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**The Virginia Criminal Sentencing Commission**  
**March 19, 2001**  
**Meeting Minutes**

**Members Present:**

Judge Gates, Judge Bach, Jo Ann Bruce, Frank Ferguson, Douglas Guynn, Howard Gwynn, Arnold Henderson, Judge Honts, Judge Johnston, Judge McGlothlin, William Petty, Reverend Ricketts, Judge Stewart

**Members Absent:**

Gary Aronhalt, Mark Christie, Judge Honts, and Judge McGlothlin

The meeting commenced at 10:10 a.m. Judge Gates announced that there were four new members of the Commission. The four new members are Gary Aronhalt, Douglas Guynn, Howard Gwynn and Arnold Henderson. With no objections from the Commission members, Judge Gates also gave Dr. Kern approval to spend up to \$150 each for service recognition gifts for the departing Commission members (G. Steven Agee, Peter Decker, Lane Kneedler and Bobby Vassar). He then asked the Commission members to approve the minutes from the last meeting.

**Agenda**

**I. Approval of Minutes**

Approval of the minutes from the November 6, 2000, meeting was the first item on the agenda. The Commission unanimously approved the minutes.

The second item on the agenda was General Assembly action on new sentencing legislation – 2001 session. Judge Gates asked Dr. Kern to discuss this item on the agenda.

**II. General Assembly Actions on New Sentencing Legislation- 2001 Session**

Dr. Kern noted that the Commission only recommended one piece of legislation to the 2001 session of the General Assembly. This legislation would require the preparation of pre-sentence reports (PSIs) in felony sexual offense cases. Dr. Kern remarked that Senator Stolle, Chairman of the Senate Courts of Justice Committee, and Senator Howell, the chief proponent of the Senate Joint Resolution that requested the sex offender risk assessment study, co-patroned the legislation. This bill was adopted unanimously and will become effective July 1, 2001. Dr. Kern pointed out that pre-sentence reports are already being prepared in approximately 75% of the convictions for felony sex offenses. Therefore, it is estimated that only 200 additional cases statewide would now require a pre-sentence report due to the passage of this bill. However, he observed that there might be some sex offense cases affected by the risk assessment that will not be subject to the new legislation. He stated that the new legislation requiring PSIs is tied to date of

conviction. The effective date for the use of the sex offender risk assessment instrument is also July 1, 2001, but it is tied to date of sentencing. Therefore, it is possible that some early risk assessment cases may not have a PSI prepared. Dr. Kern said that one remedy to correct this situation would be for the Commission to revise the effective date/criteria of the sex offender risk assessment to be consistent with the new legislation. Specifically, the proposal would be to make the risk assessment instrument applicable to anyone convicted of a felony sex offense on or after July 1, 2001.

Mr. Ferguson voiced a concern that there was no opportunity for this proposed remedy to be reviewed by the General Assembly. He felt that such a change would be a substantive revision to the Commission proposal already reviewed by the General Assembly. Other Commission members expressed a similar concern and thought it would be inappropriate to alter the effectiveness criteria without the General Assembly's input. Some of the judges suggested that the best remedy to the problem would be for judges to be trained early enough on the pending use of the risk assessment instrument so that they could order PSIs in the affected cases. Dr. Kern responded that he was going to be providing such training at the annual judicial conference on May 18. All thought this approach would be effective in addressing the problem.

Dr. Kern then discussed a letter written by the Virginia chapter of the ACLU (American Civil Liberties Union of Virginia) in mid January that was addressed to all members of the General Assembly. This letter attacked the Commission's proposals regarding the implementation of the sex offender risk assessment instrument within the sentencing guidelines system. The ACLU concluded in the letter that basing the length of sentences on the age, education, and employment history of an offender is scientifically unsound and a violation of the U.S. Constitution. The letter also stated that sentencing commissions in other states and at the federal level have studied the use of similar risk assessment instruments for sentencing purposes and they have been rejected in every instance. The ACLU letter urged the General Assembly members to introduce legislation forbidding the Commission's adoption of its recommendations on sex offender risk assessment.

