The Virginia Criminal Sentencing Commission
September 12, 2011
Meeting Minutes

Members Present:
Judge Bach, Judge Alper, Judge Bass, Linda Curtis, Shannon Dion (Attorney General Representative), Eric Finkbeiner (conference call), Judge Fulton, Delegate Gilbert, Marsha Garst, Robert Hagan, Judge Humphreys, Senator Marsh, Debbie Smith, and Judge Trumbo

Members Absent:
Harvey Bryant, Judge Kirksey, and Esther Windmueller

The meeting commenced at 10:05 a.m.

Agenda

I. Approval of Minutes

The Commission unanimously approved the minutes from the June 13, 2011, meeting, without amendments. Judge Bach decided to take up the last agenda item (Miscellaneous Items) first and then the Commission would resume the agenda as written.

V. Miscellaneous Items

Dr. Kern addressed the miscellaneous items on the agenda.

He began by saying that the Bureau of Justice Assistance (BJA) has launched a Justice Reinvestment Initiative (JRI) program. JRI is a data-driven approach to reduce spending on corrections and reinvest identified savings in evidence-based strategies designed to increase public safety and hold offenders accountable. State and localities using the justice reinvestment approach collect and analyze data on drivers of criminal justice populations and costs, identify and implement changes that address costs and achieve better outcomes, and measure both the fiscal and public safety impacts on those changes. The Council of State Governments (CSG) has been promoting the program in several states--essentially avoiding the construction of new prisons and spending the money saved on social services for those who otherwise might have been behind prison bars. Dr. Kern mentioned that crime and other important public safety indicators in Virginia are either stable or trending in the right directions. Crime in Virginia, however, can always be further reduced.

The Justice Reinvestment Working Group, with assistance from CSG Justice Center and BJA, will conduct several analyses using Virginia data sets. CSG requested felony sentencing data from the Sentencing Commission. Data collected will be masked to prevent identification of jurisdictions. The staff will provide the data to CSG for the purposes of conducting the Justice Reinvestment Initiative. The working group will begin their work this week. The co-chairs, (Delegate Bell and Senator Marsh) will lead the group to carry out the scope of work.

Moving on, Dr. Kern noted that at the end of August, the subcommittee of the Governor's Task Force on Nonviolent Felons met and reviewed the latest iteration of a proposed sanctioning system for nonviolent felons whom are technical probation violators. Angela Hawken, professor from Pepperdine University, came to Virginia to speak about Hawaii's Opportunity Probation with Enforcement (HOPE) to the Governor's Task Force on Nonviolent Offenders. Dr. Kern described her HOPE presentation briefly. The objective of the program is to reduce probation violations by drug offenders and others at high risk of recidivism. The logic behind the program is as follows: crime attracts reckless and impulsive people for whom deferred and low probability threats of severe punishment are less effective than the immediate and high probability of the imposition of mild punishment; as a result, delivering a relatively mild sanction swiftly and consistently is both more effective and less cruel than sporadically imposing much harsher punishment. Classical deterrence theory has long held that the threat of a mild punishment imposed reliably and immediately has a much greater deterrent effect than the threat of a severe punishment that is delayed and uncertain. He said that Dr. Hawken suggested that it was possible that the HOPE program could be merged with drug courts. In Hawaii, a minority of probationers did not respond well to supervision. HOPE is on the front end. Hawaii's drug court was reformed to allow high-risk probationers and gives HOPE failures another chance before prison. The evaluation results of the program showed that drug use plummeted, arrests plummeted and, most important, the program saved money. Judge Humphreys noted that the program is inexpensive to run and incarceration days dropped sharply. The cost savings would be at the back end.

