results. Upon completion of all data collection and evaluation analysis, project staff will draft a policy report, designed and presented in a fashion that can be easily consumed by judges, government agencies, legislators, and other decision-makers who are in a position to affect sentencing policy. At this juncture, he asked the members if they had any questions about the evaluation project.

Mr. Petty commented that one of the complaints he has heard is that drug offenders are included in the risk assessment work sheets. He asked if the project would look at the offenses separately so the Commission could tell if the drug offenders have a different rate of recidivism from other offenders. Dr. Ostrom responded affirmatively that the evaluation would include an analysis by offense. Mr. Vassar inquired about the definition of “failure” to be used in the evaluation study. Dr. Ostrom said that offenders

placed in alternative punishment programs will be tracked to see if all program requirements were completed. The offenders will also be monitored for a period of three years after release from their sanction. Several data bases, such as the automated criminal history record system, the PSI data system, and the Commission's own data bases will be used to identify any new criminal activity. The evaluation project will tell us how accurately the risk assessment has predicted the offenders who are unlikely to re-offend. As noted earlier, the length of the grant is only two years so the operative definition of "failure" in the initial analysis will be recidivism that occurs within a one-year follow-up period. Dr. Ostrom said that they may need to ask for a extension on the grant if the Commission would like to continue the project beyond the one year follow-up.

Mr. Vassar asked if the evaluation was going to track offenders that were not eligible for risk assessment for comparison purposes. Dr. Kern said that offenders recommended for risk assessment who did not receive an alternative will be tracked. The Commission staff will monitor recidivism of these offenders, but most of these offenders will not be released for at least a year. The recidivism analysis will take longer for these offenders than those recommended and sentenced to an alternative. Mr. Vassar asked if the Commission was going to track the offender population at-large who are not eligible for risk assessment. Dr. Kern said that such an analysis could be done but, depending on how recidivism is measured, it could consume more staff time and resources than is covered in the grant award. If new recidivism was measured in terms of a new felony conviction in Virginia, then it will be relatively easy to establish a baseline failure rate for the non risk assessment offender population. Mr. Vassar remarked that he would like to see this analysis with a break down between violent and non-violent offenses.

Judge Stewart commented that he felt two years was too short a period for this project. He felt that a continuation on the project would prove to be less expensive than the start-up of the evaluation. Judge Stewart asked Dr. Ostrom to please keep the Commission advised on this matter. Judge Gates thanked Dr. Ostrom and Mr. Kauder for their presentation. He then introduced Walt Pulliam from the Department of Corrections (DOC) to talk about an update on community corrections.

Virginia Dept. of Corrections: Update on Community Corrections

Mr. Pulliam began by presenting a chart summarizing the sentencing options for state felons. He also handed out a Community Corrections Status Report for FY1998. He pointed out that the range of community corrections options for felons spans from the least restrictive option (probation) to the most restrictive sanction (Detention Center Incarceration). He observed that the General Assembly recently funded some expansion on the number of day reporting centers. He said currently there are six active day reporting centers and four additional centers are planned in FY99. These new centers will target the greater Wise County, Martinsville, Harrisonburg, and Chesapeake areas. He also added that some areas are also providing interactive "drug court" services with the day reporting centers. In these areas, drug offenders are directed to some specific

substance abuse treatment. Overall, the day reporting centers provide daily contact and monitoring of offenders. Mr. Pulliam noted that some offenders in the day reporting program are given intensive substance abuse treatment, aftercare/relapse prevention counseling, or life skills and vocational training.

Mr. Pulliam continued by providing an overview of Diversion Centers. The Diversion Center is a residential facility where the offenders are released each day to work in the community. The program staff monitor offenders in the community and perform random urinalysis testing. Programs provided within diversion centers include employment counseling, substance abuse education, basic education, and coping with domestic violence. A male diversion center opened in Harrisonburg on July 20, 1998 and a female diversion center opened on August 4, 1998 in Southampton. The Chesterfield Diversion Center program is currently full with a long waiting list. The General Assembly did authorize one additional detention center in our four administrative regions and one male and female diversion center in each of the four regions. The Department of Corrections was pleased with this decision from the legislature.