Dr. Kern remarked that some claims made in the ACLU letter were false. The Virginia Sentencing Commission, he noted, is the first and only sentencing commission in the nation that has studied the use of risk assessment for adaptation into sentencing guidelines. With regard to the constitutionality of the sex offender risk assessment instrument, Dr. Kern pointed out that an opinion on this matter was still pending with the Attorney General.

A member of the House of the Delegates (Delegate Darner) did introduce a bill (HB2770) that would prohibit the use of the risk assessment instrument in sentencing decisions. After some discussion by the House Courts of Justice this bill was tabled and not voted upon. The delegates agreed that the judges should have the sex offender risk assessment information available to them but concerns were raised about the proposed manner for presenting the information to the judges. Specifically, the delegates were uneasy about the accuracy of the proposed language that would accompany the sentencing

enhancement. For example, the proposed statement would read “Due to the offender’s statistical likelihood of being re-arrested for a new crime against the person or a new sex offense, as indicated by risk assessment: the upper end of the recommended sentence range has been increased by \_\_\_ %.” The delegates suggested that the statement be altered to reflect that the characteristics of the offender and the circumstances of the offense have correlated with a significant risk of recidivism among other sex offenders. The members of the House Courts of Justice Committee also felt that the judges should be provided with the original sentencing guidelines range as well as the range modification resulting from application of risk assessment.

With regard to the modification suggested by the delegates, Mr. Petty remarked that the revised statement is only accurate if, in fact, there is an adjustment. Dr. Kern agreed that the revised statement was phrased in such a way as to only apply to those receiving enhancements due to the risk application. Mr. Ferguson concurred with Mr. Petty’s concern and suggested that the language could be modified slightly to address the conditional nature of the risk assessment result. Mr. Ferguson recommended that the word “may” be added so that the statement would read “characteristics of the offender and the circumstances of the offense may have correlated with a significant risk of recidivism among other sex offenders. If so, the upper end of the recommended sentence range has been increased by.” Mr. Ferguson made a motion to make this language change to the risk assessment statement found on the cover sheet of the rape and other sexual assault sentencing guidelines. Mr. Petty remarked that Mr. Ferguson’s modification would be satisfactory. The motion was seconded. Judge Gates asked the Commission for a vote. The Commission voted 14-0 in favor.

Returning to his presentation, Dr. Kern observed that the legislative debate over House Bill 2770 raised some concerns on the part of some delegates that a significant policy change as reflected in sex offender risk assessment could take effect without an explicit formal vote by the General Assembly. He reported that some delegates were surprised that they were not required to vote on the matter. Dr. Kern noted that he explained to the delegates that statutory law required that the Commission annually submit on December 1 its recommendations on guidelines revisions and that such recommendations automatically take effect the following July 1 unless otherwise directed by the General Assembly. This process, he noted, allows the General Assembly an opportunity to review all Commission recommendations without separately voting on each one while providing an opportunity for the legislature to veto any that are considered inappropriate. He also mentioned that he reminded the Delegates that much thought had been given to this matter by the General Assembly during its special session in 1994 and that the procedure adopted was deemed to be optimum to ensure both the integrity and accountability of the Sentencing Commission.

During the recent General Assembly session, however, some Delegates still felt that all guidelines revisions should have to be explicitly voted upon by the legislature. A bill (HB 2685) was introduced to amend the process of legislative review of the Commission’s proposed revisions to the sentencing guidelines. The legislative patrons of the bill noted that its introduction should not be interpreted as a condemnation of the

work of the Commission. In fact, the chief patron of House Bill 2685, Delegate Joannou, stated that he felt the Commission was doing a great job and that the proposed change would likely result in a “rubber stamping” of the Commission’s recommendations. However, Delegate Joannou felt strongly that it was the legislature’s responsibility to adopt policy changes to sentencing and that they should be given the role of having to vote to adopt each recommendation made by the Commission. During the debate on this measure, a number of delegates noted that they felt that the current statutory procedures were working very well and that all of the Commission recommendations were clearly presented to the legislature each year in detailed presentations at the start of the Courts of Justice Committee docket hearings. Many Delegates noted that the existing process worked extremely well and there was no point to amending something that was not in need of repair. The House Courts of Justice Committee ultimately voted to pass the bill by indefinitely.

