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**The Virginia Criminal Sentencing Commission**  
**November 8, 1999**  
**Meeting Minutes**

**Members Present:**

Judge Gates, G. Steven Agee, Jo Ann Bruce, Judge Honts, Judge Johnston, Lane Kneedler, William Petty, Reverend Ricketts and Bobby Vassar

**Members Absent:**

Judge Bach, Mark Christie, Peter Decker, Frank Ferguson, Judge Hudson, Judge McGlothlin, Judge Newman and Judge Stewart

Judge Gates introduced Mr. Walt Pulliam from the Department of Corrections and Ms. Linda Pittman from the Parole Board. The meeting commenced at 10:05 a.m. and Judge Gates asked the Commission members to approve the minutes from the last meeting.

**Agenda**

**I. Approval of Minutes**

Approval of the minutes from the September 13, 1999 meeting was the first item on the agenda. The Commission unanimously approved the minutes.

Judge Gates then asked Ms. Farrar-Owens to present the second item on the agenda. He congratulated her on becoming the new Associate Director with the Commission.

**II. Virginia Sentencing Guidelines Revisions Recommendations**

Ms. Farrar-Owens said that she would be presenting, for the Commission's consideration, proposals for revisions to the sentencing guidelines system.

*First Recommendation*

The first proposed sentencing guidelines revision was to amend the miscellaneous offense to increase the scores for habitual offender statutes. An analysis revealed that compliance with the guidelines recommendations is 89% in cases of offenders with no prior felony habitual offender traffic violations, but is only 53% when the offender's record includes four or more of these prior convictions. The rate at which judges sentence above the guidelines recommendation rose dramatically as the number of prior convictions for felony habitual traffic violations increased.

To address this problem, the staff recommended that the Commission increase the score for prior felony convictions/adjudications when the primary offense is a habitual traffic violator. She noted that scoring of this factor in other types of cases would remain unchanged. Mr. Kneedler asked why this particular offense merited more time than the other miscellaneous offenses. Ms. Farrar-Owens explained that the compliance is so low in this category that she felt that it did merit some increase in points. Mr. Vassar asked if there might be other alternatives than simply voting to adjust the guidelines upon evidence that compliance rates are much lower than average. Judge Gates responded that our guidelines are based on historical data. He said that if current data shows that judges are sentencing outside the guidelines at a very high rate on a particular crime then the Commission should attempt to adjust the guidelines to reflect the more recent sentencing patterns.

Mr. Petty commented that this historical methodological approach to adjusting the guidelines should not be the only method used to revise the guidelines. Mr. Petty said that the Commission should break away from the pure reliance on historical data on this crime and be more proactive in terms of sentencing guidelines adjustments. He noted that last year the General Assembly repealed the Code sections covering the adjudication of habitual offenders. However there are still a large number of habitual offenders out there. He observed that the habitual offender laws target people other than the drunk driver. They also target people who don't pay their fines and those who drive after their license is revoked. Judge Johnston said that most of his habitual offender cases deal with the drunk driver who drives on a suspended license and not the person who has failed to pay a fine. Mr. Petty stressed that the increased sanctions being proposed for habitual traffic offenders should target repeat drunk drivers. With such an approach, Mr. Petty explained, the guidelines would address the offense behavior of greatest concern instead of focusing on a legal designation (habitual offender) that is no longer defined in the Code. Judge Johnston felt that Mr. Petty's suggestion was a good one and he supported that recommendation. Mr. Petty added that he felt that the guidelines should be expanded to cover the third and fourth DUI offense.

Judge Gates remarked that this might be an appropriate occasion to rely less on historical data and more on normative input in deciding to adjust the guidelines. A motion to adopt this proposal was made and seconded and Judge Gates asked the Commission for discussion. Mr. Petty asked if there was any possibility of enhancing the prior record scores for just those habitual traffic violators whose offense was associated with a DUI. Ms. Farrar-Owens responded that the guidelines range is rather broad so the judge could adjust his sentence based on this type of information.

