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The Virginia Criminal Sentencing Commission
September 11, 2000
Meeting Minutes

Members Present:

Judge Gates, G. Steven Agee, Judge Bach, Jo Ann Bruce, Frank Ferguson, Judge Honts, Judge Hudson, Judge Johnston, Lane Kneedler, Judge McGlothlin, Judge Newman, Reverend Ricketts, Judge Stewart and Bobby Vassar

Members Absent:

Mark Christie, Peter Decker and William Petty

The meeting commenced at 10:15 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 June 12, 2000 meeting was the first item on the agenda. The Commission unanimously approved the minutes. Judge Gates congratulated Dr. Kern for completing this great conference room. It took almost four years but it was worth the wait.

The second item on the agenda was a tour of the conference room's technology. Judge Gates asked Dr. Kern to discuss this item on the agenda.

0II. Conference Room Virtual Tour

Dr. Kern began by saying that the conference room has almost been a four-year project. The room was almost completely paid for by attorneys attending training and buying manuals for the last five years. Dr. Kern thanked Betsy Moore Gates, Judge Gate's daughter, for decorating the room completely free of charge. She is a wonderful interior designer. Ms. Moore Gates worked many hours of volunteer time to finish this room. Dr. Kern gave a presentation of the progression of the Supreme Court Building and the new conference room. He detailed all the electronic capabilities in the conference room.

The third item on the agenda was a report on Sentencing Guidelines Compliance Report. Judge Gates asked Ms. Kepus to discuss this item on the agenda.

III. Sentencing Guidelines Compliance Report – FY2000

Ms. Kepus reported that for year-to-date FY2000 (as of June 30, 2000), over 17,000 work sheets were submitted to the Commission. The majority of the work sheets received were Drug Schedule I/II. She noted that overall compliance is 79.8% in FY2000. The aggravation rate was reported as 9.4% and the mitigation rate, 10.8%. She next presented information concerning the reasons judges cite when sentencing above or below the guidelines. Judges reported the decision to sentence an offender to an alternative sanction or the factor of rehabilitation potential more frequently than any other mitigation departure reason. The most common reason for sentencing above the guidelines, cited in 15% of the aggravations, is the acceptance of a plea agreement.

Dispositional compliance is defined as the rate at which judge's sentence offenders to terms of incarceration that fall within the recommended guidelines range. Ms. Kepus noted the high rate at which judges agree with the type of disposition recommended by the guidelines (87%). Durational compliance, however, is 81.2%. This result indicates that judges agree with the type of sentence recommended by the guidelines more often than they agree with recommended sentence length in incarceration cases.

Ms. Kepus stated that compliance rates varied greatly across circuits. Overall, 75% of the circuits increased their compliance rates. The highest compliance rate, 89.0%, is found in the Loudoun area (Circuit 20). She also noted that Circuit 29 in Southwest Virginia has the lowest compliance rate at 68.4%. Buchanan County, however, did have one of the highest compliance rate increases, up 5% since last meeting.

Ms. Kepus said that the compliance rates for all the offense groups have gone up since FY2000 except Burglary of Other Structure. Compliance for rape cases has risen more than 10%. The compliance rate for Assault went up almost 10%. The reasons for this rise in compliance may include the new factor added on Section C involving injury to multiple victims, more training emphasis on victim injury, and the fact that several new offenses were added to the assault guidelines. The compliance rate is particularly high on the two new offenses added - assault and battery against family member (3rd or subsequent) and assault against a law enforcement officer. Compliance for robbery cases has also gone up more than 6.5% over FY1999 figures. The robbery guidelines have not changed so we cannot explain the raise in compliance.

She then said the Commission has been contacted about concerns from Commonwealth attorneys, probation officers and defense attorneys. The first concern involved the rape worksheet scoring multiple victims, both under age 13 and over age 13. Due to the different ages of the victims, the same offense is scored differently. Since the offenses are scored differently, the rape of a victim under the age of thirteen would be considerate an additional offense instead of two counts of rape. The score for the offender would be 169 versus 331. Mr. Ferguson asked if these scores were historical based. He wondered if the

staff had an explanation for the differences in scores. She thought that most of the cases that involved minors are plea agreements that are pleaded down due to lack of victim testimony. Mr. Ferguson said could one solution be to ignore the age of the victim when selecting a primary offense. Dr. Kern said that this problem was going to be presented to the Commission today with recommendations from the staff at the next meeting.

