

*DRAFT      DRAFT      DRAFT      DRAFT      DRAFT      DRAFT*  
**The Virginia Criminal Sentencing Commission**  
**March 17, 2003**  
**Meeting Minutes**

**Members Present:**

Judge Stewart, Judge Bach, Jo Ann Bruce, Eric Finkbeiner, Douglas Gwynn, Judge Harris, Arnold Henderson, Judge Humphreys, Judge Hupp, Bernard McNamee, Judge Newman, William Petty, Randolph Sengel and Sheriff Williams

**Members Absent:**

Gary Aronhalt, Howard Gwynn, and Judge Johnston

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 Dennis Hupp and Eric Finkbeiner. After these introductions were concluded, Judge Stewart asked the Commission members to approve the minutes from the last meeting.

**Agenda**

**I. Approval of Minutes**

Approval of the minutes from the November 4, 2002, 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 – 2003 session. Judge Stewart asked Dr. Kern to discuss this item on the agenda.

**II. General Assembly Actions on New Sentencing Legislation- 2003 Session**

Dr. Kern discussed the Governor's proposed amendments to the 2002-2004 budget. The budget amendments included language that the Commission should adjust the non-violent felony risk assessment instrument to identify additional low-risk, non-violent offenders for sentencing options, and to develop sentencing guidelines for technical probation violators. The intent of these amendments is to increase the utilization of sentencing options for non-violent offenders who do not pose a significant recidivism risk.

Dr. Kern said that the staff would immediately begin a work plan on the directives from the General Assembly. Judge Stewart commented that technical violators have posed significant problems in other states and that this is a serious issue not confined to Virginia. Judge Humphreys commented on the difficulty in defining what a technical violation is. Dr. Kern remarked that the Commission has a technical violator database that tracks what happens when a probation or post release supervision violation is brought back to the circuit court. Dr. Kern stated that an analysis of this data revealed that the primary reason for most of the revocations is the offender's drug use. He pointed

out, however, that the Commission will likely have to gather some supplemental information in order to fully address the General Assembly's directive. Mr. Petty asked if the staff would be looking at all probation violators including those who commit a new crime. Dr. Kern answered that all probation and post release supervision violators are tracked, regardless of the revocation reason. Judge Harris queried whether the Commission was receiving enough cases to get a general idea of what is happening in the courts on these types of cases. He mentioned there is no mandatory requirement for filling out the probation/post release supervision revocation forms that generate the Commission's data. Dr. Kern acknowledged this reality but felt that voluntary compliance on this matter was sufficiently high to yield a reliable indicator of significant trends and factors.

Dr. Kern continued by reviewing another item in the budget language that addresses the Department of Corrections. This item states that the Department of Corrections (DOC), in cooperation with the Virginia Criminal Sentencing Commission and the Supreme Court, should initiate a pilot project directed at achieving effective punishment, control and rehabilitation of felony offenders who are under probation or post-release supervision and could be found to be in technical violation of their supervisory conditions. The pilot project shall allow the Division of Community Corrections to directly refer appropriate offenders to the state detention center incarceration program and diversion center incarceration program without initiating a judicial hearing.

Judge Humphreys questioned whether this directive would ensure due process guarantees. Dr. Kern referred the question to Mr. Walt Pulliam, Operations Director for the Division of Community Corrections at the Department of Corrections. Mr. Pulliam responded that the Department of Corrections had not anticipated any problems with due process concerns because the offender's would likely have to volunteer for an alternative sentencing option. He noted that the DOC had already begun the process of identifying the pilot sites for this initiative. Some of the pilot sites are Norfolk, Arlington, Shenandoah, Lynchburg, Campbell and Fairfax. Judge Humphreys wondered, in the absence of a judge, who would be making the decision that the offender was a technical violator. Mr. Pulliam responded that the DOC would develop some standards/guidelines on how to proceed with various violations. Mr. Pulliam pointed out that an inter-agency committee has been established to coordinate the implementation of the pilot project and that Dr. Kern had appointed Meredith Farrar-Owens, the Commission's Associate Director, to this group. It is anticipated that this committee would more fully address these types of issues. Mr. Petty observed that the budget language stipulates that this project should be implemented in a timely fashion. He questioned if the Attorney General's office has been contacted about the constitutionality of this project. Mr. Pulliam said the DOC had not anticipated asking for any opinion from the Attorney General on this matter. Judge Stewart concluded the discussion on this subject by stating that these issues would likely be addressed by the newly created inter-agency committee.