Judge Alper commented that half of her probationers do not live in Arlington so she cannot place them on probation in Virginia. She wondered if anyone thought about this issue wherein the offender officially resides in another border state. Senator Marsh said that this issue would have to be confronted but that he believed the Commonwealth could save money if we could try this exciting and encouraging project. Dr. Kern said interstate compact is certainly an issue that we have to grapple with in Virginia. He felt that the Commonwealth could overcome that hurdle and work out the details via a pilot test of this proposed sanctioning scheme. Judge Trumbo commented that he warns all his offenders that he will revoke their probation if they are returned to court. On the first technical violation, he implements the consequences of the offender's decision. If the offender decides to miss appointments, or tests positive in their urine tests then they will go to jail. It is their decision. Judge Trumbo remarked that if judges were upfront with offenders in the beginning and there were some teeth in our decision making then we wouldn't have to do this. Judge Humphreys commented that it seems like Judge Trumbo was already implementing the program. Judge Trumbo agreed that his court was, unofficially, implementing the HOPE program but he would like statistical data to prove it is working. Dr. Kern commented that Judge Trumbo's court is not typical of what is done is the other thirty circuits in Virginia. There is tremendous disparity in how technical violators are being addressed. The Commission tried to deal with this issue with technical sentencing guidelines. Dr. Kern observed that it is possible that the HOPE program may prove to be better at dealing with uniformity and fairness across the board. He noted that the way Judge Trumbo runs his court is atypical. Delegate Gilbert asked Dr. Kern why Judge Alm is the only judge in Hawaii that has a HOPE court. Dr. Kern said that Judge Alm wants to invest all his extra energy and time into the program. The

other judges redirect their HOPE caseload to him. The HOPE caseload in Hawaii is small enough for one judge to handle.

Dr. Kern then presented another proposal for discussion, termed Sanctions with Unified Rapid Enforcement (SURE), which is modeled after the legislation successfully carried by Delegate Bell that allowed for pilot programs for immediate sanction programs for these types of felons. He briefly described SURE.

Dr. Kern noted that the current diagram excludes from SURE 1) violent felons (§17.1-805); 2) nonviolent felons who receive an incarceration sanction for their current felony conviction; and 3) offenders on probation who are charged with a new felony or jailable misdemeanor. Thus, the groups of felons eligible for SURE are nonviolent felons who are sentenced to a suspended incarceration term with supervised probation and not charged with a new crime. A significant percentage of these populations of nonviolent felons are, what one of our judges keenly refers to as, chronic knuckleheads and they consume a significant number of expensive beds in our jails. He said that we know from our detailed analysis of the sanctioning practices of judges for these types of offenders that there is considerable disparity and practice varies from court to court and judge to judge. In short, there is not much consistency in sanctioning practices for these technical violators and thus, from a deterrence perspective, it could be said that the most important precepts of effective deterrence (certainty and swiftness) are not being applied. Rather, what is in place is the threat of unloading all or much of the suspended time on the technical violator when the judge makes that discretionary call. At least for this particular population of nonviolent felons, the threat of a severe sanction which is only sporadically and randomly applied does not appear to be serving as much of a deterrent effect.

Assuming that the Governor's Task Force on Nonviolent Offender approves the SURE proposal, the staff will begin to work with the Department of Planning and Budget (DPB) to estimate the costs of supporting a number of pilot sites around Virginia to test the effectiveness of this program that stresses the deterrent effect of swift and certain punishment. It is not stated on the diagram, but once an offender is entered into the SURE program the probation officer will have no discretion and must bring the offender back to court for any technical violation of his probation.

Thus, the proposed SURE program is one that is soundly grounded in the criminological premise that it is the certainty and swiftness of the punishment that will be an effective deterrent to further misconduct. Those in the pilot test sites would have to agree to set aside their discretion in these cases in order that a methodologically sound and valid test of this concept can be implemented. Dr. Kern said the SURE diagram would be presented later this month to the Governor's task force for review so he welcomed the members' comments.

Judge Humphreys wondered what the role of the Commission would be in this recommendation besides data gathering. Currently, the Commission is making recommendation on Probation Violation guidelines. Dr. Kern said that probation violation guidelines would have to be suspended in those pilot sites. Judge Humphreys said if the Commission recommends mandatory minimums for sanction program violations then we have to measure the effectiveness of that sentence. He was concerned about the Commission setting policy and taking discretion

away from the judges. Judge Alper said she has never seen an offender with one violation. Offenders have multiple violations in her jurisdiction

Dr. Kern said that the Governor's Office agreed that the Sentencing Commission should take a lead role in this proposal because it involves sentencing. Judge Humphreys said he was excited about the program but he was concerned that not all jurisdictions have drug courts. Dr. Kern said that the current thinking was that all the pilot sites would have to have a drug court program. Judge Bass asked if the probation officer would have discretion. Dr. Kern said no. Judge Alper felt that this program is intensive and extra probation officers and judges are needed to run this program. The trend has been to cut down on judges. The program may eventually prove to save money but the courts need more money for additional judges and probation officers. Dr. Kern said that the staff did cost out this program in Fairfax. He did budget more money for the probation office, sheriff's department, Commonwealth's attorney office, public defender office, drug testing kits and judicial time was an in-kind contributions. Judge Fulton remarked that the drug court docket in Norfolk is not that labor intensive.