Mr. Kneedler agreed with Mr. Petty's recommendation. He proposed a substitute motion that asked the staff to separate out the DUI-related habitual traffic offenses and recommend enhanced penalties for those repeat drunk-driving offenders. He summed up his motion by asking the staff to establish guidelines for the new DUI offenses and

enhanced penalties for habitual offender violators that include an alcohol-related offense. Judge Gates asked for and received a second to the substitute motion. Upon discussion of the substitute motion, Dr. Kern remarked that the Commission's data bases would not support an empirical analysis to devise guidelines per the specifics of the substitute motion. He suspected that the staff could approximate guidelines adjustments based on this direction but did not know how reliable it would be. Judge Gates asked the Commission to vote on the substitute motion. The Commission voted 5-2 in favor of the recommendation with two abstentions. Given the short amount of time until the Commission's Annual Report was due, Dr. Kern asked what procedures the members would like to use to review the staff's analysis and recommended guidelines adjustments for the motion just approved. Judge Gates asked the Commission if they would agree to the Executive Committee making the final approval of the new recommendation. A motion to adopt this proposal was made and seconded. Judge Gates asked the Commission for a vote. The Commission voted 9-0 in favor of the recommendation.

Dr. Kern said his understanding was that the staff would propose guidelines for the felony DWI to mirror what was proposed for the habitual traffic offender. Mr. Kneeder made a motion to affirm that understanding. The motion was seconded. Judge Gates asked the Commission for a vote. The Commission voted 9-0 in favor.

#### *Second Recommendation*

Ms. Farrar-Owens continued her presentation by presenting the second proposal for amending the miscellaneous offense sentencing guidelines. Ms. Farrar-Owens said that currently only two of the three acts delineated in §46.2-357 relating to habitual traffic offenders are covered by the guidelines. During the 1997 session, the General Assembly revised the habitual traffic offender statute to add a third type of felony habitual traffic violation. Prior to the change, the Code section delineated two acts that constitute felony violation of the habitual traffic offender law: driving with a revoked license after being declared a habitual traffic in a manner that endangers the safety of others, and driving with a revoked license after being declared a habitual offender without endangerment to others (second or subsequent offense). All three acts are punishable as a Class 6 felony and carry a 12-month mandatory minimum penalty. The staff recommended adding the newest habitual traffic offense behavior to the guidelines and proposed setting the scores for the Primary Offense factor on Section C of the miscellaneous guidelines to be equivalent to the scores for those habitual traffic violations already covered by the guidelines.

A motion to adopt this proposal was made and seconded. Judge Gates asked the Commission for a vote. The Commission voted 9-0 in favor of the recommendation.

#### *Third Recommendation*

Ms. Farrar-Owens said the next recommendation was to amend the miscellaneous sentencing guidelines to add violations of §§18.2-36.1(F2,3), 18.2-51.4(D2,3) and 46.2-

391 (D2,3). Last year, the General Assembly adopted legislation that changed how Virginia will sentence Driving While Intoxicated (DWI) offenders who operate a vehicle after the revocation of their driver's license. The legislature made it unlawful to operate a motor vehicle during a period when an offender's driver's license has been revoked due to a conviction for vehicular manslaughter, a conviction for maiming while drunk driving, or a second conviction for DWI. She said the three new Code sections carry an identical penalty structure and the penalty structure mirrors the existing penalty structure for felony habitual traffic violations under §46.2-357. The staff recommended adding the new offenses to the guidelines and proposed setting the scores for the Primary Offense factor on Section C of the miscellaneous offense guidelines to be equivalent to the scores for those habitual traffic violations already covered by the guidelines.

A motion to adopt this proposal was made and seconded. Judge Gates asked the Commission for a vote. The Commission voted 9-0 in favor of the recommendation.