Mr. Pulliam referred the Commission members to a memorandum written by Gene Johnson, Deputy Director of the Department of Corrections. The memorandum stated that beginning November 1, 1998, the current three custody levels will be replaced with six classification assignments levels. Implementation of the new system will be phased in over the next twelve months in conjunction with an inmate's annual review. He said once the conversion is complete, current custody levels will be discontinued.

Mr. Pulliam then spoke about the drug sentencing guidelines work sheet. He said that the Department of Corrections would like to propose to the Commission a modification to the drug guidelines recommendation for offenders convicted of selling small quantities of cocaine (i.e., one gram of less) who have no prior felony record. Currently the recently revised guidelines for these cases include two options for judges: a relatively short period of traditional incarceration or placement in the detention center incarceration program. The DOC would like the Commission to consider expanding this recommendation to also include the diversion center program or boot camp incarceration program. He observed that the diversion center option in these cases could be seen as more problematic than the boot camp since the offender is out in the community on work projects. He pointed out, however, that the first thirty days in the diversion center is filled with a highly intense substance abuse education class. This time period provides an opportunity for the staff to figure out if the offender has learned anything from the class. The diversion center also does conduct random urinalysis and K-9's are brought to the center for random searches of offender's lockers.

Mr. Pulliam continued by saying that the Department of Corrections has been noticing more consecutive sentences that include combinations of detention and diversion centers. The Code of Virginia does not explicitly prohibit this type of sentence. He felt that one issue is that the diversion centers are filled with detention center graduates. In some cases, this sentence is the best for the offender but it does take spaces in the diversion center program away from new offenders. This type of consecutive sentence does make

sense but administratively it requires more available spaces in programs that are limited in this regard.

Mr. Vassar asked if work release is still a community corrections program. Mr. Pulliam responded that the DOC has been contracting with local jails to hold work release offenders so the offender can stay near his home, family and place of employment. Mr. Petty asked if the Department of Corrections could handle the number of offenders being diverted in the pilot project areas. Mr. Pulliam said he does not have an answer to that question at this time.

Judge Gates thanked Mr. Pulliam for his presentation. He then asked Ms. Jones to discuss the next item on the agenda, an update on the offender risk assessment project.

Offender Risk Assessment Project – Data Update

Ms. Jones began by saying that the members would not see a significant change in the risk assessment data analysis since the last Commission meeting. The Commission has received almost 400 more forms since the last analysis in July but the trends have remained constant from those reported to the Commission at its last meeting. Between December 1, 1997, through September 21, 1998, the Commission received 1,247 risk assessment cases. The majority of the cases (46%) were received from Circuit 19 and Circuit 14 (25%), while Circuit 5 (16%) and Circuit 22 (13%) submitted close to the same number of worksheets. Ms. Jones presented a chart that displayed the number of risk assessment forms that were not analyzed (702). Almost two-thirds of these cases were recommended for probation (459). The remaining 259 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, possession with intent, etc. of cocaine of a combined quantity of one ounce or more or problems in completing the forms.

Ms. Jones next focused attention on the cases (n=545) that were scored on the risk assessment form. Ms. Jones separated these cases into four different groups. The first group of cases (n=80) consisted of those where the risk assessment instrument score recommended the offender for an alternative punishment and the judge chose to sentence the offender to an alternative (15%). The second group (n=113) included cases where the risk assessment instrument score did not recommend alternative punishment and the judge sentenced the offender to an alternative regardless (21%). The third group of cases (n=58) was composed of situations where the risk assessment recommends an alternative but the judge chose not to sentence the offender to an alternative (10%). The last group consists of cases (n=294) where the risk assessment does not recommend an alternative and the judge chose not to sentence the offender to an alternative sanction (54%). In over half of the cases, the risk assessment did not recommend an alternative and the sentencing judge concurred.

