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The Virginia Criminal Sentencing Commission
June 12, 2000
Meeting Minutes

Members Present:

Judge Gates, G. Steven Agee, Judge Bach, Frank Ferguson, Judge Honts, Judge Hudson, Judge Johnston, Lane Kneedler, Judge Newman, William Petty, Reverend Ricketts, and Bobby Vassar

Members Absent:

Jo Ann Bruce, Mark Christie, Peter Decker, Judge McGlothlin and Judge Stewart

The meeting commenced at 10:10 a.m. and Judge Gates then asked the Commission members to approve the minutes from the last meeting.

Agenda

I. Approval of Minutes

Approval of the minutes from the April 10, 2000 meeting was the first item on the agenda. The Commission unanimously approved the minutes.

The second item on the agenda was a report on Sex Offender Risk Assessment Instrument. Judge Gates asked Ms. Farrar-Owens to discuss this item on the agenda.

0 Sex Offender Risk Assessment Instrument

Ms. Farrar-Owens reported that the Executive Committee met on May 8, 2000 to continue the discussion on the sex offender risk assessment instrument that left off at the last full commission meeting on April 10, 2000. The Executive Committee discussions were very productive and they made several recommendations that were distributed to all Commission members.

One of the first issues that the Executive Committee addressed was the selection of a model for the study. Ms. Farrar-Owens said there were two different analytical models used in the data analysis. The first model's analytical method (Method 1) required the same follow-up period on every offender. The set follow-up period tracked offenders for a five-year period to see whether recidivism occurred. Method 2 allowed for a variable follow-up period that ranged from five to nine years. Some prior research on sex offenders has concluded that longer follow-up periods are desirable because sex offenders recidivate

at a slower pace than other types of offenders. The Executive Committee recommended to the full Commission that Method 2 be used.

Ms. Farrar-Owens presented a chart that was shown at the last Commission meeting in April. She identified significant factors in predicting recidivism by relative degree of importance for both methods. Both methods had nearly all the same factors but the relative importance of the factors varied. For example, under the second method, offender age, offense location and prior arrest record were the strongest indicators of recidivism. Regardless of whether Method 1 or 2 is used, all the worksheet factors are the same except age at first juvenile adjudication. There is however, more emphasis on age, offense location and prior arrest record on the worksheet premised on Method 2.

Ms. Farrar-Owens displayed a chart that showed rates of recidivism by various levels of predicted risk for both models. Offenders were scored out on both instruments and labeled low risk, some risk, high risk and very high risk of recidivism. She said that both models do well in identifying non-recidivists scoring at the low levels and recidivists scoring at the highest levels on the instrument.

A chart was displayed that converted the significant variables from Method 2 into factors on a sentencing guidelines worksheet. Only one adjustment over that previously shown was made to the worksheet. Penetration or attempted penetration of the victim was increased from three to four points when the primary offense was aggravated sexual battery.

Judge Gates asked the Commission members to vote on the recommendation presented by the Executive Committee. A motion to accept the recommendation as proposed was made and seconded and the motion was approved.

Ms. Farrar-Owens then presented the second recommendation proposed by the Executive Committee. The issue was whether or not high-risk offenders should always be recommended for a term of incarceration that exceeds six months. As discussed at the previous Commission meeting, not all offenders who score high on the risk assessment scale were recommended for prison. The very high-risk group went to prison only three-fourths of the time. Nearly all offenders in the study labeled high risk who received a probation or jail sanction did, in fact, recidivate. In order to ensure that all offenders with high scores receive a prison recommendation a modification would be needed. The recommendation was to assess offender risk prior to completing all of the guidelines work sheets. The Executive Committee proposed adding a factor to Section A of the Other Sexual Assault guidelines to ensure that higher risk sex offenders are always recommended for more than six months incarceration.

Judge Gates asked the Commission members to vote on the recommendation presented by the Executive Committee. A motion to accept the recommendation as proposed was made and seconded and the motion was approved.

