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The Virginia Criminal Sentencing Commission
March 25, 2002
Meeting Minutes

Members Present:

Judge Stewart, Judge Bach, Jo Ann Bruce, Douglas Guynn, Arnold Henderson, Judge Honts, Judge Humphreys, Judge Johnston, William Petty, Bernard McNamee and Reverend Ricketts

Members Absent:

Gary Aronhalt, Howard Gwynn, Judge Hudson, and Judge Newman

The meeting commenced at 10:10 a.m. Judge Stewart announced that there were two new members of the Commission. The two new members are Judge Humphreys and Bernie McNamee. 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 5, 2001, 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 – 2002 session. Judge Stewart asked Dr. Kern to discuss this item on the agenda.

II. General Assembly Actions on New Sentencing Legislation- 2002 Session

Dr. Kern noted that the Commission only recommended two pieces of legislation to the 2002 session of the General Assembly. This first piece of legislation (House Bill 1205) would allow the Commonwealth's attorney and probation officers access to an offender's juvenile social history record without a court order in order to prepare pre-sentence reports, risk assessments and discretionary guidelines worksheets. This bill was adopted unanimously and will become effective July 1, 2002.

The second bill he discussed was House Bill 1344 which would allow Commonwealth's attorneys and probation officers access to an offender's juvenile record for strictly limited purpose of preparing a pre-sentence report, sentencing guidelines, transfers or sentencing hearings. Dr. Kern said that this bill was the most controversial of the session. The Supreme Court opposed this bill from the beginning. The Court felt there was too much potential for abuse. The arguments in favor of doing this outweighed the objections. The bill did pass and will go in effect on July 1, 2002. Dr. Kern said that he would consult with the Executive Secretary's office to make sure that Commonwealth's attorneys and

probation officers can access the juvenile record system in July. Mr. Petty asked if the record would be open on a statewide basis as opposed to single jurisdictions. Dr. Kern said that the Supreme Court MIS Department would have to program the system for a statewide basis. Users will still have to check one jurisdiction at a time. Mr. Petty said that the Supreme Court system is unique that it only checks one jurisdiction at a time. Judge Stewart asked if the Supreme Court is working on making the system check statewide. Dr. Kern said that the Supreme Court would not reprogram the system on their initiative. He also said that each jurisdiction would be advised in our training seminars that they must write a letter to gain access to this system. Dr. Kern said that the Supreme Court would try to randomly audit the system to check for any misuse of the data.

Dr. Kern then discussed House Bill 308, which would require the use of Virginia crime codes references on all reports to the Central Criminal Records Exchange and to any other database maintained by the State Police, the Supreme Court, the Department of Corrections, the Department of Juvenile Justice, the Virginia Parole Board and the Department of Criminal Justice. Dr. Kern said this bill met with opposition early on in the process. The State Police and the Supreme Court said this bill would be too costly for the Commonwealth. A fiscal impact statement provided by the Department of Planning and Budget estimated that this bill would cost the Commonwealth \$765,000 to implement. The cost to implement of these changes to more than 300 local systems affected would range from \$10,000 to in excess of \$100,000 per agency, depending on the type and size of the system. Dr. Kern did question the fiscal impact. The General Assembly felt that this change needed to be done but a reenactment clause was added to this legislation. A reenactment clause means that the bill needs to be re-visited in the 2003 Session of the General Assembly. The legislation calls for all agencies listed above to meet and to identify the necessary steps and submit a written plan for accomplishing the requirements of this act to the Virginia State Crime Commission by December 1, 2002.

Judge Stewart remarked that he has worked on committees in the past in order to improve the criminal history record system. He felt that the Commission could personally overcome the opposition from the Executive Secretary's office. The Virginia Crime Codes should be started at the Magistrate level. There are several places where the VCC can go wrong. He felt that all the problems could be overcome. Judge Humphreys said that the problem is not technical but political. Dr. Kern said that the keepers of the data are hardly ever the users. Mr. Petty commented that as both a user and producer of information that he agreed the fiscal impact statement was wrong. He felt that the fiscal impact estimate was too low. Of the 120 Commonwealth's attorneys office only twenty of those offices are automated which would lend itself to this addition. He believed that the Commission should continue this work but it is going to be hard to overcome.