Ms. Jones continued by saying that of the 545 cases that were scored on risk assessment, 138 of the offenders were recommended for an alternative punishment. Among the 138

cases, 58% received an alternative sanction while 42% were not sentenced to alternative punishment. The 80 cases that received an alternative were also separated into three groups. The first group comprised offenders recommended for prison who received a probation sentence (n=49, 61%). The second group consisted of offenders recommended for prison who were sentenced to a jail term (n=11, 14%). The third group was composed of an "other" category (n=20, 25%). The "other" category included offenders that were recommended for jail but were authorized for work release, electronic monitoring, weekend incarceration or jail farm.

Ms. Jones continued by saying that of the 80 offenders recommended by the risk assessment instrument for an alternative, the judge sentenced 21 to a detention or diversion center. She then focused on those cases not recommended for an alternative. Of the 407 offenders not recommended for an alternative, 72% did not receive an alternative. The Commission has received 1,576 risk assessment forms to date and 619 offenders were eligible for risk assessment consideration. Ms. Jones noted that due to missing data on some of these forms, the number of eligible cases dropped to 545 offenders. Of the 545 cases, 138 offenders were recommended for an alternative sanction and 80 actually received an alternative punishment.

Ms. Jones next discussed several issues relating to risk assessment. Mr. Petty asked the staff to analyze the guidelines incarceration recommendation when an offender is recommended for an alternative. Ms. Jones responded that nearly half (47%) of these offenders were recommended for incarceration up to six months. She added further that 53% were recommended for incarceration with a midpoint of one year and four months.

Ms. Jones continued by saying that the Commission has recently seen a dramatic reduction in the number of risk assessment cases completed with the wrong form (i.e., the standard white colored guidelines forms) from the Henrico County Commonwealth's attorneys office. She stressed that this issue is important because the cover sheet of the proper form (i.e., yellow colored form) informs the judge if the offender is recommended for an alternative sanction. Another issue she discussed concerned problems in completing the risk assessment forms. She said the staff reviewed forms submitted by probation officers and those completed by the Commonwealth's attorneys and found overwhelmingly evidence of frequent errors on those forms completed by prosecutors. The majority of these errors centered on mistakes made in not completing the risk assessment form at all when it was appropriate to do so, or, conversely, filling out the form when the offender was ineligible. She mentioned that Dr. Kern would speak in more detail on this issue later in the meeting.

Mr. Kneedler observed that some of the evidence would lead him to the conclusion that the risk assessment project is not working. He referenced the chart that among 138 cases that were recommended for an alternative, only 58% of the offenders received an alternative sanction while 42% were not sentenced to alternative punishment. He asked if the judges are citing any reasons for not sentencing an offender to an alternative in these circumstances. Ms. Jones said that several judges have cited reasons but it is not required by the Code. Dr. Kern pointed out that the risk assessment project goal is to

recommend 25% of incarceration bound felons and that goal is being exceeded. Some higher risk offenders are being given an alternative sanction that does give the Commission some concern. Mr. Kneedler said he was concerned about the same factor.

Judge Gates thanked Ms. Jones for her presentation and then asked Ms. Farrar-Owens to discuss the next item on the agenda, Sentencing Guidelines Compliance Report.

Sentencing Guidelines Compliance Report

Ms. Farrar-Owens presented a series of charts to summarize the compliance rate patterns and trends. She explained that her oral presentation was condensed and a complete written compliance update was in the packets distributed to each member. The analysis in the packets included all cases received in FY1998. She said that over 57,000 cases have been sentenced under the truth-in-sentencing since January 1, 1995, so the data is analyzed by individual year. She proposed using FY98 data in this year's annual report. Ms. Farrar-Owens said that Dr. Kern would talk more about the annual report later in the meeting.

Recommended and Actual Disposition: For FY1998, over 20,000 work sheets were submitted to the Commission. Ms. Farrar-Owens said that judges are continuing to use probation and jail sanctions more often than they are recommended and prison sanctions slightly less often than recommended by the guidelines. For the purposes of compliance, detention center, diversion center and boot camp are considered incarceration.

