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The Virginia Criminal Sentencing Commission
April 14, 1997
Meeting Minutes

Members Present:
Judge Gates, Judge Bach, Richard Cullen, Frank Ferguson, Judge Honts, Judge Johnston, Lane Kneedler, Judge McGlothlin, Judge Newman, Reverend Ricketts, Bobby Vassar and Heidi Medcalf for Mark Christie

Members Absent:
Robert Bobb, Jo Ann Bruce, Peter Decker, William Fuller and Judge Stewart

Agenda

I. Approval of Minutes

Approval of the minutes from the November 19, 1996 was the first item on the agenda. The Commission unanimously approved the minutes.

Judge Gates then asked Ms. Farrar-Owens to discuss the next item on the agenda, an update on the compliance rates for the sentencing guidelines.

II. Sentencing Guidelines Compliance Report

Ms. Farrar-Owens presented a series of charts to summarize the compliance rate patterns and trends.

Recommended and Actual Disposition: For the time period January 1, 1995 through March 31, 1997, over 28,000 work sheets were submitted to the Commission. Ms. Farrar-Owens said that judges are continuing to use probation and jail sanctions more often than they are recommended and prison sanctions slightly less often than recommended by the guidelines. Probation sanctions include sentences to boot camp and detention centers. The Commission's recommendation to consider those sanctions as incarceration (for the purposes of the guidelines only) will take effect July 1.

Sentencing Guidelines Compliance: Ms. Farrar-Owens noted that the overall compliance rate continues to remain at 75%. This figure stabilized very quickly after the introduction of truth in sentencing. Over half of the departures from the guidelines are sentences above the guidelines. Judges imposed sentences higher than the guidelines in 13.7% of the cases and imposed sanctions lower than the guidelines 11.2% of the time

Compliance by Offense: Ms. Farrar-Owens observed that larceny, with a compliance rate of 82.4%, was the offense group with the highest compliance rate. In contrast,

kidnapping offenses, with a rate of 60.6%, yielded the lowest compliance rate. Ms. Farrar-Owens noted that all of the violent offenses have a compliance rate below 70%. However, for the first time since the introduction of truth in sentencing there are no offense groups with compliance rates of less than 60%.

Compliance by Circuit: Ms. Farrar-Owens stated that compliance rates varied greatly across circuits. The circuit-specific compliance rates range from a high of 87% to a low of 63%. Of those circuits with high compliance rates, Circuit 7 (Newport News) and Circuit 8 (Hampton) have compliance rates of 86.6% and 86.4% respectively. She also noted that eight circuits have compliance rates above 80% and eight circuits have rates below 70%. Fifteen circuits have compliance rates in the seventies.

Reasons for Departure: Ms. Farrar-Owens next presented information concerning the reasons judges cite when sentencing above or below the guidelines. For the time period January, 1995 through March, 1997, when judges have sentenced below the guidelines, they cited alternative sanction in 20% of the cases. Alternative sanctions include boot camp incarceration, detention and diversion centers, or any community-based program. In 15.6% of the mitigation cases, judges noted the offender's potential for rehabilitation as a rationale for imposing a term below the guidelines. When judges sentenced above the guidelines, they cited the offender's criminal orientation and recidivism for the identical offense in 13.6% of the upward departures. In 5.3% of the aggravation cases, judges noted the excessive drug amount involved in the case. It was noted that with the introduction on July 1 of the sentencing guidelines factor for the quantity of sold cocaine, offenders who sell relatively large quantities of this drug will be recommended for longer prison sentences. Ms. Farrar-Owens observed that it will be interesting to see whether the addition of this factor will lead to a lower aggravated departure rate in drug sale cases.

Method of Adjudication: Ms. Farrar-Owens then presented information concerning the method of adjudication. For the time period January, 1995 through March, 1997, 83% of the cases have resulted from a guilty plea, and only 15% of the cases have been tried by a judge. Overall, only 2.4% of the cases have been tried by a jury. Ms. Farrar-Owens speculated that the phenomenon of decreasing rates of jury trials since 1994 has likely resulted from the combination of the introduction of bifurcated jury sentencing in 1994 and the implementation of truth in sentencing.

Sentencing Guidelines Compliance in Jury Cases: Ms. Farrar-Owens proceeded to discuss sentencing guidelines compliance in jury cases. Of the 652 jury cases, jury sentences were within the guidelines 44% of the time. Juries imposed sentences higher than the guidelines in 44.6% of the cases and imposed sanctions lower than the guidelines 11.3% of the time. She noted that only 20% of the jury sentences were modified by judges. Furthermore, only 7% of the jury cases resulted in a modification by a judge that lowered the sentence enough to bring it within the range recommended by the guidelines. The majority of the judicial modifications of jury sentences resulted in an adjusted sentence that still represented an upward departure from the guidelines.