The next proposal dealt with the question of should the sentencing guidelines recommendation be modified based on the results of sex offender risk assessment. At the last full Commission meeting, several options were reviewed for incorporating risk assessment information into the guidelines recommendations for sex offenders. These options ranged from noting that the offender fell into different risk categories (high, moderate, low) to providing a specific risk of recidivism probability for each evaluated offender. Options were also discussed with regard to what, if any, changes should be made to the guidelines recommendation based on projected risk.

The Executive Committee recommended, in principle, that the upper end of the sentencing guidelines range be increased for those sex offenders determined by risk assessment to be at high risk of recidivism.

Judge Gates asked the Commission members to vote on the recommendation presented by the Executive Committee. Judge Gates asked the Commission to vote on the Executive Committee's recommendation. A motion to accept the recommendation as proposed was made and seconded and the motion was approved.

The fourth issue taken up by the full commission was what levels of risk represent the greatest threat and what specific adjustments should be made to the sentencing guidelines based on risk assessment.

In the Commission's study of convicted sex felons, each of the 28 offenders who received a risk assessment score of 44 or greater was found to be a recidivist. For this grouping of sex offenders then, the overall recidivism rate was 100%. It was felt that sex offenders with a risk assessment score of 44 or more pose the most significant risk to public safety.

The Executive Committee recommended that those offenders receiving a score of 44 or more points on the sex offender risk assessment instrument have the upper end of their recommended sentencing guidelines range increased to reflect the statutory maximum penalty for the primary offense. Furthermore, the Executive Committee recommended that the recommended sentencing guidelines midpoint for these cases be set equal to half the maximum statutory penalty for the primary offense.

Judge Honts asked why offenders who scored 31 points recidivated at a rate of 32% while those who scored 30 points recidivated at a rate of 62%. Ms. Farrar-Owens said it is normal to see some type of statistical fluctuations like that in a small number of cases for some scores. Mr. Petty said he had some concerns about sentencing sex offenders on the basis of research conducted on an earlier sample of similarly situated sex offenders.

Mr. Petty expressed confidence that the research was sound but said he was not convinced that the risk assessment tool could be applied properly. Judge Gates remarked that he recently attended a Department of Justice conference that highlighted some recent research on sex offenders. Among the findings presented at the conference was the conclusion that many sex offenders recidivate but that it sometimes takes quite some time before their new criminal acts come to the attention of law enforcement authorities. Also, among those sex offenders who are caught, most do not serve any time in prison. Judge Gates indicated that the conference proceedings had a profound effect on him and he remains convinced that sex offenders present a unique and serious problem and that if the Commission can offer judges some help in this matter then it should do so.

Mr. Kneedler felt that the point that Mr. Petty raised was very valid but it is also applicable to guidelines in general as it is to this category of offender. He observed that the earlier sentencing guidelines committee initially experienced the same discomfort about guidelines based on research performed on a previous group of sentenced felons. He went on to note that the Sentencing Commission today is more comfortable with the application of this type of methodology in crafting guidelines. In fact, Mr. Kneedler said, the fact that the guidelines are predicated on research on previously sanctioned Virginia felons is a strength as opposed to other guidelines that might have no foundation in historical research.

Judge Gates asked the Commission to consider the next issue with the previous issue when voting. The next issue was beyond the highest level of offender risk, what level represents the next greatest level of risk of recidivism and what specific sentencing guidelines adjustments should be made for those sex offenders who are assessed at this level?

Ms. Farrar-Owens commented that in the Commission's study of convicted sex felons, offenders with individual risk assessment scores of 33 points up through 43 points all reported recidivism rates that met or exceeded 50%. Among the 134 convicted sex felons who received a risk assessment score between 33 and 43 points, 90 were found to be recidivists. For this grouping of offenders then, the overall recidivism rate was 67%. Convicted sex felons with risk assessment scores within this range were judged to be an appropriate category for an adjustment in the sentencing guidelines that took into consideration this relative level of risk of recidivism. The Executive Committee recommended that those offenders receiving a sex offender risk assessment score of at least 33 points up through a score of 43 points have the upper end of their recommended sentencing guidelines range increased by 100% and any score over 44 would receive a 300% increase. They also recommended that those offenders receiving a sex offender risk assessment score of at least 28 up through a score of 32 points have the upper end of their recommended sentencing guidelines range increased by 50%. A score less than 28 would receive no change.