Overall Sentencing Guidelines Compliance: Ms. Farrar-Owens commented that overall compliance with the guidelines was nearly 75%. The aggravation rate was reported as 12% and the mitigation rate, 13%. She noted that the Commission has received 20,482 for FY1998.

Compliance Within the Sentencing Guidelines Range: Given that the incarceration length ranges within the guidelines are sometimes rather broad, it is informative to examine where within the ranges judges sentence when complying with the guidelines. Ms. Farrar-Owens then presented a chart illustrating compliance within the sentencing guidelines range for cases in which the guidelines recommended an active prison term. She noted that 57.2% of the cases were sentenced below the midpoint while 23.5% were sentenced above the midpoint. 19.3% of the cases were sentenced at the midpoint exactly. Thus, about 77% of these prison terms were at or below the sentencing guidelines midpoint. In reviewing the average distance from the midpoint for sentences falling above and below it, Ms. Farrar-Owens noted that most of the sentences were clustered relatively close to the midpoint with a median departure range of five to seven months.

Compliance by Offense: Ms. Farrar-Owens observed that compliance rates within offense groups range from a high of 81% in the larceny offense group to a low of 62%

among the rape offenses. The rape offense group also has the highest rate of mitigation (27%). She noted that all of the violent offenses have a compliance rate below 70%.

Compliance by Circuit: Ms. Farrar-Owens stated that compliance rates varied greatly across circuits. The circuit-specific compliance rates range from a high of 86% to a low of 63%. Of those circuits with high compliance rates, Circuit 7 (Newport News) and Circuit 8 (Hampton) have compliance rates of 86% and 84% respectively. She also noted that seven circuits have compliance rates above 80% and eight circuits have rates below 70%. Sixteen circuits have compliance rates in the seventies.

Midpoint Enhancements: Next, Ms. Farrar-Owens discussed the compliance rates for cases that received midpoint enhancements. She stated that 79.9% of the 20,482 cases analyzed did not receive any midpoint enhancements. Of the 4,122 cases receiving a guidelines enhancement, 31.2% involved an enhancement based on a violent instant offense, 35.9% for a Category II violent crime, and 13.4% for a Category I violent crime. Cases involving both a violent instant offense and a violent prior record (Category I or II prior) comprised only 19.5% of the guidelines cases. Compliance by type of midpoint enhancement varies between a high of 72% in cases involving a Category II prior record, to a low of 64% for those cases receiving enhancements for an instant offense and a Category II prior record. The highest rate of mitigated departures was found in cases that had both a Category I prior record and an instant offense enhancement (29.6% mitigated departure rate). Mr. Petty asked if the staff had any information on the degree of variance dealing with mitigation on the most serious offenses. She said the staff could analyze the new data but that, in past cases, the degree of variation was usually a couple of years. Judge McGlothlin asked whether the data would indicate if the offenders with a Category I or II prior record were often on parole or probation. In addition, he asked if the Commission calculated extra additional imposed time on cases with a parole or probation revocation. Ms. Farrar-Owens said that the judge may cite the "legal restraint" factor as the departure reason. She said that the sentencing guidelines cases could be matched to the Pre-Sentence Investigation (PSI) and the impact of legal restraint in these cases could be analyzed. Dr. Kern said that the best approach would be to analyze offenders who receive the midpoint enhancements. Mr. Petty recommended that the staff research these enhancement cases to find out why there is a significant number of mitigation departures. Dr. Kern added that this type of analysis should be broken out by type of enhancement.

Reasons for Departure: Ms. Farrar-Owens next presented information concerning the reasons judges cite when sentencing above or below the guidelines. For the time period FY1998, when judges have sentenced below the guidelines they cited alternative sanction in 21% of the cases. Alternative sanctions include boot camp incarceration, detention and diversion centers, or any community-based program. In 19.9% of the mitigation cases, judges noted the offender's potential for rehabilitation as a rationale for imposing a term below the guidelines. When judges sentenced above the guidelines, they cited the offender's criminal orientation in 13.6% of the upward departures. In 15% of the aggravation cases, judges noted plea agreement – a departure reason that is not very helpful to the Commission when the data is analyzed.