#### *Fourth Recommendation*

Ms. Farrar-Owens said the next recommendation for guidelines revision was brought to the Commission's attention by a judge. This judge pointed out that an offender convicted of grand larceny (not from person) who has a prior misdemeanor conviction for which he received a prison or jail sentence is not recommended for a term of incarceration under the current larceny guidelines. Ms. Farrar-Owens presented data that revealed that the rate at which judges give offenders convicted of grand larceny (not from a person) a probation sanction without an accompanying term of incarceration declined as the number of prior misdemeanor convictions increased. The majority of offenders with four or more prior misdemeanor convictions received incarceration ranging from one day to six months. For 37% of grand larceny offenders who have one or two prior misdemeanor convictions/adjudications, the guidelines recommend incarceration up to six months, but more than 43% of these felons received such a sanction. The guidelines have received some criticism for not recommending incarceration time for an offender with this particular profile.

To address this particular concern, the staff proposed increasing the scores for prior misdemeanor convictions/adjudications on Section B of the larceny guidelines. This would increase the likelihood that a larceny offender with such prior convictions would be recommended for a term of incarceration under the guidelines.

A motion to adopt this proposal was made and seconded. Judge Gates asked the Commission for a vote. The Commission voted 9-0 in favor of the recommendation.

#### *Fifth Recommendation*

Ms. Farrar-Owens noted that currently the guidelines recommendations for felony homicide under §18.2-33 of the Code of Virginia are significantly less than the guidelines recommendations for second-degree murder. Prior to July 1, 1999, felony homicide was a

Class 3 felony, carrying a penalty range of five to twenty years. The General Assembly has increased the maximum penalty for felony homicide to forty years. The maximum penalty for second-degree murder had been raised from 20 to 40 years in 1993. The Code defines felony homicide as “the killing of one accidentally, contrary to the intentions of the parties, while in prosecution of some felonious act other than those specified. Despite the fact that each of these crimes now has the same statutory maximum, Ms. Farrar-Owens pointed out that the guidelines recommendations for felony homicide are far less than the recommendations for second-degree murder. The staff did not make a specific recommendation for the Commission on this issue other than to note that questions have been raised in the field about the differences in scores for these two crimes. Ms. Farrar-Owens asked the Commission if they wanted to increase the score for felony homicide to mirror second-degree murder or leave the felony homicide recommendation the same as it currently is.

Mr. Kneidler suggested that the Commission leave felony homicide as it stands now in the guidelines. Dr. Kern mentioned that he had received a call from a member of the General Assembly who was concerned about why the guidelines recommendation for felony homicide was so different than that for second-degree murder. He explained to the General Assembly member that the guidelines recommendation for felony homicide was based on historical practice and not statutory maximums. Felony homicide was an offense not targeted for a midpoint enhancement in the parole abolition legislation while second-degree murder received such an enhancement. Mr. Petty said he thought that felony murder was the unintentional killing of someone during the commission of a felony, which is also, he noted, deemed to be second-degree murder. Mr. Petty suggested removing felony homicide from the Murder/Homicide worksheet as a separate heading and instruct users to score felony homicide as second-degree murder.

A motion to adopt this proposal was made and seconded. Judge Gates asked the Commission for a vote. The Commission voted 9-0 in favor of the recommendation.

Ms. Farrar-Owens then commented that Dr. Kern would like to discuss another issue before moving to the next agenda item. Dr. Kern asked the Commission members to locate a handout in their folders that was on Parole Board letterhead. He remarked that this was a letter from Mr. James Jenkins, chairman of the Parole Board. Mr. Jenkins has requested a response from the Commission regarding a position on some proposed legislation. The legislation proposed by the Parole Board would amend the post-release supervision statute to require that all offenders who are sentenced under no parole after July 1, 2000, be placed on mandatory post-release supervision. Currently, post-release supervision is a discretionary act on the part of the judge. Almost all judges suspend some of the incarceration sentence and place the offender on probation when released from prison. This proposal would amend the statute to place the control and supervision of offenders released on post-release supervision under the Parole Board, which would establish conditions of release and have the power to revoke and order incarceration for

any offenders violating conditions of post-release supervision. The day-to-day supervision and monitoring of the offenders would be the responsible of probation and parole officers. An analysis faxed with the letter stated that the Department of Corrections said that 25% of offenders released from prison are not having any type of post-release supervision conditions placed on them. The analysis also stated that these cases represent a full range of crimes and sentencing. The letter from the Parole Board stated that this analysis led them to conclude that there were a significant number of felons being released with no supervision and that this represented a serious threat to public safety.