Ms. Farrar-Owens displayed a chart that showed the Rape Section C Recommendation Table with the proposed enhancements that would target offenders with elevated risk assessment scores. If the guidelines score is higher than the statutory maximum then the statutory maximum takes precedence. Mr. Kneedler noted some concern that an offender who had a prior record as a result of a barroom fight would be counted as a recidivist even though his new crime was not a sexual assault. Ms. Farrar-Owens reminded everyone that the offender would first have to be a convicted felony sex offender for such a record to count against him. Mr. Kneedler was still uneasy about that scenario. Ms. Farrar-Owens commented that the research done both here in Virginia and elsewhere documents that sex offenders are quite elusive and that when caught, they often escape official designation as a “sex offender.” It is often the case that the offenses committed by sex offenders have been bargained down to lesser crimes so it is hard to tell if the real offense behavior involved a sex crime. Mr. Ferguson commented that it had been his experience that assaults arising out of barroom brawls are typically treated as a misdemeanor. Furthermore, Mr. Ferguson observed, the risk assessment instrument was developed by tracking offenders and looking at the characteristics of those who recidivate and that if the research demonstrated that a previous record of assault helped identify higher risk sex offenders, then the information should not be ignored.

Mr. Ferguson recommended that the threshold risk assessment score of 33 points that is being proposed for enhanced guidelines recommendations be moved back to the 28 to 32 range because the revisions indicate that is the proper place for that score. A motion to accept the recommendation as proposed was made and seconded and the motion was approved.

Ms. Farrar-Owens displayed a chart that would increase the upper end of the guidelines score for certain offenses. Under this proposal, aggravated sexual battery, carnal knowledge and indecent liberties would receive a larger enhancement to the guidelines range than forcible rape, object sexual penetration and sodomy. Mr. Ferguson said he had a problem with increasing at a higher rate the guidelines range for crimes that were less serious. He made a motion to increase the upper end of guidelines ranges for all sex offenses by 50%, 100% and 300%. Mr. Petty said this recommendation is increasing the upper range of the guidelines only and not affecting the midpoint at all. Ms. Farrar-Owens responded that the Executive Committee debated changing the midpoint to half of the statutory maximum in instances where the risk assessment score was 44 or more but that it was abandoned due to difficulties in putting such a proposal into practice.

Judge Gates repeated Mr. Ferguson’s motion, which was to increase the upper end of guidelines ranges for all sex offenses by 50%, 100% and 300%. Judge Gates asked the Commission members to vote on the recommendations presented by the Executive Committee. Judge Gates asked the Commission to vote on the Executive Committee’s recommendation. A motion to accept the recommendation as proposed was made and seconded and the motion was approved.

Mr. Kneedler wondered if there was an easy way for the sentencing guidelines preparer to increase the midpoint in these cases. Ms. Farrar-Owens felt that it would be difficult since it is not the mathematical average. Judge Honts remarked that he had some similar concerns but suggested leaving the recommendation the way it is for at least a year and then re-evaluate the situation..

The next issue concerned how adjustments to the sentencing guidelines on risk assessment should be communicated to the judge. If the sentencing guidelines are adjusted based on the results of the sex offender risk assessment instrument, should the revised guidelines be presented to the judge with no additional comment or should there be some explicit mention of the adjustment? There were some concerns raised that use of terms such as “high risk,” “moderate risk,” etc., could be potentially inflammatory during the sentencing proceeding. Concern was also expressed about the provision of a singular statistic that represented the percent-likelihood of recidivism for a specific risk assessment score since the group recidivism probabilities do not always increase in a stair-step fashion along with a concomitant increase in the risk assessment instrument score.

The Executive Committee recommended that the sentencing guidelines coversheet should communicate to the judge when the recommended range has been modified due to the sex offender’s risk assessment score. Furthermore, this information should include the specific sentencing guidelines range adjustments delineated in the earlier recommendations.