Sentencing Guidelines Compliance in Jury Cases: Of the 418 jury cases, jury sentences were within the guidelines 43.3% of the time. Juries imposed sentences higher than the guidelines in 44.3% of the cases and imposed sanctions lower than the guidelines 12.4% of the time. Ms. Farrar-Owens observed that judges modified only 27% of the jury sentences.

Habitual Traffic: Ms. Farrar-Owens then spoke about the impact of changes in the habitual traffic offender statute. This modification allows judges to suspend the 12 month mandatory minimum incarceration term and sentence offenders to Detention Center, Diversion Center or Boot Camp Incarceration in cases where the judge feels an alternative sanction is appropriate. Of the 951 habitual traffic cases sentenced in FY1998, only 11% 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 pointed out that not many habitual offenders are receiving one of these alternatives. It does not appear that that many judges are utilizing this sentencing option very often.

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 incarceration. The judge has the option to do either and be in compliance with the guidelines.

The Commission has received 340 cases of first-time felons convicted of selling a gram or less of cocaine in FY1998. These cases were targeted for the dual option guideline recommendation of either traditional incarceration or detention center incarceration. In 16% of these cases, judges have opted for incarceration in a detention center. In 7% of these drug cases it appeared that the boot camp incarceration program was selected. Approximately 12% of these drug felons received no incarceration and 20% received incarceration of six months or less. The remaining 40% 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 the 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. 107 offenders have received the new enhancement. In 15% of these cases, judges have opted for no incarceration or an alternative sanction. In 2.8% of these drug cases, the offender received incarceration of

12 months or less. Approximately 26% of these drug felons received incarceration of two years to four years.

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 179 sexual assault cases in FY1998 that involved victims younger than 13. In 16% of these cases, judges have opted for no incarceration or an alternative sanction. In 16% of these sexual assault cases, the offender received incarceration of 12 months or less. Approximately 27% of these sexual assault felons received incarceration of one year to two years.

Judge Gates thanked Ms. Farar-Owens for her presentation, then he asked Dr. Kern to discuss the next item on the agenda, the 1998 Annual Report Outline.

1998 Annual Report Outline

Dr. Kern presented a proposed outline for the 1998 Annual Report. He noted that last year's Annual Report proved to be a success with the Commission receiving many favorable comments on its content. Given the success of last year's report, the proposal for this year calls for a report that follows the same format. He said that Chapter One, the introduction, would be very similar to last year's report with a new section on the juvenile sentencing data system. Several sections in this chapter are the Offender Notification Program, inmate forecasting, Community Corrections Revocation Data System, and implementation of guidelines revisions. This first chapter will deal with the revisions and the implementation of the new manual that took place in July '98.

Dr. Kern said that Chapter Two of the Annual Report is very similar to last year's report. This section would include all the information Ms. Farrar-Owens just spoke about. Dr. Kern said that the staff would not include compliance by judge in this chapter. Similar to last year's report, a section will be dedicated to jury trial rate trends. Judge Gates commented that very few judges are using their authority to sentence an offender to an additional three years post-release time in a jury trial. Judge Gates felt that there should be some mention about this in the 1998 Annual Report.

The next chapter would cover risk assessment and sentencing guidelines and would be an in-depth discussion of the project. The material in this chapter would include the information that was presented by Ms. Jones, Dr. Ostrom and Mr. Kauder. This chapter would be a documentation of the development and implementation of the risk assessment instrument. There are several parts of the section that are new such as monitoring of risk assessment component, compliance rates for risk assessment component cases, and the evaluation of the risk assessment component. Dr. Kern also added that the staff has arranged a meeting with Circuit 4 (Norfolk) and Circuit 7 (Newport News) to discuss

adding these circuits to our pilot sites. Circuit 12 (Chesterfield), Circuit 13 (Richmond) and Circuit 8 (Petersburg) had also been suggested as pilot sites for the risk assessment study.