A projected fiscal impact was included with the Parole Board letter. This impact analysis concluded that this proposal would result in no immediate need for funds. The analysis stated that, due to workload increases in the future, the Parole Board would need one to three additional staff members.

In summary, this proposal by the Parole Board would require a judge to impose a post-release supervision term of six months to three years. According to the proposal, the Parole Board instead of the judge would supervise the offender. Dr. Kern remarked that because the letter and proposal had just been faxed to the Commission, he had not had any time to evaluate the data analysis prepared by Department of Corrections. However, Dr. Kern commented that he suspected that the percentage of felons being released from prison without any post-release scrutiny was much lower than the 25% figure quoted in the Parole Board proposal. Dr. Kern said that almost all felons have suspended time hanging over their head with the exception of habitual traffic offenders. Dr. Kern noted that this proposal may result in great duplication of supervision services for the Department of Corrections and have a dramatic impact on their already limited community corrections resources. In addition, he felt that there would likely be a significant impact on the prison population due to the duplicative revocation proceedings. Because of these serious resource implications, he suggested that the Commission staff analyze this data more thoroughly before reacting to this proposal. In addition to the resource concern, Dr. Kern observed there was the policy implication of reinstating a Parole Board function into the future after the abolition of parole release.

Mr. Kneedler said that when the General Assembly was considering the abolition of parole some people were concerned that truth-in-sentencing made sense but that the part that would be not be addressed was post-release supervision. However, at that time, data was presented to document that almost all felons would leave prison under some suspended sentences with judicial scrutiny. Mr. Kneedler agreed with Dr. Kern that the staff should explore this issue further with more detailed data analysis. Mr. Agee remarked that the conclusion reached by the parole board that this situation represented a threat to public safety should be backed up with some more detailed analysis. He questioned if this statement on the part of the parole board was philosophical or based on facts. Judge Johnston shared Dr. Kern's concerns about the reliability of the estimate

that 25% of felons were being released from prison without any supervision. He commented that in his experience this percentage was much too high.

Mr. Agee suggested that the staff look at the federal system. Mr. Petty said that while he did not have a problem with a mandatory post-release supervision period, he did have a problem with transferring that supervision from the court to the Parole Board. He remarked that in past years when the Parole Board was supervising offenders there was a tremendous backlog dealing with technical violations and some were precursors to new law violations. Mr. Petty felt that the courts, being in the community, would be in a much better position to deal with these offenders than the Parole Board situated in Richmond. Mr. Agee observed that if it were indeed true that 25% of the released offenders were unsupervised, then it would take more than three people to solve this problem. Judge Gates asked if the Commission wanted to take a formal position on this legislation. Mr. Kneedler recommended that the Commission refer the matter to the staff for a more complete analysis and, if the analysis did not converge with that presented by the Parole Board, to advise the Parole Board that the Commission could not find any empirical support for the need for the proposed legislation.

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A motion to adopt this proposal was made and seconded. Judge Gates asked the Commission for a vote. The Commission voted 9-0 in favor of the recommendation.

At this juncture in the meeting, Mr. Petty reminded the Commission that last year he recommended that the staff expand its study on embezzlement cases to include an analysis of the effect of dollar amount stolen in all larceny cases. At that time, the Commission staff did not have enough resources to do a complete study on both embezzlement cases and all other felony larceny cases. Now that the embezzlement study was completed and adjustments have been made to the guidelines to reflect the study results, Mr. Petty made a motion that the staff conduct a study on grand larceny cases to focus on amounts stolen in order to determine if appropriate enhancements to the guidelines should be made. He added that the failure of the guidelines to consider the value of property stolen is one of the biggest complaints he hears about the current version of the guidelines.

A motion to adopt this proposal was made and seconded. Judge Gates asked the Commission for a vote. The Commission voted 9-0 in favor of the recommendation.

Judge Gates thanked Ms. Farrar-Owens and Dr. Kern for their presentations and then asked Ms. Farrar-Owens to discuss the next item on the agenda, Sex Offender Risk Assessment Project – Initial Findings.