Ms. Kepus continued by saying that the second concern is very similar. It is also a scoring issue that deals with felony homicide. The aggravation rate for felony homicide was 71.4%. Felony homicide is currently being scored the same as second-degree murder. She said that the staff would continue to monitor this situation. The aggravation rate is also high for second-degree murder. This rate is consistent with last year's compliance. This is another area that she is going to continue to monitor. Mr. Kneedler wondered if most of the cases were actually first-degree murder pleaded down to second-degree murder. Ms. Kepus said the staff would try to find out the answer to his question.

One out of every five cases has qualified for midpoint enhancements for a current or prior conviction for a violent crime. When judges depart from the guidelines in these cases, they are choosing to mitigate in the vast majority. Enhancements for a Category II prior record generated the highest rate of compliance for a midpoint enhancement (75%). The most severe midpoint enhancement, that for a combination of a current violent offense and a Category I prior record, yields a rate of compliance of 74% and compliance in cases receiving only a Category I enhancement is 68%.

She then discussed compliance within jury cases. Of the 280 jury cases, jury sentences were within the guidelines 36% of the time. Juries imposed sentences higher than the guidelines in 57% of the cases and imposed sanctions lower than the guidelines in 7% of the cases. Mr. Ferguson asked if the staff tracked conviction rates in jury versus non-jury cases. Ms. Kepus observed that judges modified only 28% of the jury sentences.

Judge Gates thanked Ms. Kepus for her presentation. Judge Gates asked the members if they would like to take a break. The members declined a break. 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 give an overview of the study elements. One of the Commission's actions that could be studied is the enhanced recommendation for the sale of larger amounts of cocaine. Midpoint recommendations were increased for selling larger amounts of cocaine. This guidelines recommendation was effected in July 1997. An analysis for sentences for felons selling 28.35 grams or more of cocaine showed that these type of offenders received longer incarceration sentences after the guidelines modification. The median sentence in 1997 was 21 months and the median for 2000 was 42 months.

The sentencing commission also felt that alternative sanctions should be recommended for sale of one gram or less of cocaine if the offender did not have a felony prior record. The detention center recommendation was available in July 1997 and the boot camp recommendation was a viable option in July 1999. The use of detention center incarceration increased due to the recommendation by our Commission. Mr. Vassar was interested in why the probation/no incarceration sentences were decreasing.

Dr. Creech said in terms of alternative sanctions for drug offenders the compliance rate is 70% with mitigation being 24%. Nearly all of the mitigation is due to offenders being sentenced to probation or no incarceration. The proportion of offenders sentenced to alternative sanctions has increased 20% from 1997 to 2000. He did speak briefly about the risk assessment pilot project that is currently being evaluated by the National Center for State Courts.

He then reviewed the enhancements that the Commission made to the drug work sheets. For offenders convicted for an instant offense of possession of Schedule I/II drug with two or more prior convictions for possession or sale, etc. of a Schedule I/II drug the Commission enhanced the likelihood that those offenders would be recommended for incarceration. The compliance rate did increase due to this change and the aggravation rate decreased.

Dr. Creech then spoke about the adequacy of recommendations in deterring recidivism. He said he was going to briefly cover the other elements of the SABRE request. The data for this part of the study is from the Commission's risk assessment study that focused primarily on the drug offenders. These offenders were released from prison, jail or sentenced to no incarceration between July 1, 1991 through December 31, 1992. The recidivism rate for prison releases was the highest rate at 26.5%.

This legislation has called for an integration of criminal justice sanctions with substance abuse screening, assessment and treatment options. Dr. Creech said many offenders are not screened prior to sentencing, which will make integration difficult. The Commission

may want to ensure that any criminal justice sanctions are ample to provide the opportunity for completion of an appropriate treatment program. The Criminal Justice Research Center has been given the task to evaluate the screening and assessment program. The Northern Virginia Regional Task Force requested that the Commission consider enhanced sentence recommendations for offenders with 100 or more grams of methamphetamine. Dr. Creech said that the PSI indicated that there have been no offenders sentenced in circuit court with 100 or more grams of methamphetamine.

SABRE explicitly included 100 or more grams of methamphetamine for three crimes. Those crimes are manufacture, sell or distribute and two levels of continuing criminal enterprise crimes. There is a twenty-year mandatory minimum for the sale, etc. of 100 or more grams of methamphetamine. This mandatory minimum can be suspended if the offender meets certain conditions like no prior violent record. The continuing criminal enterprise crimes also carry a twenty-year to life mandatory minimum. Dr. Creech said those crimes raised by the Task Force are completely subsumed under SABRE legislation. The Sentencing Commission has a policy in place with respect to mandatory minimums.