The next chapter in the report would address the impact of the new sentencing system. This chapter will detail the goals of the sentence reform and impact to date. One section of the chapter will analyze recommended and actual disposition for selected felony sentencing guidelines offenses. Judge Johnston mentioned that there were still some provisions in the law that allowed some felons to serve less than 85% of their incarceration time. He said that this occurs when a judge allows extra good conduct credit when a felon, serving his time in a local jail, is involved in certain work projects. Several Commission members thought that this undermined the integrity of the 85% standard set in the truth in sentencing legislation and should be brought to the attention of the legislature.

Dr. Kern then returned to a discussion of the impact chapter and noted that it will show that the actual incarceration rate under the new sentencing scheme is very close to the historical incarceration rate that the guidelines emulate. Dr. Kern also noted that the proposed chapter would include some discussion on the 1998 official jail and prison bed space forecast. Another section would be added to discuss the expansion of alternative sanction options that Mr. Pulliam spoke about earlier. This information would come from DOC and would detail when these programs are going to be expanded.

The final chapter of the Annual Report would include Commission recommendations and the future plans for 1999 and beyond. Dr. Kern asked the Commission to notify him if they have any other recommendations for this section. In summing up, Dr. Kern noted that the future plans section would include topics like continued monitoring and refinement of existing guidelines, implementation and evaluation of risk assessment, efficiency in work sheet automation and integration of intermediate sanctions in guidelines.

Dr. Kern noted that sections of the Annual Report would be distributed to the Commission at the next meeting and that any remaining sections would be mailed. A timetable would be followed to allow staff to integrate any revisions and have the report completed on time for the December 1, 1998 deadline.

Judge Gates next asked Ms. Farrar-Owens to cover the next item on the agenda, Substance Abuse Services for Offenders, a status report.

Substance Abuse Services for Offenders – Status Report

Ms Farrar-Owens began by saying that during the most recent session of the General Assembly, legislation was passed which requires that all adult felons undergo screening and assessment for substance abuse problems prior to sentencing. The legislation also mandates that pre-sentence reports be prepared in every felony case.

She said there are other aspects to the legislation which affect criminal justice populations other that adult felons. The legislation requires screening and assessment of adult offenders convicted of a 2nd DUI or a Class 1 drug misdemeanor and also screening and assessment of juveniles adjudicated for felonies and Class 1 and 2 misdemeanors. She then focused on the relevant portion of the legislation for the Commission that deals with the adult felon population.

When the Crime Commission studied this issue they learned that no one could tell them how many offenders had substance abuse problems and were in need of treatment. The only information available was anecdotal which estimated that around 70-80% of offenders had substance abuse problems. Ms. Farrar-Owens said that it's difficult to plan for the right distribution of treatment services when no one really knows how many offenders have a need and what types of services they require.

Ms. Farrar-Owens reported that the goal of the legislation is to identify the number of offenders who have substance abuse problems through the screening and assessment process. A full substance abuse assessment can also tell you what level and types of treatment are appropriate for a particular offender. Once it is known how many offenders need treatment and what types of treatment are called for, then the gaps in Virginia's treatment network can begin to be addressed. Money can be spent for services that are needed most.

The effective date of the legislation was delayed a year, until July 1, 1999, so that an implementation plan could be developed. She said that an Implementation Work Group composed of policy makers and agency heads was established to develop proposals on the best way to operationalize the legislative mandate. The Implementation Work Group must submit its recommendations in a report to the General Assembly by December 1 of this year.

Ms. Farrar-Owens continued by saying there are three subcommittees working on different aspects of the legislation. The Screening and Assessment Subcommittee, which she chairs, was tasked to select the most appropriate screening and assessment instruments and to make recommendations as to the best procedures for conducting screening and assessment of offenders. She then gave a brief update on the status of their work.