Dr. Kern remarked that Senate Joint Resolution 178 confirming the appointment of Judge Stewart as Chairman of the Commission passed unanimously. The next bill discussed, Senate Bill 252, would establish a uniform time for appointment terms to the Sentencing Commission to expire at the end of the calendar year for all members. He noted that

under current law, many of the terms expire at different times in October and November. The bill also staggered the terms of gubernatorial appointees beginning in January 2004.

Dr. Kern discussed the bill – SB 136. This bill provides that an evaluation for participation in the Detention Center Incarceration program or the Diversion Center Incarceration program can occur upon motion of the attorney for the Commonwealth or the courts own motion, as well as the defendant’s motion. This bill passed unanimously and will take effect July 1, 2002.

Dr. Kern discussed the next proposal - HJR 215. This resolution directed the Virginia State Crime Commission to study the sentencing of misdemeanor crimes. The Crime Commission would give particular attention to the sentences imposed by judges and juries in misdemeanor cases. The study would also include the length of time actually served by defendants given a jail sentence. The Commission completed the same study for felony crimes and the analysis took a year to complete. He felt that this study would be impossible to complete since no comprehensive data existed for misdemeanors. The Crime Commission may ask the Sentencing Commission to provide assistance with this study.

Dr. Kern summed up his remarks by touching on a number of bills that were not adopted. He mentioned HJ203 that would have directed the Crime Commission to study all penalties for crimes involving sexual offenders and crimes against children. This resolution was continued to the 2003 General Assembly. The Crime Commission is currently working on a study to reorganize the inconsistencies in Title 18.2 of the Code of Virginia.

He mentioned HB768 that would have authorized the court to suspend, with terms and conditions, including periodic drug abuse screening, the sentence imposed on a person convicted of a felony violation when the sentence would be three years or less under the sentencing guidelines. As you already know, judges can suspend all of these sentences. The bill was passed by indefinitely.

Judge Stewart thanked Dr. Kern for his presentation. He then asked Dr. Creech to cover the next item on the agenda, Proposed Legislation and Impact Analysis - 2002 General Assembly Session.

III. Proposed Legislation and Correctional Impact Analysis – 2002 General Assembly Session

Dr. Creech began by reminding the members 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 2002 session of the General Assembly. The Commission produced 221 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. Nearly 50% percent of the proposed legislation involved expansion or clarification of an existing statute and 32% represented a proposal to increase the penalty from a misdemeanor to a felony. Mr. McNamee asked for better clarification on the percentage of analyses and why the total did not add to 100%. Dr. Creech said that bills could have multiple types of legislative change.

In a comparison of the 2002 and 2001 sessions, Dr. Creech noted there were more impact statements (221 vs. 144), more bills with impact statements (95 vs. 79), and more impact statements with a cost associated with the proposal (36 vs. 10). In addition, one of the purposes for requiring an impact statement is being met. That is, the impact statements serve as a “gatekeeper” that reduces the number of bills that will cost the Commonwealth in the near future from being passed. Dr. Creech noted that 14 legislative drafts, for which the Commission identified an impact, were never introduced, despite an overall increase in the number of bills introduced (from 7 to 17) with an impact. In the 2001 session, all legislative drafts with an identifiable impact were still introduced. The largest change in type of legislation from 2001 to 2002 were ones that increased the penalty from misdemeanor to felony; in 2001, less than 3% of the proposals were of this type compared to more than 32% in 2002.

Dr. Creech identified several goals that the Commission staff sought to improve upon between the 2001 and 2002 sessions. Primarily these included (a) improving communications with the Division of Legislative Services, (b) provide impact analyses for bills with line amendments, (c) combine adult and juvenile correctional impact statements on an informal basis, and (d) improve our ability to communicate summary impact information on bills. The Commission was able to achieve all of these goals. However, Commission staff was unable to make available through the Legislative Information System the impact statements for bills with line amendments. Nonetheless, these impacts were prepared and made available through the Clerks of the House and Senate, and were also provided to those who typically receive the Commission’s impact statements.

Dr. Creech assured the Commission members that as the Commission’s impact-analysis responsibility grows to include local and state community corrections programs, the staff will be working to obtain the best information available, and to be in communication with the primary users of the information on how to present the information and how to report the associated costs.