Mr. Kneedler asked how our compliance rate compares with other states that have sentencing guidelines systems. Ms. Farrar-Owens responded that our guidelines compliance rates have never been compared to those in other states. She commented that such a comparison could be made but that, for methodological reasons, only certain states should be selected. To ensure a valid comparison, Ms. Farrar-Owens felt that we should limit this investigation to states with both truth in sentencing systems (no parole) and operating sentencing guidelines systems. She said that such an analysis would be pursued with hopes of having some data on this issue for the next Commission meeting in June.

III. 1997 General Assembly Session Action on Commission Recommendations

Judge Gates asked Dr. Kern to move on to the next item on the agenda which was the results of the 1997 General Assembly session as it concerns the Commission's recommendations.

Dr. Kern remarked that in the Annual Report, the Commission made seven specific recommendations to the General Assembly. Five of these recommendations involved guidelines revisions and the other two involved changes to the Code of Virginia. All of these recommendations were accepted. Dr. Kern noted that he presented the Annual Report and recommendations before both the House and Senate Courts of Justice Committees as well as the Public Safety Subcommittees of the House Appropriations Committee and the Senate Finance Committee. Dr. Kern said that these committees were very pleased with the work of the Commission and its recommendations.

Dr. Kern noted that with regard to the recommended guidelines revisions, no actions were taken to override the suggested changes. With regard to those recommendations that required changes to the Code, Delegate Jim Almand agreed to patron our bills and he successfully ushered them through the legislative process.

One of the Commission's recommendations was an amendment to §46.2-357 that deals with the penalty for those driving after being declared an habitual offender (felony version). Subsection D of this Code section now allows the judge to suspend the imposition of the mandatory minimum one year incarceration sentence and place the offender in the detention center, diversion center or boot camp incarceration program. This revision passed without a single negative vote.

The second recommendation was an amendment to §19.2-298.01 which now provides language on how these alternative punishment programs are defined per the use of the sentencing guidelines system. Now, within the context of the sentencing guidelines system, any sentence to the detention center, diversion center or boot camp incarceration programs shall be considered a term of incarceration. These programs are still defined as probation in their respective enactment clauses. Mr. Kneedler asked if judicial use of these alternative punishment programs would now be in compliance with the guidelines when incarceration is recommended. Dr. Kern responded affirmatively because the term will be considered incarceration in the sentencing guidelines system.

Dr. Kern then spoke about approved legislation which affects the Commission in some fashion. The first such legislation amended various sections of the Code to require that one member of the of the Sentencing Commission (Governor's appointments), the Criminal Justice Services Board, and the Parole Board be a representative of a crime victim's organization or a victim of crime. The second piece of legislation discussed was House Joint Resolution 561 that directs the Crime Commission to study crimes of intimidation against ethnic, racial, gender and religious groups, entities and other individuals including the incidence of arson against African-American church buildings. This resolution instructs the Sentencing Commission to provide technical assistance on the study. The last piece of legislation which directly affects the Commission codifies the process used to forecast jail and prison populations and involves the Commission in the process as both technical advisors as well as policy advisors.

Dr. Kern also informed the Commission that the legislature has again redefined the term "state responsible inmate." Effective July 1, 1997, a state responsible inmate will be any felon receiving an incarceration term of one year or more. The previous definition was an incarceration sentence of greater than six months. This new definition will affect our guidelines in terminology only. Since the guidelines work sheet C recommends incarceration terms beginning at 7 months, the staff have removed any reference here to "prison" as well as references on work sheets A and B to jail and prison. Mr. Cullen suggested that the Commission alert the Commonwealth's attorneys about the change in the drug work sheet dealing with quantity of cocaine. He believed this would be a good idea since the prosecutors strongly encouraged this modification and the Commission responded in an efficient manner. Judge Gates agreed that the Commission should take steps to ensure that this guidelines change is communicated. Judge Gates then complimented Dr. Kern on his work during the General Assembly session.

Judge Gates then asked Dr. Hunt to discuss the next item on the agenda, an update from the Research Subcommittee.

IV. Offender Risk Assessment - Status Report

Dr. Hunt stated that the Research Subcommittee will be meeting on May 19 at which time they will be making some major decisions on the next steps in the risk assessment project. Accordingly, Dr. Hunt indicated that his presentation today would be a review of where the project stood as of now. Dr. Hunt remarked that §17-235 directs the Commission to develop a risk assessment instrument and apply it to non-violent offenders. He noted that through statistical analysis and research, the guidelines could be modified to include a risk assessment instrument which could divert from incarceration some number of non-violent offenders, who otherwise would be recommended for prison, to alternative punishments.