Dr. Creech concluded that there should be no need for the Sentencing Commission to enhance its penalties further for crimes involving 100 or more grams of methamphetamine, even if the crime were more prevalent than the PSI data would indicate.

Judge Gates thanked Dr. Creech for his presentation. Then he asked the Commission members to take a five-minute break.

Judge Gates said the next item on the agenda was Larceny/Fraud Special Study. He asked Ms. Celi to discuss this item on the agenda.

V. Larceny/Fraud Special Study

Ms. Celi began by stating that she was going to give the analysis results on the larceny study. She stated that Mr. Barnes would share the fraud results with the members since these types are treated separately in the sentencing guidelines. The purpose of the larceny study was to examine the value of money or property stolen in larceny and fraud cases to determine if a factor can be added to the worksheets that would add points in cases that involve high dollar amounts. Ms. Celi said that the study originally sampled 800 cases and they were able to complete 749. Of the 749 completed cases, 440 were fraud cases and 309 were larceny cases.

The majority of the primary offenses of the cases sampled were grand larceny (75%). The value of items stolen was concentrated at the low end, with about 67% falling below \$2,500, and nearly 39% at or below \$500. Of the items stolen, the most common was

cash or monetary benefit. The most common location for a larceny offense is a business, followed by a house and a car. In nearly 88% of the cases, there was only one victim.

Ms. Celi said that the money or item stolen was completely recovered in nearly 36% of the cases and none was recovered in 11% of the sample. In nearly 60% of the cases, no restitution was made at the time of sentencing, while restitution was made in full in approximately 2% of the cases.

The current model that is based on all cases predicted sentence outcome with 93.9% accuracy. Ms. Celi said that the staff tried all of the variables in various combinations to try to improve the accuracy of prediction. None of the models the staff tried was able to predict as accurate as the present model. She did have slightly better success with the probation/jail cases. There were two models that improved the accuracy slightly. The first model added one factor, the value of \$2,500 or more and which increased the accuracy by 2%. The second model also added the value of \$2,500 or more and a factor to show whether at least some of the restitution was paid by the time of sentencing. This model increased the accuracy by approximately 3%.

She presented a summary of the models available. There was a slight increase in predictive ability for both of the new models but that would have to be weighted against any difficulties the members envisioned for implementation and the cost.

Judge Hudson said he was worried about those aggravating factors in embezzlement cases that may have been missed like elaborate scheme, gross breach of trust or financial jeopardy of the victim. Ms. Farrar-Owens said that this study did not include embezzlement cases that he was concerned about. Dr. Kern said the guidelines are designed to fit a typical case and not those cases that Judge Hudson described. Mr. Ferguson was reluctant to recommend the second model because of the restitution factor. He felt that some offenders could not pay restitution. Judge Gates commented that this was Mr. Petty's project and he suggested that the members hold off on a decision until Mr. Petty can be in attendance. Judge Gates asked the Commission to defer the fraud results until the next meeting.

Judge Gates thanked Ms. Celi for her presentation. Then he asked Ms. Farrar-Owens to discuss this item on the agenda.

VI. Sex Offender Risk Assessment Instrument

Dr. Kern started by saying that he gave a presentation to the Public Safety Subcommittee of Senate Finance Committee. He discussed the sex offender recommendations and that committee was very enthusiastic about the research. Approximately two weeks later, the Virginia State Crime Commission also requested a presentation on this topic. The

Washington Post printed a story on the sex offender risk assessment proposal prior to the Crime Commission meeting. Some members of the Crime Commission were concerned if the Sentencing Commission's recommendation were constitutional. He still felt that the Crime Commission was interested in the study and the original request of the study came from their commission. The Crime Commission will officially request the Attorney General's Office to review the constitutionality of the sex offender recommendations.

Dr. Kern said that Court TV asked him to appear on a show called Pro's and Con's to talk about the recommendations about sex offender risk assessment. He then proceeded to show the members the five-minute videotape of the show that Dr. Kern appeared. He also showed the members a tape from a story that ran on Channel 8 about the sex offender risk assessment instrument.