Mr. Kneedler asked the judge about the likelihood that defense attorneys would call the sentencing commission staff for statistical data. Judge Bach remarked that the likelihood of defense attorneys asking for that information would, in his experience, be slim. Mr. Petty said he assumed that the research methodology would be detailed in the Annual Report and defense attorneys would, via that device, gain access to the statistical data

Judge Bach commented that he was not comfortable with the placement of raw risk assessment scores on the proposed cover sheet. . Mr. Ferguson recommended that the Commission adopt the Level classification instead of raw scores on the new cover sheet for sex offenders. Judge Gates asked the Commission to vote on Mr. Ferguson’s recommendation. A motion to accept the recommendation as proposed was made and seconded and the motion was approved.

Ms. Farrar-Owens said the next issue is should a pre-sentence investigation report be required in all cases involving convicted sex offenders. Under current law, pre-sentence investigations are not required in all cases involving convicted sex offenders. Consequently, a probation officer does not always complete the sentencing guidelines forms in sex offender cases. It was felt that a probation officer would be the best individual, however, to complete the risk assessment instrument. Assessment of risk depends on a complete and accurate identification of prior arrests for person and sex

offenses (both adult and juvenile) including out-of-state arrests. When a pre-sentence investigation is prepared, it is much more likely that a thorough and accurate criminal history check will be made. Also, there is a concern that if a pre-sentence investigation is not completed, some of the other factors on the risk assessment form may also not be completed accurately (i.e., employment, education, prior treatment experience). In FY1998, among the 714 rape and sexual assault felony conviction cases, 72.5% had a pre-sentence report completed. If a pre-sentence report is not completed in a sex offender case and the offender receives either supervised probation or any prison incarceration time, then a post-sentence investigation report will be completed. Post-sentence investigations were completed in all the non pre-sentence sex offender cases examined in FY 1998. Based on FY 1998 experience then, if pre-sentence reports were required in all sex offender cases, approximately 196 post-sentence investigations across the entire Commonwealth would have to be completed prior to sentencing – thus making them pre-sentence investigations. While it was acknowledged that completion of a pre-sentence investigation may take more time than a post-sentence report, it was felt that the impact of shifting to all pre-sentence reports in these cases would be negligible in any single jurisdiction.

The Executive Committee recommended that the Commission urge judges to order a pre-sentence investigation report in all rape and sexual assault cases. It also recommended that the Commission also request legislative change so that pre-sentence reports would be required by Code in all rape and sexual assault conviction cases.

Mr. Petty expressed concerns that this proposal could result in problems. He acknowledged that Commonwealth's attorneys would have difficulty in preparing the risk assessment document. He noted that there is certain information that is not available to them like education and prior sex treatment. However, he pointed out that if a Commonwealth's attorney agrees to a plea agreement and the pre-sentence investigation report comes back with information not previously known then it could affect the sentencing guidelines recommendation. Ms. Farrar-Owens remarked that it is very important to find out the prior arrests of the offender. Judge Newman said a judge could still ask for pre-sentence investigation report in any case. Mr. Petty said he understands that but that many sex offender cases involve difficult evidence issues. Judge Newman felt that the public would understand a plea agreement made on the basis of weak evidence. Mr. Petty responded that the news media was less likely to report such circumstances. Judge Gates noted that he felt a pre-sentence report would be critical to ensure a proper and full assessment on all convicted sex offenders.

Judge Gates asked the Commission to vote on the Executive Committee's recommendation. A motion to accept the recommendation as proposed was made and seconded and the motion was approved with one opposing vote.

The last issue dealt with the question of when the sex offender risk assessment instrument should be implemented? In the Commission's 1999 Annual Report, the chapter that reported on the sex offender risk assessment project concluded by stating "If the Commission determines that a useful sex offender risk assessment instrument can be developed, it will be integrated into the sentencing guidelines that become effective July 1, 2000." It was noted at the meeting that even if the full Commission reached final closure on the remaining issues, there would not be enough time to implement the instrument by July 1. The members observed that statewide training seminars would have to be scheduled and held to educate all sentencing guidelines users on the sex offender research and the application of the risk assessment instrument. Staff recommended that these seminars be offered in all areas of the Commonwealth and noted that the summer was not an ideal time to expect a good turnout at such training seminars. The staff felt that the earliest time that training could be offered would be in the months of September and October leaving November as a feasible target time for implementation. Concern was raised, however, that the General Assembly would not have an opportunity to review the risk assessment instrument and its proposed application under this timetable. It was pointed out that the statutory procedure for changes to the guidelines requires the Commission's proposed revisions to be detailed in the Annual Report each December 1. If the General Assembly takes no action to reject a Commission revision to the guidelines, the revision takes effect the following July 1.