Dr. Kern commented that some officials from the U.S. Justice Department said that in comparing the systems across the country, Virginia as the best process for reviewing the

fiscal impact for proposed bills. Mr. Petty asked if there is a uniform method for calculating the number of bed spaces particular offense change would create. Dr. Creech said he there is a simulation model that he uses to compile the number. Mr. Petty questioned if the staff uses existing convictions for that particular crime. Dr. Creech said he does use existing convictions and sentence length. He would apply information from the proposed penalty to those existing numbers. Judge Stewart felt that the staff really works hard during the General Assembly. Mr. Petty commented that if a bill passes depends largely on the fiscal impact more than the merits of the legislation. The numbers that are being provided should be accurate because a huge importance is placed on these statements. The Commission should be aware of how these numbers are calculated and that they are calculated correctly. Judge Stewart said that he believes that the staff has a good reputation with the General Assembly. Judge Humphreys asked if the staff ever look at these fiscal impacts for the past to see if they are accurate. Dr. Creech said the staff has looked at the Exile/SABRE bill but it was full of assumptions. All of those assumptions are included in the fiscal impact statements.

Judge Stewart thanked Dr. Creech for his brief overview. He then Ms. Farrar-Owens to cover the next item on the agenda, Sentencing Guidelines Reanalysis.

IV. Sentencing Guidelines Reanalysis

At its November 2001 meeting, the Commission approved the concept of conducting a thorough reanalysis of Virginia's sentencing guidelines. Ms. Farrar-Owens began by discussing the benefit of such a reanalysis. She reminded the Commission that current guidelines are based on patterns of sentencing and time served for the period 1988 through 1992. By examining sentencing practices under the truth-in-sentencing/no parole system, the reanalysis will provide a more focused picture of Virginia's experiences since the abolition of parole, Ms. Farrar-Owens stated. She noted that, since 1995, revisions of the guidelines have been based on examination of compliance and departure patterns; however, analyzing sentencing data holistically, taking into consideration all the factors that may affect sentencing outcome, is a more precise approach.

Ms. Farrar-Owens reviewed the development of the current sentencing guidelines for Commission members. Pre-1995 guidelines were based solely on historical sentencing patterns. In 1989, a committee of judges selected five years of sentencing data to define "history." Using the five years of data minimizes year-to-year fluctuations and reduces the likelihood of spurious results when building sentencing models. In order to make the transition to a system without parole, the truth-in-sentencing guidelines were developed from analysis of sentencing practices and patterns of time served. Once that transition was completed, midpoint enhancements were built in to increase the sentence recommendation and, therefore, time to be served by violent felons. The truth-in-sentencing guidelines apply in felony cases in which the crime was committed on or after January 1, 1995. Because the truth-in-sentencing system is tied to the date of offense, Ms. Farrar-Owens advised the Commission that the majority of felons were not sentenced

under the truth-in-sentencing system until late 1995 or early 1996. Hence, five years of sentencing data under the new system have only recently become available.

Ms. Farrar-Owens then discussed the data to be used for the guidelines reanalysis: the pre/post-sentence investigation (PSI) data system. PSI information is collected and maintained by the Department of Corrections (DOC). Probation and parole officers prepare PSIs and submit them to DOC's central office. The PSI contains a vast array of detailed information regarding the offender and the offense(s) committed. Ms. Farrar-Owens advised the Commission that a PSI report is not completed on every felon convicted in circuit court. Cases that do not result in a prison term or a term of supervised probation will not have a PSI. When a pre-sentence report is not ordered, there is a considerable time lag between sentencing and preparation of the post-sentence report. Data for a given year is incomplete for a lengthy period. Ms. Farrar-Owens stated that it is necessary to supplement the data, so that it more fully represents all felony cases sentenced in circuit court in a given period. The method of supplementing PSI data has evolved with DOC policy and practice and the availability automated data systems. Today, sentencing guidelines data is used to identify felony cases that do not have a PSI in the system. Information on the guidelines form is used to generate a PSI record for each case without an existing PSI. Ms. Farrar-Owens shared with the Commission that reanalysis will begin with 126,533 cases, of which approximately 23% are supplemental PSIs generated from the sentencing guidelines database.