Risk assessment involves estimating an individual's likelihood of continued involvement in crime and classifying offenders regarding their relative risk of such continued involvement. Dr. Hunt said that using risk assessment means developing profiles or

composites based on overall group outcomes. Groups that statistically demonstrate a high degree of re-offending will be labeled high risk. The standard used to judge risk classification is not perfection, but the degree to which current practice (i.e., existing recidivism rate) can be improved.

The Subcommittee directed the staff to use existing automated information to study recidivism among nonviolent offenders. Nonviolent felony offenders were defined by the Subcommittee to be those convicted of the crimes of fraud, larceny, sale or possession of drugs and certain burglaries. The largest group of offenders in the study sample are convicted of sale or possession of drugs. The staff is continuing to conduct intensive research on offense patterns for the May 19 Subcommittee meeting. Three broad groups of offenders have been identified. The first group of offenders are characterized by having extensive and diverse prior criminal records. The second group consists largely of offenders who are convicted of drug crimes. The third group of offenders are unemployed and have prior records consisting of many misdemeanor crimes. Dr. Hunt said the Subcommittee will be discussing these groups and making some recommendations on May 19.

Since the last meeting, statistical models have been revised and new ones have been explored. By approval of the full Commission, for purposes of risk assessment the staff is considering offenders with prison or jail recommendations. Per the wishes of the Commission, the staff has also statistically controlled for effects of race in risk assessment model development. Judge Bach asked for some elaboration on what was meant by controlling for the effects of race. In responding, Dr. Hunt said that a strong predictor of whether someone was going to recidivate with a new conviction was the offender's race. The research revealed that non-whites were more likely to recidivate than white offenders. While the offender's race was proven to be statistically correlated with the likelihood of recidivism, it was viewed as an unacceptable factor for further consideration. Instead, Dr. Hunt noted, the Subcommittee decided to focus on other statistically relevant items and average out the influence of race in the statistical model predicting the probability of recidivism.

Dr. Hunt noted that a few factors like prior adult record, offender age, and low social status influence recidivism probabilities. Those factors which prove to be most relevant to the likelihood of recidivism are identified as key predictors. As a result of the research work completed to date, the Subcommittee believed that the risk assessment instrument is feasible and could be useful in identifying relatively good risks for alternative punishments. Dr. Hunt said the Subcommittee will meet in May to complete the analysis and to reach closure on remaining issues.

Dr. Hunt summed up his presentation by reminding the Commission that simply implementing a risk assessment instrument is not the end result. He noted that statistical risk assessment must be tested and evaluated to determine the predictive power of the models. There are two basic forms of prediction error. First, the model may err with a false reconviction prediction. Second, the model may err with a false non-reconviction prediction. He observed that the Subcommittee will need to gather more information on

offenders who receive alternative or intermediate sanctions. New information must be gathered on each offender's experiences (e.g., vocational training, substance abuse treatment) within the program setting. Dr. Hunt remarked that such information will be critical in determining which sanction experiences matched to which offender profile resulted in the best successes (i.e., lowest recidivism rates).

The Subcommittee will initiate the development of risk assessment works sheets and models at the May meeting. The current plan is to implement the risk assessment instrument in a few selected circuits and to then proceed with gradual implementation across the rest of the state. Judge Honts asked what the ultimate objective of the project was. Judge Gates remarked that the Commission was given a legislative directive to develop a risk assessment instrument, apply it to non-violent offenders, and to report on the feasibility of using it to divert from prison up to 25% of these offenders. Judge McGlothlin also observed that, aside from the legislative directive, he viewed the risk assessment instrument as a helpful tool to assist a judge in determining the possibility of an offender re-offending.

With no further questions, Judge Gates thanked Dr. Hunt for his presentation and moved on to the next item on the agenda - a status report on the offense seriousness measurement study.

V. Offense Seriousness Measurement Study - Status Report

Ms. Farrar-Owens provided the report on this agenda item and began her presentation with a quick review of the methodology used in this study. The offense seriousness survey asked respondents to rate the seriousness of the 287 most frequently occurring felonies and misdemeanors. For each offense, the respondent was asked to assign a score reflecting his perception of the seriousness of that crime relative to a standard offense used as a benchmark. The benchmark, burglary of a non-dwelling with intent to commit larceny without the use of a deadly weapon, was assigned a score of 100. Respondents were to assign a score to selected offenses based on their own perception of its seriousness relative to the standard offense. Ms. Farrar-Owens provided the Commission with a review of the tentative findings of the survey.