Ms. Farrar-Owens said that the subcommittee has developed a series of recommendations for the policy group to consider. The subcommittee has proposed that the screening and assessment be done in two stages. All the specified offenders should be screened for substance abuse problems, but only offenders identified by the screening instrument as likely having a substance abuse problem should be put through the complete assessment. The subcommittee picked a screening instrument that takes about five minutes to administer but, in a recent study, identified 93% of offenders who were drug or alcohol dependent.

Based on the legislation, the results of the screening and, if indicated, the assessment, would be attached to the pre-sentence report and provided to the judge along with the sentencing guidelines in every felony case. The members of the Subcommittee from the department of Corrections have expressed their very grave concerns about the legislation as it is currently written. DOC's main problem with the legislation is the requirement of having pre-sentence reports in every felony case. DOC is concerned that the additional report writing requirements without additional resources will interfere with the supervision of offenders. The legislation will provide DOC with funding to upgrade one existing probation officer position in each district office to a senior level. Ms. Farrar-Owens said this will establish a certified substance abuse counselor in each probation office. These substance abuse counselors are supposed to conduct the screening and assessments. The legislation provides DOC with 24 new full-time positions to replace the upgraded positions. Ms. Farrar-Owens continued by saying that DOC has estimated their resource needs at 66 additional officers and offered an alternative proposal. They proposed that pre-sentence reports be mandatory for offenses which they believe are likely related to substance use or abuse. The offenses that they felt should be covered are assault, burglary, fraud, larceny and drug crimes. These comprise about 80% of new felony cases.

Ms. Farrar-Owens continued by saying that currently, if no pre-sentence report is ordered, a post-sentence report is prepared in nearly all cases and submitted to DOC for automation. That way the Sentencing Commission and the General Assembly have as complete a picture as possible of the universe of offenders being convicted and sentenced for felonies in Virginia. This is important not only for the work of the Commission but also for the General Assembly in terms of assessing the impact of proposed legislation. Under the DOC alternative proposal, if a pre-sentence report is not ordered and not required based on the offenses listed above, no PSI report would be completed at all. Post-sentence reports would be abolished. We would no longer have a complete picture of felony sentencings.

She said that over a course of several meetings, the members of the Subcommittee could not come to agreement. The policy maker group is going to meet in November. Both proposals will be presented at the meeting. Ms. Farrar-Owens said that she would keep the Commission informed on this matter.

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

Miscellaneous Items

Dr. Kern asked the members if there were any guidelines revisions they would like to recommend. The staff will show the members at the next meeting the proposed changes to the larceny work sheet that will incorporate extra points for the amount of money embezzled. He said that the staff may also propose changes to the miscellaneous work sheet that deals with repeat habitual offenders with a long record of traffic offenses.

Another situation that has been bought to the Commission's attention is habitual offenders who are also charged with an additional offense of driving under the influence, which is handled in the general district court and then appealed to the circuit court. The guidelines do not recommend added time for that offender but the general district court does often sentence the offender to time. This appears to be an inconsistency.

Dr. Kern said another matter bought to our attention was possession of cocaine offenses. Most judges feel that these offenders should not get prison time unless they are chronic offenders. He said that the staff would present recommendations on these matters and some others at the next meeting. He asked members again if they had any policy or guidelines recommendation to contact him before the next meeting. Mr. Petty felt that one issue that would be coming from the Crime Commission and deals with sex offenders accepting responsibility for their crime. He is fairly confident that this recommendation will go to the full Crime Commission. Dr. Kern said that we do not have any data on that issue. Judge Gates felt the Commission should wait till a decision has been made on that matter by the Crime Commission.

Dr. Kern next shifted attention to the definition of a state responsible prisoner. The Department of Corrections had recently sent a memo to sheriffs and jail administrators that they had receive a ruling from the Attorneys General's Office that felons sentenced to 12 months in jail will be considered a local responsible prisoner. In contrast, it was said that a felon that received a one-year prison term would be considered a state responsible inmate. Dr. Kern pointed out that the guidelines do not make a distinction between a 12 month and one-year sentence. Consequently, he felt that this interpretation of the law provided a distinction where there is none. One of the objectives of the sentence reform effort in 1994, he noted, was to simplify the sentencing system and eliminate nonsensical distinctions such as the difference between 12 month and one-year sentences. However, there does seem to be some confusion in the Code in regard to this matter. The fact that there remains some contradictory language in the statutes on this matter, likely reflects something overlooked rather than an intentional design to provide distinction between these two sentences. Frank Ferguson mentioned that the Attorney General's Office would be convening a meeting of concerned parties to discuss this matter and to try and reach a satisfactory resolution. It was decided that if no movement has been made on this matter by the next meeting, the staff will present the members will a policy recommendation on this issue.