The Executive Committee recommended that the sex offender risk assessment instrument findings and proposals be detailed in the 2000 Annual Report of the Sentencing Commission with a proposed implementation date of July 1, 2001.

Judge Gates asked the Commission to vote on the Executive Committee's recommendation. A motion to accept the recommendation as proposed was made and seconded and the motion was approved.

Reverend Ricketts wondered if the Commission should communicate with the General Assembly leadership on the Commission's progress on this issue. Judge Gates said that Dr. Kern was scheduled to meet with both the Public Safety Subcommittee of the Senate Finance Committee and the Virginia Crime Commission and could report the Commission's decisions on the sex offender project.

The third item on the agenda was a report on the Larceny/Fraud Special Study. Judge Gates asked Ms. Celi to discuss this item on the agenda.

III. Larceny/Fraud Special Study

Ms. Celi began by stating that she was going to give an update on the data collection efforts on the national larceny survey and review the study timetable. The members were given a synopsis of the dollar thresholds for felony larcenies that were currently in effect

across the nation. The felony threshold is the minimum dollar value of a stolen good or service that will result in the offender being charged with a felony. Ms. Celi also presented adjusted dollar thresholds derived from the Consumer Price Index, which is an indexation of the prices of goods and services over time. The advantages of using this synopsis is that it is directly linked to the items the Commission is concerned with and it can be applied over all the states. The disadvantages are that there are regional differences that can result in a slight overestimation or underestimation of the adjusted value. Another concern about the Consumer Price Index is that different goods and services inflate at different rates. However, Ms. Celi observed, since the dollar thresholds for felony larceny do not consider the types of goods or services, this is not a concern.

Ms. Celi said that in 1978, Maryland adopted a \$300 felony larceny threshold. Adjusted to 1999 prices, the value of this threshold would be \$518 in current terms; this means there has been a 156% change in the value of the threshold since the enactment. The current thresholds around the country vary from zero to \$2,000. Forty-three percent of the States have changed their dollar threshold for felony larceny within the past ten years, 84% within the past 20 years and 98% within the past thirty years. Virginia enacted its \$200 threshold in 1980.

A chart was presented that displayed the average dollar thresholds enacted in 1975 through 1999. There is a definite trend to enact higher monetary thresholds, which is consistent with the inflationary pressure on prices of goods and services. Ms. Celi referred the members to a handout in their packet that summarized the different systems of handling larceny offenses by state. There are many different systems in general, but the states can be broken into two groups, single threshold states and multiple threshold states. Single thresholds, like Virginia, have a single dollar value that distinguishes between a misdemeanor and a felony. Multiple threshold states have more than one dollar threshold that distinguishes larcenies not only by a misdemeanor and felony, but also by different levels of felony larceny. Sixty-six percent of the states currently have multiple felony larceny thresholds.

There are items or circumstances that are required by statute to be treated separately from the general dollar threshold either in amount or penalty. These exclusions can be grouped by victim and offender characteristics, business related offenses and others.

Ms. Celi then reviewed the progress on data collection. The supplemental data collection instrument was included in the member's packets. The instrument included all of the items approved at the last meeting as well as the duration variable (period of time over which the larceny/fraud took place) requested by Mr. Vassar and approved by the full Commission. The data collection is expected to continue through August 4th. She said it would take a week to clean the data and the analysis should begin on August 14th. The results are expected to be presented at the next full Commission meeting on September 11th.

Judge Gates thanked Ms Celi for her presentation. The fourth item on the agenda was a report on the SABRE Drug Legislation. Judge Gates asked Dr. Creech to discuss this item on the agenda.