Dr. Kern continued by referring to one last item in the budget directing the Commission, in junction with the Supreme Court and Department of Criminal Justice Services, to conduct information and training sessions for judges and other judicial officials on

programs and services and facilities available through the Pretrial Services Act and the Comprehensive Community Corrections Act for local-responsible offenders.

Dr. Kern next discussed proposed legislation of relevance to the Commission's work. The first piece of legislation of interest (House Bill 1434) was requested by the Commission and would require the State Police to provide the Commission with sex offender registry data in an electronic format. The Commission would use the data for research, evaluative or statistical purpose only. This bill was adopted unanimously and will become effective July 1, 2003.

The second bill discussed was House Bill 2179 which would require that the Commission's annual report include any modifications to the discretionary sentencing guidelines that the Commission has adopted and the reasons supporting the modifications. Dr. Kern said that this bill was altered significantly through several amendments. He compared the bill as introduced with the final version of the bill as it was passed. He observed that the language in the adopted bill would not require any changes to what the Commission has already been doing in its annual reporting. This bill was adopted unanimously and will become effective July 1, 2003.

Dr. Kern then discussed House Bill 2181, which would revise the statute for possession of a firearm while in possession of Schedule I or II drugs. This successful bill modified the existing Project Exile legislation and created three separate and distinct Class 6 felonies instead of the existing one. Dr. Kern said the Virginia Crimes Codes (VCCs) would be changed to reflect the new codes.

Dr. Kern discussed House Bill 2231 which passed unanimously and grants greater access to confidential records of the juvenile court for the purpose of pre-trial investigations, risk assessment instruments and post-sentence investigation reports. The next bill reviewed, House Bill 2445, addressed the issue of civil commitment of sexually violent predators. Among other changes, this bill would define a sexually violent predator on the basis of the risk assessment score received on the Commission's sex offender risk assessment instrument. The bill also moves the effective date of the sexually violent predator legislation from 2004 to effective from its passage. Mr. Petty questioned if any factors on the Commission's sex offender risk assessment have any equal protection issues. Dr. Kern said that this issue has been raised in the past but not pursued, perhaps due to the fact that the instrument is discretionary. Mr. Petty commented that if the Commission's risk assessment instrument is used in this legislation and required by law then these factors could be an issue. House Bill 2231 was adopted by the legislature. Dr. Kern advised that the Commission staff has been working with the Governor's Office to assess the projected impact of the legislation as passed.

Dr. Kern continued by discussing House Bill 2541 which was adopted by the legislature. This bill requires the use of Virginia crime code references forailable offenses on all charging documents issued by magistrates, criminal warrants, summons, criminal indictments, criminal petitions, and dispositional documents from criminal trials, effective October 1, 2004.

Dr. Kern moved on to the particulars of HB 2578. This bill allows the waiver of the pre-sentence report requirement in criminal cases when the court, the Commonwealth and the defendant agree. This bill was adopted unanimously and will become effective July 1, 2003.

Dr. Kern summed up his remarks by touching on a number of bills that were not adopted. He mentioned HB1763 that would modify the sentencing guidelines for drug crimes involving methamphetamine. This bill would have provided that in any conviction involving any substance that contains any quantity of methamphetamine, the sentencing guidelines applicable to cocaine would be used.

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 - 2003 General Assembly Session.

### **III. Proposed Legislation and Correctional Impact Analysis – 2003 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 2003 session of the General Assembly. The Commission produced 235 impact statements that were communicated to the Clerk of the House of Delegates, The Clerk of the Senate, 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. Thirty-five percent of the proposed legislation requiring an impact assessment involved the definition of new crimes. With regard to the other bills requiring impact assessment, nearly 28% percent of the proposed legislation involved expansion or clarification of an existing statute and 12% represented a proposal to increase the penalty from a misdemeanor to a felony.