### **1III. Sex Offender Risk Assessment Study – Initial Findings**

Ms. Farrar-Owens said that she would present data on the findings of the initial analysis. She asked that the Commission consider these findings preliminary because staff is still expecting to receive rap sheets from the FBI. These rap sheets, she noted, are the best way to collect historical information on crimes committed outside the state of Virginia. The staff examined a variety of offender and offense characteristics in order to gain a better understanding of the circumstances surrounding sex offenses committed in Virginia and the individuals convicted of these crimes. Of the 581 study cases, the most common instant offense was aggravated sexual battery. Sex offenders in the study received a broad array of punishments for the instant offenses they committed and the punishments varied by the type of crime. Nearly all forcible rape and forcible sodomy offenders were sentenced to incarceration of one year or more.

The staff obtained hard copies of the PSI reports for the study cases and extracted rich offense detail from each report's narrative section. The data revealed that nearly two-thirds of the victims experienced some kind of penetration during the assault. When penetration was reported, it was mostly vaginal penetration although more than one-quarter of the penetrations were committed orally. Multiple types of penetration were recorded in some cases. The majority of the victims of the sexual assaults were minors.

The data also revealed that offenders in the study sample were most likely to use a position of authority as the mode of committing the sex offense. Offenders in a position of authority assaulted 42% of the victims in the study. Mr. Kneedler felt that the annual report should include definitions and hypothetical situations to explain the mode of offense. Data was also recorded that includes the location of each sex offense. Overall, more than two-thirds of the victims were assaulted in a residence. Nearly a third of the victims were assaulted in a residence that they shared with the offender.

The data collection also revealed that only 15% of the victims did not know the offender at the time of the assault. In over 80% of the cases, the offender was known to the victim at the time of the offense. In over one-third of the cases, the offender was a member of the family, such as a step-parent.

Ms. Farrar-Owens presented a series of charts on the rates of recidivism. Those offenders whose instant offense was aggravated sexual battery were the most likely to re-offend within a five-year follow-up. The data also indicated that younger offenders were more likely to recidivate than older offenders. She said that almost 40% of the sex offenders convicted between the ages of 20 and 27 were re-arrested for a new person or sex crime. Reverend Ricketts asked if this data includes out-of-state convictions. Ms. Farrar-Owens said this data did not at this time. Accordingly, she remarked that the recidivism rates were likely to increase with the addition of FBI data.

She then discussed some initial models for preliminary analysis. To analyze the recidivism data, the staff will use three sophisticated statistical methods. Different



analysts perform the two methods independently. The preliminary models generated by each method can be compared. She spoke on the preliminary results on each model.

Mr. Kneedler asked if the victim injury categories could be broken down to threat of violence and physical violence instead of being grouped together. Ms. Farrar-Owens felt that the categories could be divided up.

Dr. Kern discussed the fact that the Legislative Joint Study Resolution has given the Commission the green light to develop and implement a risk assessment instrument for sex offenders. The study is not yet completed but the preliminary results just discussed would be included in the Commission's annual report. The analysis is not far enough along yet though to propose a risk assessment instrument for sex offenders. The staff will not be ready to present a risk assessment instrument until April, 2000.

Judge Gates thanked Ms. Farrar-Owens for her presentation and then asked Mr. Walt Pulliam from the Department of Corrections to discuss the next item on the agenda, Drug Screening, Assessment and Treatment Program for Felons.

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#### **6IV. Drug Screening, Assessment and Treatment Program for Felons**

Mr. Pulliam began by saying that he wanted to update the Commission on sex offender supervision. He said that the department is pilot testing sex offender supervision in nine district offices. A specialized officer has been hired to deal with these offenders. The officer is trained in polygraph procedures, clinical assessment and treatment.

Mr. Pulliam reported that several community corrections facilities have been added since the Commission's last meeting. One new facility is in Clarke County where a work center has been converted to a detention center. That facility has been receiving inmates since August. Another facility has been changed to a diversion center. Mr. Pulliam said he was very proud that the probation and parole system in Virginia got national accreditation with the American Correction Association.