The next bill discussed, Senate Bill 1178, would provide modifications to the sentencing guidelines for cases involving methamphetamine. This bill stated that, for any conviction involving a substance that contains any quantity of methamphetamine, the discretionary guidelines applicable to cocaine should be used. The patron of the bill (Senator Potts) was concerned that the sentencing guidelines for methamphetamine cases were not sufficiently tough. Delegate Weatherholtz introduced an identical bill in the House (House Bill 2356). After data analysis, the staff identified 64 cases that involved methamphetamine during 1999. Of those 64 cases, only 14 cases would be affected by this proposal. Dr. Kern remarked that most of the 14 affected cases would actually receive a lower sentencing guidelines recommendation if the proposed bill were adopted. Consequently, he advised the General Assembly that the proposed measure would not likely result in stiffer sanctions for cases involving methamphetamine. While the Senate voted to endorse the proposed bill, the House chose to amend the proposed language to allow the Commission to develop discretionary felony sentencing guidelines for convictions related to possessing, manufacturing, selling, giving, distributing or possessing with intent to distribute methamphetamine. Dr. Kern noted that the adopted measure requires the Commission to conduct an assessment of the quantity of methamphetamine seized in such cases with regard to the recently enacted provisions of §18.2-248 (SABRE Legislation) and must complete the assessment by December 1, 2001.

Dr. Kern discussed the next proposal - HJR 687. This resolution would establish a joint subcommittee to study the organization of and inconsistencies in Title 18.2 of the Code of Virginia. As originally introduced, this resolution would establish a joint subcommittee of 21 members to conduct this work. One of the 21 members of this subcommittee would be a member of the Criminal Sentencing Commission. This resolution was ultimately amended to eliminate the role of the 21-member subcommittee and instead directs the Virginia State Crime Commission to conduct the work. Dr. Kern pointed out that Rich Savage, the Executive Director of the Crime Commission, was present at our meeting and had provided assurances that the Sentencing Commission would be consulted and asked for significant input as the work on this resolution proceeds.

Dr. Kern then proceeded to speak on House Bill 1762 that related to the conditional release of geriatric prisoners. This measure would provide geriatric release consideration for any felon, other than those convicted of a Class 1 felony, regardless of the date of their offense. Under current law, only felons convicted of a crime other than Class 1 committed on or after January 1, 1995 are eligible for geriatric release consideration. This measure was adopted by the General Assembly.

Dr. Kern summed up his remarks by touching on a number of bills that were not adopted. He mentioned HB2675 that would have required the Virginia Parole Board to review the time served by every person in the Department of Corrections for a felony offense committed prior to January 1, 1995. This proposal would require the Parole Board to release on parole any inmate who had served the maximum sentence as calculated under the sentencing guidelines in effect on July 1, 2001, increased by ten percent. Another piece of failed legislation discussed was SB 977 that would provide that the court may place a defendant who has not been previously convicted of a felony or a Class 1 or 2 misdemeanor on probation and defer further proceedings without entering a judgment of guilt.

Judge Gates thanked Dr. Kern for his presentation. He then asked Dr. Creech to cover the next item on the agenda, Proposed Legislation and Impact Analysis - 2001 General Assembly Session.

### **III. Proposed Legislation and Correctional Impact Analysis – 2001 General Assembly Session**

Dr. Creech began by noting that statutory law requires that the Commission exclusively prepare a fiscal impact statement for any bill that would result in a net increase in periods of imprisonment in state adult correctional facilities. That law became effective July 1, 2000.

Dr. Creech presented an overview of the legislative impact process for the 2001 session of the General Assembly. The Commission produced 143 impact statements that were communicated to the Clerk of the House of Delegates, the Department of Planning and Budget, the Senate Finance Committee, the House Appropriations Committee, the Joint Legislative Audit and Review Commission, the Department of Corrections, the Compensation Board, and the Secretary of Public Safety. He displayed a chart that presented the types of changes proposed in the bills assessed by the Commission. Sixty percent of the proposed legislation involved expansion or clarification of an existing statute and 22% represented a proposal to create a new crime.