The next item Dr. Kern discussed was the error rate on the preparation of the sentencing guidelines work sheets. He said that some concerns had been raised about the possibility of errors being made in the preparation of the guidelines work sheets. Specifically, Dr. Kern noted that concern had surfaced that some prior violent convictions were not always being identified on the guidelines worksheets and, consequently, offenders were being recommended for far more lenient sentences than what was appropriate. This information was presented to the Commission earlier in the year and it was decided that a random audit be undertaken to determine the pervasiveness of this problem.

The methodology for the audit study included a random sample of 2,400 sentencing guidelines cases that were matched to the PSI. This sample was also stratified by judicial training regions and the type of report (pre or post). The final sample consisted of 400 cases from each of the six judicial regions; 200 of which had a pre-sentence report, 200 of which had a post-sentence report. Error was defined as a failure to either score at all or correctly classify a violent prior conviction. Of the 410 cases characterized with a violent prior conviction, the overall error rate was 27%. Among the worksheets with errors, 36.5% were prepared by Commonwealth's attorneys while 16.6% were prepared by probation officers. The most frequent errors consisted of a complete failure to score a Category I or II enhancement (72% of these work sheets were prepared by Commonwealth's attorneys while 28% were prepared by probation officers). Another frequent error involved the scoring of a prior violent crime as a Category II enhancement when it should have been a Category I (83% of these work sheets were prepared by Commonwealth's attorneys while 17% were prepared by probation officers). Also, errors occurred where a violent prior crime was missed and resulted in work sheet C not being completed (81% of these work sheets were prepared by Commonwealth's attorneys while 19% were prepared by probation officers).

Mr. Petty wondered if most of these cases with errors involved plea agreements. Dr. Kern answered that plea agreements were prominent among the worksheets completed by prosecutors. However, even though a plea agreement is struck, Dr. Kern observed that the worksheet, if in error, presents the judge with an agreement based on missing important information. Dr. Kern noted that the high error rate among the prosecutors should not be seen as a poor reflection on the performance of the Commonwealth's attorneys. Instead, he said, the fault lies with the poor quality of the criminal history record keeping system maintained by the State Police. He asserted that the rap sheets that are produced by the Virginia Criminal Information Network are not comprehensive enough and are characterized with much missing and ambiguous information. Furthermore, despite a statute mandating the reporting of juvenile convictions to the State Police, very few are ever actually found on the rap sheets. Due to the poor quality of the source material, the worksheets produced by the prosecutors are often absent the complete scoring of criminal history. However, probation officers, as part of their preparation of the presentence report, perform an exhaustive check of juvenile and criminal history, using the rap sheets only as an initial source document in their research. As a result, the guidelines worksheets prepared by probation officers are much more complete and accurate than those done by prosecutors.

Dr. Kern concluded his presentation on this matter by displaying some audit results on work sheets completed in the risk assessment pilot study. Of the 295 risk assessment work sheets prepared by Commonwealth's attorneys, 90% contained errors. These errors included the complete failure to prepare the risk assessment form and the preparation of the form when a felon was ineligible for risk assessment consideration. Judge Gates commented that the audit results were disturbing in that these types of errors undermine the integrity of the new sentencing system. He requested the staff to prepare a recommendation on how to address this issue for the Commission to consider at its next meeting.

With no further business, Judge Gates reminded everyone that the next Sentencing Commission meeting is November 16, 1998, in the 3rd floor judicial conference room.

With no further business on the agenda, the Commission adjourned at 1:00 p.m.