Ms. Farrar-Owens reported that there were 548 respondents who participated in the survey. She provided a breakdown of survey participation by professional occupation groups. Judges (186), private attorneys (170), and public defenders (116) were the professional groups with the highest participation rates. Only 52 prosecutors completed the survey. The initial analysis proceeded by examining the responses within each occupational group and then comparing these results across occupational groups. The results of this first stage analysis illustrated that the ranking of offenses from most serious to least serious was remarkably similar across the four occupation groups. However, the level of numeric value assigned to the crimes relative to the standard offense varied substantially across the groups. Ms. Farrar-Owens noted that the analysis revealed that judges and Commonwealth's attorneys tended to rate the offenses similarly to each other.

However, public defenders and private defense attorneys rated offenses on a much lower scale than that used by the judges and prosecutors. Mr. Cullen asked about the significance of this result. Ms. Farrar-Owens replied that since there were substantive differences in these seriousness judgments across occupational groups, a policy decision would have to be made about which set of values to use in the potential applications of this information. Given these findings and the likelihood that the first use of the seriousness values would be in the upcoming analysis of judicial sentencing under no-parole, Ms. Farrar-Owens said that the initial analysis was performed on the judicial responses only.

With regard to the analysis, Ms. Farrar-Owens commented that the statistical correlation between perceptual seriousness ratings and the corresponding statutory maximum penalties is high. However, she pointed out there were a number of occasions where the order of the offenses based on the perceived seriousness scale did not correspond with the ordering of offenses by statutory maximum penalty. For example, there were circumstances where a crime with a statutory maximum penalty of 40 years in prison was rated as more serious than a crime with a statutory maximum penalty of life in prison.

Mr. Cullen asked how the Commonwealth's attorneys responses correlated with those of the judges. She responded that the Commonwealth's attorneys did rate offenses similarly to judges but the small number of booklets returned by the prosecutors (52) make the results unreliable. Mr. Ferguson questioned if the Commission received any feedback as to why the response from the prosecutors was so low. Ms. Farrar-Owens answered that the Commonwealth's Attorneys' Training Council had reviewed the Commission's request for prosecutors participation in the survey and had made a policy decision that the survey should only be distributed to the elected Commonwealth's Attorney and not all of the assistant prosecutors working in each office. Dr. Kern added that even with this restriction only a small percentage of the elected Commonwealth's Attorneys filled out the survey. He noted that the Commission had received letters from a number of the prosecutors which based their survey participation refusal on their belief that determining the seriousness of crimes was a policy matter for the General Assembly and not the Commission.

Returning to the analysis results, Mr. Kneedler commented that he would expect that offenses like murder and rape would receive high scores from everyone regardless of their occupation or background and questioned the basis of the group differences in seriousness ratings. Ms. Farrar-Owens responded that the differences in offense seriousness ratings are largely grounded in the responses to the non-violent crimes. Mr. Kneedler asked if it was possible to receive a chart of the offense seriousness values for each of the groups who participated in the survey. Mr. Vassar asked if anyone had problems with understanding the standard offense. Ms. Farrar-Owens said a few of the respondents did experience problems with the methodology.

Ms. Farrar-Owens next turned attention to the survey's attempt to gather relative seriousness information on drug sales involving different amounts of cocaine. In the survey the respondents were asked to rate the seriousness of drug sales involving the two

different forms of cocaine - powder and crack. Respondents rated the sale of 9 grams, 1 gram and 1/10 of a gram of powder cocaine, as well as the sale of 9 grams, 1 gram and 1/10 of a gram of crack cocaine. In general, the results revealed that judges did rank the sale of larger quantities of cocaine as more serious than sales of smaller quantities. Ms. Farrar-Owens further said that judges rated equal quantities of powder cocaine sales as more serious than those for crack cocaine. For instance, she pointed out that the sale of 1/10 of a gram of crack cocaine was rated substantially less serious than the same amount of a sale involving powder cocaine.

Mr. Vassar asked if the study results supported the conclusion that the respondents felt crack cocaine was less serious than powder cocaine. Ms. Farrar-Owens responded that the survey revealed that, for the amounts studied, that powder sales were viewed more serious than crack sales. Mr. Ferguson asked if the group of judges who completed the survey consisted only of circuit court judges. Ms. Farrar-Owens said the group consisted of circuit court as well as general district, juvenile and domestic. She added that the majority of the judges were circuit judges. Mr. Ferguson asked if she could break out the responses by type of judge. She said that such an analysis could be completed but cautioned that the results would be suspect given a low number of judges in certain groups. Mr. Cullen questioned the validity of the survey results revealing crack cocaine being perceived less serious than powder cocaine. He felt that if a circuit court judge was asked individually he would say crack is more serious than powder cocaine. In contrast, Judge Newman said he viewed powder cocaine as being more serious because it is an indicator of the possibility of a higher-level dealer. Judge Honts commented that the crack cocaine cases typically involve very small quantities and are committed by those with substance abuse problems trying to earn money to support their habits.