Mr. Finkbeiner asked if the mandatory minimums could provide for a range rather than one specific jail term of say 10 days. Judge Fulton responded that perhaps a range should be set up so that the second tier doesn't give a lower amount of time than the first tier. Ms. Garst asked what happens when the offender objects to the program. Dr. Kern responded that the offender who objects to entry into SURE would then be treated in the normal fashion as a technical violator. She also commented that the workload would be too much for her office since she lost two attorneys due to budget constraints. Ms. Garst said she would like to try the program but she doesn't have a drug court. Judge Humphreys said she could still test the first two tiers of the program. Senator Marsh said that if all the pilot sites agreed to commit to the facets of the proposed program then the money to support its operation would come. Judge Bach felt that the members gave lots of feedback to Dr. Kern to discuss at the next meeting of the Governor's Task Force. Dr. Kern questioned if the members recommended offenders waiving the right to counsel during the second tier stage. Judge Fulton agreed and continued by saying that if the offender fails to waive counsel then he/she is out of the program.

Dr. Kern provided the Commission with an update on data collection for the study on crimes committed in the presence of children. Through September 2, 2011, 1054 cases had been reported to the Commission by prosecutors through the Commission's website and incoming worksheets.

II. Preliminary FY2011 Compliance Report

Ms. Laws addressed the next item on the agenda: a preliminary report on judicial compliance with the sentencing guidelines during FY2011.

Ms. Laws reported that, for FY2011, 20,998 worksheets had been submitted to the Sentencing Commission. She noted that this number would increase slightly, as a few cases might yet be received by the Commission. The overall compliance rate among the FY2011 cases was 79.4%. Departures from the guidelines were roughly split between aggravations (9.8%) and mitigations

(10.8%). Ms. Laws pointed out the high rate of dispositional compliance (defined as the degree to which judges agree with the type of sanction recommended by the guidelines). For example, when a longer jail sentence or a prison term was recommended by the guidelines, the judges concurred 86.2% of the time. Durational compliance (defined as the rate at which judge's sentence offenders to terms of incarceration that fall within the recommended guidelines range) was also high for the fiscal year, at 80%.

Ms. Laws provided information on the departure reasons cited by judges. In mitigation cases, judges most often reported the decision to sentence an offender in concordance with a plea agreement as the reason for departing from the guidelines. This was also the most common reason reported in aggravation cases.

Ms. Laws displayed compliance rates across the 31 judicial circuits. The highest compliance rate for FY2011, 89.1%, was found in the Bristol area (Circuit 28). Circuit 9 (Williamsburg) had the lowest compliance rate at 72.2%.

Showing compliance by offense group, Ms. Laws noted that nonviolent offenses tend to have higher compliance rates than the violent offenses. The compliance rate for the Drug Other offense group was the highest in FY2011, at 85.8%. For FY2011, the Murder/Homicide offense group recorded the lowest compliance rate (59.6%).

Ms. Laws gave an overview of the Commission's nonviolent offender risk assessment instrument and its utilization during FY2011. The purpose of this instrument is to recommend alternative sanctions for low-risk nonviolent offenders who are recommended for incarceration by the guidelines. She stated that, for FY2011, compliance for all drug, larceny and fraud offenses was 86%; however, in 22% of cases, judges were in compliance with guidelines because they had concurred with the recommendation for an alternative to incarceration. The most common alternatives used by judges were supervised probation and/or a short jail sentence given in lieu of a prison term.

She then discussed the Sentencing Commission's sex offender risk assessment instrument. The purpose of this instrument is to extend the upper end of the guidelines range for sex offenders who are statistically more likely to recidivate. Increasing the upper end of the recommended range provides judges the flexibility to sentence higher-risk sex offenders to terms above the traditional guidelines and still be in compliance with the guidelines. For the period examined, 43% of rape offenders and 42% of other sexual assault offenders received a risk classification of Level 1, 2, or 3 and had the upper end of their guidelines range extended accordingly. Judges appear to be utilizing the extended range when sentencing many of these offenders, particularly in rape cases.