Mr. Pulliam provided a folder for each member that included an overview of the drug screening, assessment and training program. The purpose of screening is to identify potential candidates for treatment intervention as early as possible in their criminal justice processing and to interrupt their cycles of addiction and crime. He said that this screening does not require extensive training. An initial screening is useful in separating those who are likely to be addicted from those who are not. Mr. Pulliam pointed out that defendants, including adults and juveniles, who commit the specified offenses on or after January 1, 2000 will be screened and, if indicated, assessed for substance abuse problems.

Screening will occur prior to sentencing in all applicable felony cases. He presented a copy of the screening instrument to the members of the Commission. The screening instrument is a preliminary evaluation that attempts to measure whether critical features of a target problem (drug or alcohol abuse) are present. This is a major undertaking for the Department of Corrections. He said that all the details are still being worked out within the Department.

Judge thanked Mr. Pulliam for his presentation. He then next asked Dr. Kern to cover the next item on the agenda, 1999 Annual Report Draft.

## **V. 1999 Annual Report Draft**

Drafts of the two largest chapters are completed and in the member's folders. Dr. Kern gave the Commission a quick overview of two chapters of the annual report. He said these chapters are drafts and the final report of the Commission is due on December 1, 1999. He asked the members to review these chapters and give him feedback at their earliest convenience. The staff will also send the members the additional chapters in the next week. Dr. Kern stressed that the feedback from the members should be completed by the end of November.

Dr. Kern then focused on the impact chapter of the annual report. He said this chapter includes the impact on the percentage of sentences served by felons, incarceration periods served by violent offenders, alternative punishment options, and recidivism by inmates released from prison.

Judge Gates then asked Dr. Kern to cover the final item on the agenda, Miscellaneous Items.

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## **8VI. Miscellaneous Items**

Dr. Kern first asked the Commission to discuss a data request from Ms. Monahan, a staff member of the Gender Bias Task Force chaired by Justice Lacy. Judge Gates said he would really like to cooperate if the staff has the ability and time to furnish the request. Dr. Kern distributed a written request from the Gender Bias Task Force about the analysis they would like completed. He commented that the Task Force had scaled back their original proposal. Dr. Kern said that the revised analysis request was very manageable and would not involve a large amount of staff time. The Gender Bias Task Force would like the staff to analyze sentencing guidelines compliance data focusing on Fiscal Year 1999 for four offenses (prescription fraud, possession with intent to distribute a Schedule I/II drug, issuing bad checks \$200 or more, and unlawful wounding). The staff could complete this analysis contingent upon the Commission's approval.

Mr. Agee inquired as to how the Gender Bias Task Force arrived at their decision to focus on the four offenses specified in the written request. He also questioned how the Commission has handled similar requests from other agencies with regard to budgetary impact on the Commission's resources. Dr. Kern responded that the Commission did not receive additional funding for such ad hoc analysis requests. With respect to the Gender Bias Task Force request, Dr. Kern felt that the analysis would take one analyst only a couple of days to complete and, therefore, would not have any significant budgetary implications. With regard to Mr. Agee's first question, Dr. Kern remarked that it was his impression that the Task Force selected those four offenses because they believed that these felony crimes involved a larger proportion of females than other felony crimes.

Mr. Petty commented that three of the four offenses in the Gender Bias Task Force request are primary offenses but unlawful wounding is usually a lesser charge of malicious wounding. He suspected that some disparity might be revealed in the analysis with respect to those convicted of unlawful wounding. He suggested that the Task Force consider adding malicious wounding to the analysis for comparison purposes. Mr. Petty made a motion to include the offense of malicious wounding to the analysis request.

A motion to adopt this proposal was made and seconded. Judge Gates asked the Commission for a vote. The Commission voted 9-0 in favor of the recommendation.

Dr. Kern advised the members that a crime report from the Department of Criminal Justices Services was included in their packets.

Judge Gates reminded everyone that the next Sentencing Commission meeting would be determined in January.

With no further business on the agenda, the Commission adjourned at 12:25 p.m.