The discussion next turned to the results of the survey dealing with an evaluation of the seriousness of embezzlement and grand larceny crimes involving varying dollar amounts. The results revealed judges did rate these crimes more seriously as the dollar value of what was stolen or embezzled increased. The embezzlement of $10,000 was rated at 1 ½ times more serious than the embezzlement of $1,000. For grand larceny, the seriousness ratings ranged from a score of 118 for a dollar value of $5,000 down to a score of 83 for the dollar value of $500. These results validated the methodology as a means to develop formulas to calculate the seriousness level of cocaine sales of any quantity or larcenies and embezzlements involving any dollar amount. The sentencing guidelines are occasionally criticized for not taking into account the dollar value of a crime such as embezzlement. The dollar value of property stolen or lost in a felony crime is information that is not collected in the pre-sentence investigation database. However, if the Commission desires, Ms. Farrar-Owens suggested that the staff could initiate a supplemental data collection effort designed to acquire the dollar amount embezzled for all cases in a given year. She further indicated that the collection of this information would allow our analysts to assess the impact, if any, of including a specific weight for dollar value stolen in the embezzlement guidelines.

Ms. Farrar-Owens remarked that the Judicial Planning Division of the Supreme Court became interested in the survey results when they were asked to develop a day fine

system for use in the General District Courts. At their request, we provided them the survey results but no action was taken on this matter since the day fine project has been terminated. She noted that the most immediate application of the offense seriousness measure would likely be in the forthcoming analysis of no parole sentencing. The question to be answered here would be whether the use of the offense seriousness measure developed from the survey can help our analysts create better statistical models of judicial sentencing behavior. Currently, the sentencing guidelines and the statistical models they are based on utilize a measure of offense seriousness that is grounded in the statutory maximum penalty for each crime. Thus, a crime which has a statutory maximum penalty of 40 years is considered twice as serious as an offense with a maximum term of 20 years. The survey results, though, illustrate that judges perceptions of crime severity do not necessarily correspond with the maximum penalties provided in the Code of Virginia. Furthermore, the survey results indicate that there is a great deal of variation in crime seriousness judgments for the many crimes that all have the same maximum penalty. Ms. Farrar-Owens observed that there is no question that the survey results provide a more refined measure of crime seriousness than that represented by the statutory maximums but that does not necessarily mean that the survey measure is better. Such a judgment, she said, should be put to an empirical test with the analysis of our data. In any event, Ms. Farrar-Owens pointed out that the existence of the perceptually based offense seriousness measure provides the Commission with an additional option to consider should it wish to entertain alternative schemes for how the guidelines weigh crime seriousness.

Mr. Vassar inquired about the feasibility of surveying general citizens on the matter of perceptions of offense seriousness. Dr. Kern responded that a citizen survey, done in a methodologically sound fashion, might be expensive but that he would have to consult with others on the matter. Dr. Kern suggested that he could contact the Survey Research Center located at Virginia Commonwealth University (VCU) to discuss the matter and get some cost and feasibility estimates. Judge Gates questioned whether a citizen survey on this matter would produce any useful information for the guidelines. Mr. Vassar remarked that he thought the results would provide public attitudes on crime and that the Commission could consider incorporating these citizen opinions into a restructuring of the guidelines. Mr. Ferguson offered that the Code Commission will likely be initiating a re-codification of the criminal code in about three years. He commented that the results from this survey in its existing form will be very helpful in completing that task. He added that the public perspective on crime seriousness is important but that the public would not understand a lot of the legal terminology in this survey. For example, he noted that many citizens refer to robbery and burglary interchangeably as though they were the same thing. He thought that if lay citizens were to be surveyed that another survey would have to be constructed with plain language and less comprehensiveness.

Judge Gates asked Dr. Kern if the Commission needed to take any action on the survey results. Dr. Kern responded that there was no need to take any actions now. Dr. Kern further said that staff would meet with officials from the VCU Survey Research Center to explore the costs of randomly sampling Virginia citizens and constructing a shorter survey. Judge Gates thought it may be a good idea to try again to get the

Commonwealth's attorneys to complete the survey. Dr. Kern said he would discuss a mechanism to garner greater participation from prosecutors by contacting Walter Felton, the Administrator of the Commonwealth's Attorneys' Services Council.

Mr. Cullen commented that he was very interested in the embezzlement findings and was supportive of a special study of these cases. Judge Gates said it was the wish of the Commission that the embezzlement research be initiated by the staff.