In a comparison of the 2002 and 2003 sessions, Dr. Creech noted there were more impact statements (235 vs. 221), more bills with a defined impact (116 vs. 95), and the same number of impact statements with a cost associated with the proposal (36). Dr. Creech noted that 9 legislative drafts, for which the Commission identified an impact, were never introduced, despite an overall increase in the number of bills introduced (from 17 to 27) with an impact. The largest change in the type of legislation from 2002 to 2003 were ones that involved proposed new crimes; in 2002, 24% of the proposals were of this type compared to more than 35% in 2003.

Dr. Creech presented several slides to provide a taste of the diversity of the legislative proposals that the Commission evaluated in its impact statements. He also reviewed the fiscal impact for House Bill 1576 (failure to file a tax return or filing of a fraudulent tax return) which was the only piece of introduced legislation with an associated fiscal impact that passed with an appropriation. Mr. McNamee commented that the fiscal impacts really influence the life of a bill and stressed how important this information is. Judge Stewart commended the staff on the considerable amount of time and effort the staff expend during the Session. Judge Humphreys remarked that legislators take these impacts as gospel and have great respect for the information and that there is no question that the analysis work is non-partisan and objective.

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

#### **IV. Sentencing Guidelines Reanalysis**

In 2002, the Commission approved a plan to conduct a thorough reanalysis of Virginia's sentencing guidelines. Ms. Farrar-Owens 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. 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 said that 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 an 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. Some cases that do not result in a disposition that includes 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 of 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 incarceration 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. She commented that at least two analysts would work independently on each offense group in order to reduce the chance of error or individual bias in the final sentencing models.

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% to 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 said that the supplemental data collection captured 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.

Next, Ms. Farrar-Owens briefly discussed the analysis of rape data which began in September 2002. She said that the Commission may want to consider removing spousal rape, sodomy and object penetration crimes from the guidelines. There were only

fourteen convictions of these crimes in five years. These crimes are grouped with rape, sodomy and object penetration categories for victim's age 13 or more. Sentencing practices in spousal cases appear to differ substantially from the crimes with which they are currently grouped.

The analysis of sexual assault data will begin in mid 2003. The results will be initially presented to the Commission's Research subcommittee. She noted that input from the Commission members will continue to be vital to guide and shape the analysis. Mr. Petty commented that the statute of marital rape or sexual assault has been removed from the *Code* and it is currently one crime only.

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 – FY2003**

Ms. Kepus reported that for year-to-date, over 6,500 worksheets were submitted to the Commission. She noted that overall compliance is 82.3% so far in FY2003. The aggravation rate was reported as 8.7% and the mitigation rate as 9%. 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 81.5%.

She next presented information concerning the reasons judges cite when sentencing above or below the guidelines. Judges reported the decision to sentence an offender to an alternative sanction or the factor of rehabilitation potential in 12% of the mitigation cases. The most common reason for sentencing above the guidelines, cited in 11% of the aggravations, is the flagrancy of the offense.

Ms. Kepus stated that compliance rates varied across the 31 judicial circuits. The highest compliance rate, 89%, was found in Chesapeake (Circuit 1). She also noted that Circuit 23 in Roanoke had the lowest compliance rate at 71%.

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 84%. Ms. Kepus observed that the compliance rates within offense groups range from a high of 84% in the traffic offense to a low of 67% among the robbery offenses. The rape offense group has the highest rate of mitigation (24%). 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.

She then discussed compliance within jury cases. Of the 88 jury cases, jury sentences were within the guidelines 42% of the time. Juries imposed sentences higher than the guidelines in 33% of the cases and imposed sanctions lower than the guidelines in 25% of the cases.

Judge Stewart thanked Ms. Kepus for her presentation and then asked Dr. Kern to discuss the next item on the agenda, Miscellaneous Items

## **VI. Miscellaneous Items**

Dr. Kern discussed a letter the Commission received from Delegate Armstrong concerning the sentencing guidelines for embezzlement. Dr. Kern provided the Commission with his written response to Delegate Armstrong's concerns.

Dr. Kern reminded the members of the dates for the remaining Commission meetings for the year. The Commission is scheduled to meet on June 16, September 8, and November 10

With no further business on the agenda, the Commission adjourned at noon.