Next, Ms. Farrar-Owens presented the methodological approach that will be used by staff for the guidelines reanalysis. Statistical models of sentencing under the truth-in-sentencing/no-parole system will be developed. Although all 14 sentencing guidelines offense groups will be reanalyzed, the reanalysis will proceed in stages, with 4 or 5 offense groups completed each year. Models will be developed by type of sentencing decision. The in/out decision will be modeled separately from the sentence length decision. This approach is supported by criminological studies on sentencing. Because compliance rates in midpoint enhancement cases are below average, midpoint enhancements will be examined closely during the reanalysis.

Ms. Farrar-Owens then discussed an issue that will be of particular concern during the reanalysis: the definition of what constitutes a state-responsible (prison) sentence versus a local-responsible (jail) sentence. She stated that the General Assembly has revised the definition of a state-responsible sentence several times since 1990. The latest modification, in 1997, shifted the threshold for a state-responsible (prison) sentence from a sentence greater than six months to a sentence of one year or more. She noted that the current structure of the guidelines continues to reflect the definition of a state-responsible (prison) sentence effective in 1995 (a sentence greater than six months). Therefore, the current structure of the guidelines is out of sync with the current definition of a state-responsible prison sentence. Ms. Farrar-Owens advised the Commission that staff will take this issue into consideration during the reanalysis and will explore the possibility of reducing the number of guidelines worksheets from three to two (an incarceration in/out worksheet and a sentence length worksheet).

Ms. Farrar-Owens concluded by proposing a work plan to the Commission. She proposed that the offense groups with the lowest compliance rates be reanalyzed first. She reported that, of the 14 guidelines offense groups, rape, sexual assault, murder, and robbery had the lowest compliance rates in fiscal year (FY) 2001, ranging between 67% and 70%. In the course of the reanalysis, staff will supplement existing sentencing data in rape cases (including forcible sodomy and object penetration) with additional detail from the narrative portions of PSI reports (as approved by the Commission at the November 2001 meeting). Ms. Farrar-Owens proposed that the supplemental data collection capture at least the following factors: the number of victims, the ages of all victims, the mode of committing the offense (physical force, threats of violence, manipulation, coercion, position of authority), the duration of offense behavior, the type of weapon used, the mode of inflicting injury, the offender/victim relationship, use alcohol by offender and victim at the time of offense, gender of the victim, and additional detail regarding the offender's prior convictions for sexual assault crimes. The Commission subsequently approved the work plan presented by Ms. Farrar-Owens.

Judge Stewart 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 – FY2002

Ms. Kepus reported that for year-to-date FY2001, over 8,500 worksheets were submitted to the Commission. She noted that overall compliance is 79.0% so far in FY2002. The aggravation rate was reported as 9.0% and the mitigation rate as 11.8%. 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 80%.

Ms. Kepus stated that compliance rates varied across the 31 judicial circuits. The highest compliance rate, 90%, was found in Chesapeake (Circuit 1). She also noted that Circuit 29 in Southwest Virginia had the lowest compliance rate at 66%.

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 87%. Ms. Kepus observed that the compliance rates within offense groups range from a high of 87% in the traffic offense to a low of 65% among the rape offenses. The rape offense group also has the highest rate of mitigation (31%). 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 Stewart thanked Ms. Kepus for her presentation and then asked Mr. Fridley to discuss the next item on the agenda, Sentencing Guidelines Manual/Worksheet Revisions for July 1, 2002.

VI. Sentencing Guidelines Manual/Worksheet Revisions for 7/1/2002

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 risk assessment statewide
- Update Virginia Crime Codes
- Enhanced formatting of guidelines work sheets/manual.

Mr. Fridley briefly discussed each of some of the 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 worksheets 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, 2002 and all scheduled training should be completed by the end of July.

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.

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

VII. Miscellaneous

Dr. Kern began by detailing the dates for the remaining Commission meetings for the year. The Commission is scheduled to meet on June 17, September 9, and November 4.

Dr. Kern then discussed the annual meeting of the National Association of Sentencing Commissions. Virginia will host the conference. It is being held on August 4-6, 2002. Dr. Kim Hunt, former employee of the Commission, is the current Chair of the National Association of Sentencing Commissions. The National Center for State Courts may possibly be interested in co-hosting the conference with the Commission. Dr. Kern said that any interested Commission members should contact him about attending.

With no further business on the agenda, the Commission adjourned at 12:15 p.m.