There being no further comments on this matter, Judge Gates turned to the next item on the agenda and asked Mr. Fridley to provide an overview of the new sentencing guidelines manual and work sheets.

VI. 1997 Edition of Sentencing Guidelines Manual/Work Sheets

Mr. Fridley said the 1997 edition of the guidelines manual will contain all the changes recommended by the Commission that were approved in the last General Assembly Session. He remarked that the new manual will have a different look that includes laminated tabs for easy and quick access to the various chapters. This feature is one which was frequently requested by manual users. Mr. Fridley added that the guidelines work sheets have been re-designed completely and will now be able to be computer scanned in order to decrease data entry time. The sentencing guidelines cover sheet has also been revised to make it easier to complete the sentencing guidelines recommendation and final disposition sections. In instances where work sheet A and B are completed, all possible sentence recommendations are conveniently listed on the cover sheet. Mr. Fridley said there is no section B for kidnapping, murder/homicide, rape and robbery. In situations where the guidelines recommendation for one of these offenses is not a term of greater than six months (section C), then the recommendation is always probation or incarceration up to six months. A check box for this recommendation is furnished on the cover sheet as well. For cases in which section C is completed, the user will enter the recommended midpoint and sentence range in the fields provided. Mr. Ferguson inquired if the staff has considered an automated version of the work sheets. Mr. Fridley said several software developers have contacted the Commission with this idea but no one has yet produced a useable product. Furthermore, he added that many of the work sheet preparers have limited access to state of the art computers. Dr. Kern agreed that most prosecutors and probation officers are not equipped with computers that are powerful enough to run much of the latest software programs.

Judge Gates commented that he would like to express his appreciation to the probation and parole officers for the work they do. He felt that these officers are the backbone and the success to the system. Judge Gates said he relies heavily on the probation officers to help him complete his job. He asked Dr. Kern to write a letter expressing the Commission's appreciation for their hard work.

Mr. Fridley also noted that the manner in which the final disposition is recorded on the work sheets had changed. The final disposition section now includes check boxes to indicate when a life sentence is part of the imposed or the effective sentence. Fields have been added to record the term of probation imposed in years, months and days, or if so ordered by the judge, a box can be checked to record the imposition of indefinite probation. If the offender is sentenced to time served in jail prior to sentencing, this is to be reported by simply checking the "sentenced to time served" box now provided.

Mr. Fridley then asked Ms. Smith Mason to provide an overview of the work sheet modifications.

Ms. Smith Mason reminded the Commission that, for the first time, the guidelines will account for the quantity of cocaine in cases involving offenders convicted for the sale, distribution, manufacture or possession with the intent to sell this controlled substance. The factor addressing cocaine quantity is a tiered system of enhancements designed to increase the guidelines recommendation in cases involving unusually large amounts of cocaine. In cases of cocaine sales involving 28.35 grams (one ounce) up to 226.7 grams, the midpoint recommendation is increased by three years, and by five years in cases involving 226.8 grams (1/2 pound) or more.

The new drug guidelines are also designed to offer judges another sentencing option for offenders convicted of selling smaller quantities of cocaine (one gram or less) who have no prior felony record. In these cases, the guidelines will recommend an incarceration sentence of at least seven to 16 months but will also include, as an alternative, the option of placing the offender in the Detention Center Incarceration Program. The Detention Center Incarceration Program requires secure confinement of four to six months, in addition to time that may be served in jail during the program's evaluation period, and features a mandatory 20 week substance abuse treatment component. In these cases judges will be considered in compliance with the guidelines if they sentence offenders to either recommendation option.

Ms. Smith Mason continued by discussing the guidelines modification dealing with the consideration of the age of the victim in the guidelines computations for sexual assault crimes. For the offenses covered by the sexual assault work sheets, cases involving victims who were under the age of 13 at the time of the offense receive additional points on both sections A and B of the guidelines work sheets. The result of this modification is that offenders who commit sexual assault offenses against victims under the age of 13 are more likely to be recommended for an incarceration term than under the current guidelines.

VII. Miscellaneous Items

Judge Gates next asked Dr. Kern to cover a number of miscellaneous items left on the agenda. The first item concerned the effective date of the revised guidelines. Historically, any changes to the guidelines under the old voluntary system went into

effect for anyone sentenced on or after a selected date. Dr. Kern recommended that this procedure be continued with the new guidelines system and that they become effective for any sentencing on or after July 1, 1997. He pointed out that selecting the date of sentencing as the effective date would avoid much confusion that will arise if we were to select the date of offense. If the date of offense were chosen as the effective date, then we would have two guidelines manuals and work sheet systems in place simultaneously for awhile and mistakes and confusion would occur. Using date of sentencing would be the preferred method for those responsible for completing the forms. He further noted that since the guidelines were discretionary that there should be no legal impediments to choosing the sentencing date for this purpose.