Dr. Creech observed that the process went fairly smoothly this year. Senate Finance and House Appropriations Committee staffs expressed full satisfaction with the fiscal analysis statements provided by the Commission. The Division of Legislative Services staff also indicated that they were very happy with the timely manner in which impact statements

were provided. He said that the Commission staff would work closely with other affected agencies to ensure that the process continues to improve and meets everyone's needs. He concluded his remarks by noting that in July of 2002 the fiscal impacts are to be expanded to include impacts on local and regional jails and impacts on local and state community corrections programs.

Judge Gates thanked Dr. Creech for his brief overview. He then asked Ms. Farrar-Owens to cover the next item on the agenda, the Methamphetamine Study.

#### **IV. Methamphetamine Study**

Ms. Farrar-Owens began by alluding to Dr. Kern's earlier discussion on the adopted legislation that requires the Commission to develop specific sentencing guideline recommendations for methamphetamine cases. The proposed legislation was patroned by Delegate Weatherholtz and Senator Potts. The legislative directive states specifically that the Virginia Criminal Sentencing Commission shall develop discretionary guidelines midpoint and range recommendations for convictions related to possessing, manufacturing, selling, giving, distributing, or possessing with the intent to distribute methamphetamine. The legislative directive further states that the Commission shall conduct an assessment of the quantity of methamphetamine seized in such cases with regard to the recently amended SABRE drug law provisions and shall complete the work by December 1, 2001.

Ms. Farrar-Owens stated that during the 2000 General Assembly Session an enactment clause of the SABRE legislation requested the Sentencing Commission to review guidelines for Schedule I or II drugs and marijuana. Ms. Farrar-Owens then reviewed the Commission's previous actions that involved a number of significant revisions to the Schedule I/II sentencing guidelines. Some of these guidelines revisions included longer sentence recommendations for subsequent sale of Schedule I or II drugs, revised scoring for marijuana and increased probability of incarceration for those convicted of repeat drug possession offenses. She noted that the Northern Virginia Regional Drug Task Force had previously written to the Commission and requested guidelines enhancements for methamphetamine distributors. This request specifically asked for tougher sanctions for those trafficking in large amounts of methamphetamine. Ms. Farrar-Owens said that only three offenders had been convicted in Virginia circuit courts for selling 50 grams or more of methamphetamine. In the 2000 Annual Report the Commission concluded that no further revision regarding the sentencing guidelines for drug offenses was needed at that time.

Ms. Farrar-Owens then discussed the proposed methodology to address the methamphetamine special study requested by the legislature. In April, the staff would collect automated data on CY 1998-2000 methamphetamine cases from incident-based reporting arrest data, pre/post-sentence investigation data and federal sentencing guidelines data (for both Eastern and Western districts of Virginia). She believed that the data analysis would take place during the coming summer months. During the data analysis, the staff would analyze the relationship between the crime elements, such as

quantity seized, and the sentencing outcome. Dr. Kern noted at this juncture that this methodology would represent the first time that the Commission would use federal sentencing data in our analysis. This step was necessary, he commented, because some members of the General Assembly felt that the most serious drug cases may be processed through the federal system and that we would be missing these cases if our analysis only focused on state-level prosecutions. Ms. Farrar-Owens concluded her remarks by indicating that the staff would keep the members informed on the progress on this special study and that the final results would be presented in September. Ms. Farrar-Owens asked the members for their approval of the study methodology.

Judge Newman made a motion to adopt the study methodology. The motion was seconded. Judge Gates asked the Commission for a vote. The Commission voted 14-0 in favor.

Judge Gates thanked Ms. Farrar-Owens for her presentation. He then asked Ms. Kepus to cover the next item on the agenda, Sentencing Guidelines Compliance Update.

## **V. Sentencing Guidelines Compliance Update – FY2001**

Ms. Kepus reported that for year-to-date FY2001, over 7,000 work sheets were submitted to the Commission. She noted that overall compliance is up from 81.0% in FY2000 to 83.0% so far in FY2001. The aggravation rate was reported as 6.7% and the mitigation rate as 10.3%. She next presented durational compliance (defined as the rate at which judge's sentence offenders to terms of incarceration that fall within the recommended guidelines range). Durational compliance was reported to be 85.3%.

Ms. Kepus stated that compliance rates varied across the 31 judicial circuits. The highest compliance rate, 90.7%, was found in Arlington (Circuit 17). She also noted that Circuit 29 in Southwest Virginia had the lowest compliance rate at 61.6%.