IV. SABRE Drug Legislation

Dr. Creech began by noting that the SABRE drug legislation passed by the General Assembly stipulated that the Commission shall review the minimum discretionary felony sentencing guidelines midpoint and the sentencing recommendation for convictions related to possessing, manufacturing, selling, giving, distributing, or possessing with intent to distribute a Schedule I or II drug or marijuana when the defendant has previously been convicted of such an offense (House Bill 383). The legislation goes on to say that the Commission shall examine the minimum midpoint and the sentencing recommendations necessary in deterring recidivism. The Commission's review shall be completed in time to make recommendations to the General Assembly on or before December 1, 2000.

Dr. Creech proceeded to review the study methodology. The staff would obtain information from the Department of Corrections and approved drug treatment programs on factors such as length of program, rates for successful program completion and recidivism rates for program participants. A comparison would be made on recommended sentence lengths and the length of treatment programs to determine whether or not our midpoint recommendations were adequate to ensure the opportunity for treatment. Another issue to be examined is the integration of criminal justice sanctions with substance abuse screening, assessment and treatment options. Dr. Creech observed that the only thing that the Commission could complete on this particular issue would be a compilation of descriptive data.

Judge Gates thanked Dr. Creech for his presentation. The last item on the agenda was Miscellaneous Items. Judge Gates asked Dr. Kern to discuss this item on the agenda.

V. Miscellaneous Items

Dr. Kern directed the members to a report in their packets called Unequal Justice. The report, completed by the Virginia Advisory Committee to the United States Commission on Civil Rights, contained a discussion on criminal sentencing in Virginia. Dr. Kern then read a recommendation from the report that asks the Virginia General Assembly together with the Supreme Court of Virginia to order monitoring of judicial sentencing in Virginia to determine whether or to what extent racial disparity exists or is increasing. Another recommendation also directed the Supreme Court of Virginia to ask the Virginia Criminal Sentencing Commission to conduct a full-scale assessment of sentencing disparities by race and gender to determine if there are any unwarranted factors or prejudicial patterns in

sentences, prosecutions, and arrests. The report did not present any evidence that unwarranted sentencing disparity existed in Virginia.

Dr. Kern then asked the members if anyone wanted to attend the National Association of Sentencing Commissions Annual Conference in Pittsburgh, Pennsylvania on August 6-8. The funds are available if anyone wants to attend.

Dr. Kern also gave the Commission members a copy of a recent Supreme Court ruling that detailed that juries should be told about the abolition of parole as well as the existence of the geriatric clause, when applicable.

The Commission received a letter from a criminal defense attorney requesting statistics regarding actual sentences received within the past five years in the County of Henrico for the following offense and factors: manufacturing/possession of marijuana not for personal use with no prior juvenile or adult record. Dr. Kern reminded the members that the Commission only provides statistical information if the data has already been compiled and presented. He asked what the Commission would like to do with this request. Mr. Petty said we could not deny providing the requestor with the raw data. Judge Honts said it would be better if we analyzed the data instead of someone less familiar with it. Judge Gates asked what the Commission wished to do with the request. One member made a motion that the data should not be given out. The recommendation was made and seconded. During the discussion on the motion, Judge Bach expressed an option to provide the requestor with the raw data but with no analysis. He observed that if our staff were to complete this analysis, every defense attorney around the Commonwealth would start asking for special data analysis. Judge Newman inquired as to what the Commission's legal obligations were. Judge Gates responded that he would talk to Mr. Ferguson about our requirements under the law. The original motion was withdrawn. Judge Bach made a motion that the Commission consult with the Attorney General's office with regard to what the Commission's legal obligations were with regard to this information request. The motion was seconded and approved.

Dr. Kern next noted that a doctoral student from Rutgers University also asked for information for his dissertation. This student also works at the National Center for State Courts. Dr. Kern made it clear that the student only wanted raw data and did not want any data analysis performed by the staff.

Judge Gates asked if the Commission members were opposed to providing the student with Commission data. There were no objections raised to provision of raw data to this student. Dr. Kern then advised the members that the next meeting would commence in the new conference room. The room is still not complete but it should be ready by September.

With no further business, Judge Gates reminded everyone that the next Sentencing Commission meeting is September 11, 2000, in the new conference room.

With no further business on the agenda, the Commission adjourned at 12:30 p.m.