Judge Gates asked the Commission to vote on this recommendation. The Commission voted 10 - 0 in favor of the recommendation. Mr. Cullen abstained from voting on this issue.

The next topic covered by Dr. Kern was the new analysis plan on no-parole cases. Dr. Kern noted that the methodological process approved by the legislature for the development of the first set of guidelines involved analyzing five years of sentencing and time served data for felons during the years 1988 - 1992. As such, he observed, the current guidelines reflect the decision-making of judges, Parole Board members and officials in the Department of Corrections (who calculated and awarded good conduct credits).

Under the new sentencing system, offenders will serve at least 85% of the time imposed by judges. Now, in analyzing the amount of punishment the decision making of the Parole Board is eliminated as a consideration and, for all practical purposes, so too that of the officials in the Department of Corrections. In essence then, an analysis of cases sentenced under the new law will allow for the first time a simultaneous modeling of the sentencing and time served decision. As a result, it is possible that the statistical models generated from this analysis might be different from those that the current guidelines are grounded in. On the other hand, Dr. Kern continued, the models may be strikingly similar given the high overall guidelines compliance rate. Dr. Kern stated the issue is whether the Commission wants to proceed with a new analysis of sentencing with the no parole cases to see what models we can develop and how they compare to what the current guidelines. He cautioned that since the new sentencing system is anchored to the date of offense occurring on or after January 1, 1995 we only have about 18 months of solid data. This will prove to be a disadvantage in analyzing sentencing patterns for violent offenses since there are relatively few of these cases. Dr. Kern said, however, that there are now a sufficient number of non-violent crimes to proceed with an analysis. One approach to take, he suggested, would be to proceed with a study of those offense groups with the most cases and study possible revisions to these guidelines before moving on to the violent crimes. Mr. Cullen remarked that this was a sound approach and that the Commission should proceed accordingly. Other Commission members concurred.

Dr. Kern then talked about the juvenile sentencing grant application. The General Assembly instructed the Department of Criminal Justice Services to set aside some federal grant funds to support the Commission's efforts to study the sentencing of juveniles for serious offenses. The staff recently prepared a grant application for federal funds to the Department of Criminal Justice Services for this study. The Commission requested grant funds are $107,000. The money will support some temporary personnel and their overhead who will work with the Department of Juvenile Justice and the Commission's Juvenile Sentencing Study Subcommittee to establish the data system. Dr. Kern expected that the grant funds will be awarded and made available for work to begin July 1, 1997. The grant will run for a full year and expire on June 30, 1998.

Dr. Kern then discussed the requests for judge specific sentencing results and recent court action on jury notice of parole abolition. Attorney David Baugh has filed several motions against the sentencing guidelines system and the Commission. Judge Duling held a hearing on these motions and he squashed the subpoena. Mr. Baugh indicated that he would appeal. The Court of Appeals *(Mosby vs. Commonwealth)* ruled that a circuit judge must not be required to tell a jury about a defendant's eligibility for parole. The panel said that an argument can be made that juries should be told that Virginia has abolished parole but they felt that any change of this nature must come from the General Assembly or the Virginia Supreme Court.

Turning to the next matter, Dr. Kern noted that the Commission received a letter from Judge Johnston about a matter that came up at a regional judges meeting. Judge Willett from Roanoke expressed concern about the propriety of running sentences concurrently wherein the net result would be a deviation from the guidelines but it is not being shown as such by some judges. Dr. Kern said that the answer to this inquiry is that in this case, and in every case, we ask the judge to report to the Commission the total effective sentence. If there are multiple charges and the sentences are to run consecutive, the judge adds time; if the sentences are to run concurrent, he does not add. The Commission does not do this arithmetic. We compare the total effective sentence to the guidelines range to measure compliance. Dr. Kern said he would send a letter to Judge Willett reminding him of these facts and see whether the information completely addresses his concern.

The next miscellaneous item on the agenda dealt with a proposal to initiate some office renovations on the fifth floor of the Supreme Court Building. As background, Dr. Kern told the Commission that our staff was occupying office space on the fifth floor of the building and that there was a very large area, directly adjacent to our offices, that was vacant and had no planned use by the Supreme Court. This area comprised a total area of approximately 2,000 square feet and was in need of renovation. When an inquiry was made to the Supreme Court about the space, the Commission was told by the Executive Secretary (Rob Baldwin) that the space was being given to the Commission for our use.