Judge Gates felt that Dr. Kern preformed well on Court TV. Dr. Kern felt that the media attention would increase in January during the General Assembly Session. He also directed the members to read a letter that was provided in their packet. The letter was from the director of the National Judicial Education Program. She was concerned that basing risk assessment guidelines on characteristics of incarcerated rapists created a highly skewed picture of who rapists are and how their dangerousness should be evaluated. Dr. Kern felt that there is a great deal of hidden sex crimes but as researchers we can only study what does come to the attention of the system. Mr. Kneedler felt they we need a valid response to that question. He felt that this guidelines recommendation would be subject to long debate during the General Assembly. Mr. Ferguson said that sex crimes are the most unreported crimes but this information is the best the Commission can study. Judge Bach reminded the members that the Commission is not changing the low range of the guidelines or the midpoint just the upper end. Judge Gates hoped that Dr. Kern would be the spokesperson for the Commission in regards to this study. Dr. Kern then asked Ms. Farrar-Owens to give an update on the final draft of the report.

Ms. Farrar-Owens told the members that the Commission would separately publish a report on the Sex Offender Recidivism and also include a chapter on this study in the 2000 Annual Report. Judge Honts asked Ms. Farrar-Owens about several sentences in the draft of the sex offender report. Ms. Bruce had the same type of minor concerns about the wording on increasing the upper end of the guidelines range for certain offenses. Ms. Farrar-Owens said the language was not that clear and she would work on the first paragraph on page 46 in the draft of the Sex Offender Report.

She then briefly discussed recidivism rates by range of risk assessment score that is included the Sex Offender Report. All offenders that scored 44 or more points on risk assessment recidivated within the study period. Of the recidivists scoring more than 38 points, more than three out of four were re-arrested for a felony. She concluded that it

appeared that the instrument identified those offenders most at risk for recidivating with the most serious type of charges.

Ms. Farrar-Owens then discussed recidivist events resulting in a conviction on or before July 31, 1999. The majority of the offenders who were re-arrested were subsequently convicted of one or more of the charges. She explained that these rates are underestimations of the true rate at which recidivist offenders were reconvicted because only those convictions occurring on or before July 31, 1999, are captured. Mr. Kneedler wondered what would happen if the study used only convictions instead of arrests. He felt that this is going to be a major criticism of the study. Ms. Farrar-Owens felt that most of the factors would stay in the model but some of the weights would change slightly.

She continued by saying that recidivist offenders with higher scores recidivated faster than those scoring in the lower ranges on the proposed risk assessment instrument. Of those offenders identified as recidivists in the study, 40% were re-arrested for new sex offenses. Reverend Ricketts wanted to include all this information in the Sex Offender Report.

Judge Gates thanked Ms. Farrar-Owens for her presentation. He then asked Mr. Fridley to cover the next item on the agenda, overview of spring training seminars.

VII. Overview of Spring/ Summer Training Seminars

Mr. Fridley started by showing the members where they trained around the state. He said they have trained 112 probation officers, 59 Commonwealth attorneys, 11 elected Commonwealth attorneys, 44 defense attorneys and 18 public defenders. This year Mr. Fridley gave the participants an evaluation form to fill out about the training seminar. Most of the participants asked that the Commission provide a refresher course for filling out guidelines worksheets. They also asked that the judges be more informed of some of the finer points of the guidelines.

VIII. Miscellaneous Items

Dr. Kern asked the members to think about guidelines revisions. Some of the Commission members have given the staff recommendations on guidelines changes. The staff will continue to work on these suggestions from the members. He also asked if the members have any other proposals that need to be addresses at the next meeting.

Dr. Kern informed the members that the National Association of Sentencing Commissions Annual Conference in Pittsburgh, Pennsylvania took place on August 6-8. He said that

Dr. Creech and Ms. Farrar-Owens participated in several panel sessions. He felt the conference was good but attendance was poor. The next conference will take place in Kansas City, Missouri during the month of August.

Dr. Kern also gave the Commission members a copy of the Commission re-appointment Schedule. The terms of all the Commission members will expire this year except for Judge Gates. Reverend Ricketts and Mr. Christie have been re-appointed for another term. Dr. Kern hoped that all the members would be re-appointed. He urged the judges to request an additional term. The judges were asked to contact Chief Justice Carrico about their re-appointment.

Dr. Kern next noted that a letter was enclosed in their packet from James L. Jenkins of the Parole Board. The Parole Board asked that the Commission review their proposed changes to Section §53.1-40.01 of the Code of Virginia that would establish a uniform conditional release law for all geriatric prisoners. Dr. Kern asked the members if they wanted to discuss it now or wait till the next meeting. Judge Gates said that the Commission members approved of the changes to the Code of Virginia.

With no further business, Judge Gates reminded everyone that the next Sentencing Commission meeting is November 6, 2000, in the new conference room on the fifth floor.

With no further business on the agenda, the Commission adjourned at 1:15 p.m.