Ms. Kepus then discussed the compliance rates for all the major offense groups. The compliance rate for the traffic offense group was the highest at 89.6%. Ms. Kepus observed that the compliance rates within offense groups range from a high of 89% in the traffic offense to a low of 71% among the rape offenses. The rape offense group also has the highest rate of mitigation (24.5%). Ms. Kepus advised that these results should be interpreted cautiously since the results were based on a relatively small number of cases received for the period under study.

Judge Gates thanked Ms. Kepus for her presentation and then asked Mr. Fridley to discuss the next item on the agenda, Sentencing Guidelines Manual/Work Sheet Revisions for July 1, 2001.

## **VI. Sentencing Guidelines Manual/Work Sheet Revisions for 7/1/2001**

Mr. Fridley presented the sentencing guidelines revisions that will take effect on July 1, 2001. This year, utilizing the wealth of information available from a variety of sources, the Commission adopted the following types of modifications to the guidelines system:

- Introduced sex offender risk assessment
- Required pre-sentence investigations for all felony sex offense cases
- Modified Rape and Other Sexual Assault work sheets to incorporate sex offender risk assessment
- Amended scoring of additional counts of the primary offense
- Revised scoring of second degree murder and felony homicide
- Revised scoring of child abuse cases on the miscellaneous guidelines
- Added new guidelines offenses
- Enhanced formatting of guidelines work sheets/manual.

Mr. Fridley briefly discussed each of these modifications. He then reviewed a timetable that outlined the process of manual and work sheet revisions, the distribution of new materials to the thousands of guidelines users, and the upcoming training seminars. The revised work sheets should be received from the printer in mid-May and distributed to the probation officers and Commonwealth's attorneys shortly thereafter. The updated manual pages should be mailed to judges, Commonwealth's attorneys and probation officers no later than mid-June. The implementation date is July 2, 2001 and all scheduled training should be completed by the end of July.

Judge Gates thanked Mr. Fridley for his presentation and then asked Mr. Fridley to also discuss the next item on the agenda, Sentencing Guidelines Training for 2001.

## **VII. Sentencing Guidelines Training for 2001**

Mr. Fridley stated that three different types of training classes would be offered to guidelines users in the Spring and Summer. These courses were specified as 1) the Basics, 2) What's New, and 3) the Refresher course. He provided the members with a visual map that detailed all the areas of the state where the courses will be offered. All classes will be approved for MCLE credits. He remarked that all of the circuit court judges will be trained on the Sex Offender Risk Assessment program at the annual judicial conference on May 16, 2001, at the Hotel Roanoke.

Judge Gates thanked Mr. Fridley for his presentation and then asked Dr. Kern to discuss the next item on the agenda, Miscellaneous Items.



## **VIII. Miscellaneous**

Dr. Kern began by detailing the dates for the remaining Commission meetings for the year. The Commission is scheduled to meet on June 11, September 10, and November 5. Judge Gates said he had a scheduling conflict and asked the Commission members if they would agree to reschedule the June 11<sup>th</sup> meeting to June 18<sup>th</sup>. The members agreed to move the meeting to Monday, June 18<sup>th</sup>.

Dr. Kern then discussed the annual meeting of the National Association of Sentencing Commissions. The Kansas Sentencing Commission will host the conference. It is being held on August 5-7, 2001. Dr. Kim Hunt, former employee of the Commission, is the current Chair of the National Association of Sentencing Commissions and he has asked Virginia to host the next conference in August of 2002. The National Center for State Courts may possibly be interested in co-hosting the conference with the Commission. Judge Gates questioned if there would be great expense to the Commission if we chose to host the conference. Dr. Kern said that the registration fees paid by the attendees would cover the meeting expenses but that hosting the conference would require us to commit significant staff resources during the conference itself and, to some degree, a few months before the meeting. The Commissions members thought hosting the national conference was a good idea and Judge Gates authorized Dr. Kern to contact hotels in the Williamsburg area to see if a competitive proposal in an attractive setting was feasible. Dr. Kern said he would do so and report back at the next Commission meeting.

With no further business on the agenda, the Commission adjourned at 12:00 p.m.