Before proceeding to talk about one use of this vacant space, Dr. Kern presented a series of slides illustrating a pictorial history of the Federal Reserve Building (1918) to the present day Supreme Court Building. The importance of this history is that the present

day building was constructed in four major phases and as these additions were tacked on, several major architectural features of the building were been covered up over the years.

Dr. Kern then began to discuss one possible plan for renovating this office space. The proposal would be to convert the existing space, which has been broken up into eight relatively small offices, into a multi-media conference room. Dr. Kern stated that he believed there is a strong need and desire for a conference room that is audio/visual friendly. Such a facility would have build-ins for our computer network, Internet access, presentation monitors, microphones, portable computers and screens. He pointed out that in the entire judicial branch of government the best conference room available was the one the Commission was currently meeting in. This room, he continued, is not well designed for the Commission's use. He noted the many wires and cables running across the carpet and how they posed a risk to attendees of tripping. Furthermore, the room provided no convenient location for our equipment and was simply very awkward to use from a staff perspective. To illustrate, Dr. Kern pointed out how the Commission's projector and related accessories were, by necessity, positioned directly in front of several Commission's members and severely limited their work space. Furthermore, Dr. Kern reminded the Commission that the room has very limited seating for guests. Additionally, he observed that since it was the only conference room relatively large enough to handle medium size meetings, the room was in much demand in the Supreme Court Building and had limited availability to us.

In order to give the Commission some idea of what this proposed renovation would cost, Dr. Kern invited the Department of General Services (DGS), the agency that oversees the maintenance of state office buildings, to provide some estimates. The DGS contacted private contractors and architects who are on state contract to evaluate the space and provide conservative cost estimates of such a renovation. The estimate arrived at from this process was a cost of approximately $120,000. This figure was presented as a worst case scenario. Dr. Kern said that there is some question about the existence of asbestos in the ceiling and under the floor. The estimate assumes that asbestos is present and will have to be eliminated as part of the project. The actual cost of the proposed renovation would come down if there is no asbestos abatement project. These costs include demolition, floor, wall and ceiling finishes, all mechanical and electrical work (e.g., air conditioning, heat, water sprinklers, computer and electrical outlets), lighting, and an additional 18% contingency for unexpected problems.

Dr. Kern next addressed the issue of paying for such a renovation. First he noted that the Supreme Court did not have any funds available for renovating this space. Furthermore, the Commission did not have sufficient general fund money to cover such a cost. He said that the Commission, however, could pay for most of the proposed renovation with the non-general funds generated from manual sales and training seminar fees paid by private defense attorneys. Under normal circumstances, these monies would be applied toward the cost of printing the new guidelines manual and work sheets each year. However, the Commission chose not to make any modifications to the first set of guidelines adopted by the General Assembly and, as a consequence, these funds accumulated. It is unlikely this

will occur again. Thus, the Commission has accumulated about $105,000 in this non-general fund and could likely afford to proceed with the proposed renovation if they so choose. Dr. Kern asked the Commission if he should continue to pursue this project and take it to the next step. The next step would be to get some more detailed specifications on exact costs and to begin to appropriate some of the monies to demolition work.

Mr. Cullen asked why the Commission would want to use its money to renovate this building and why Mr. Baldwin shouldn't be paying for this renovation. Judge Gates answered that the Commission was an agency in the judicial branch of government but separate from the Office of the Executive Secretary of the Supreme Court. Furthermore, Judge Gates reminded everyone that Mr. Baldwin and the Chief Justice did not have any money for renovating this office space. Judge Gates felt that the Commission should explore this opportunity. He believed the Commission should have a conference room that meets our needs and make it available to others in government who have such a similar need. Mr. Cullen agreed that such a room was needed but wanted to make sure that an appropriate process was followed and that all avenues for funding the renovation were explored. Mr. Vassar asked if this cost estimate of $120,000 included furniture. Dr. Kern said the figure did not include any furnishings. Judge Gates asked Dr. Kern to discuss the matter with representatives of the legislature's money committees as well as the Governor's budgeting agency to ensure that there were no perceived or actual impediments from their perspectives to such a renovation of a state owned property. Dr. Kern said he would do so and report back to the Commission.

Judge Gates next asked if any of the Commission members were interested in going to the annual conference of State Sentencing Commissions to be held in Palm Beach, Florida at the end of July. Judge Gates informed all members that a brochure describing the Conference was in everyone's folders and that, after reviewing it, if anyone is interested to please contact him or Dr. Kern.

Judge Gates reminded the members that the next full meeting of the Commission is set for Monday, June 23, 1997. The meeting will begin at 10:00 a.m. in the Judicial Conference Room in the Supreme Court Building. The Commission will also meet on September 22 and November 10, 1997.

With no further business on the agenda, the Commission adjourned at 12:45 p.m.