Regarding jury cases, Ms. Laws explained that juries typically recommend sentences above the guidelines range. Of the 290 jury cases received for FY2011, 39% of jury sentences fell within the guidelines, while 51.3% exceeded the guidelines range. By law, juries are not permitted to receive the guidelines.

Ms. Laws then presented preliminary compliance information for changes to the guidelines that took effect on July 1, 2010. She first discussed the change made to the Miscellaneous guidelines. Following thorough analysis of the data, the staff had recommended adding arson of an occupied dwelling or church to the Miscellaneous guidelines. Based on that analysis, compliance in those arson cases was expected to be approximately 78%, with a rough balance between mitigation and aggravation. However, judicial compliance among the 24 felony vandalism cases received in FY2011 was 67%. Aggravations were more prevalent (25%) than mitigations (8%). Seventy-five percent of these offenders received prison, 21% were given incarceration up to twelve months in jail, and 4% were sentenced to probation (median sentence of 3.5 years).

Ms. Laws presented compliance results for a new guidelines offense, added as of July 1, 2010: hit and run, property damages $1,000 or more. Judicial compliance among the 160 cases received to date was 77%. Aggravations were more prevalent (14%) than mitigations (9%). She briefly reviewed compliance for several other newly added offenses.

III. Re-validation of the Nonviolent Offender Risk Assessment Instrument – Preliminary Findings

Ms. Farrar-Owens began by briefly presenting the history of the nonviolent risk assessment in Virginia. In 1994, as part of the reform legislation that abolished parole and instituted truth-in-sentencing, the General Assembly directed the newly-created Sentencing Commission to: Develop an empirically-based risk assessment instrument predictive of a felon's relative risk to public safety to determine appropriate candidates for alternative sanctions, apply the instrument to non-violent felons recommended for prison, and implement the instrument with a goal of placing 25% of these prison bound felons in alternative sanctions. The staff studied 1,500 property and drug felons released from incarceration during an 18-month period (July 1991 – December 1992). Over 200 unique factors relating to criminal record, substance abuse, education and employment history, family background, etc., were examined. Recidivism was defined as a new felony conviction within three years and a risk assessment worksheet was developed based on the factors that were statistically relevant in predicting recidivism. She presented the current risk assessment worksheet. Among the FY2010 eligible offenders for whom a risk assessment form was received (6,204 cases), 50% of prison or jail bound nonviolent felons were recommended for an alternative sanction by the risk assessment instrument.

Ms. Farrar-Owens then presented the approved methodology for a re-validation study of the nonviolent risk assessment instrument and continued to give a progress report. Felony fraud, larceny and drug offenders sentenced in FY2005 and FY2006 who meet risk assessment eligibility criteria was studied. The staff drew a sample of 1,799 offenders who met the selection criteria. Staff selected cases cased on a stratified random sampling technique to increase the likelihood of including offenders with juvenile adjudications of delinquency. She informed the Commission that criminological studies have shown that juvenile record and the age of first contact with the juvenile justice system are often correlated with subsequent offense behavior as an adult. A large sample is preferred, as some cases will be eliminated in subsequent stages.

She discussed the data collection and preparation of the data of analysis. There are several tasks related to data collection and data preparation that be must be complete before the analysis can begin. These activities were completed and performed by different staff simultaneously. Staff requested and received criminal history records from the Virginia State Police. For much of this data (more than 2/3), the Virginia Crime Code (VCC) was missing. For 5,307 of the 36, 025 arrest records, there is not a court disposition. Staff researched cases and filled in codes and dispositions with the best available information.

She announced that the staff completed the necessary forms and procedures to request out-of-state criminal history records from the FBI. The request was reviewed by a FBI special board and approved. The staff received the out-of-state rap sheets in two forms: paper and image on disc. Since none of these records are in database format, staff examined each rap sheet for the 1,800 offenders in the sample. This information was then automated and added to existing databases.

Ms. Farrar-Owens then informed the Commission that it is necessary to know release dates so that offenders can then be tracked for recidivism activity. For offenders in the sample who received a prison sentence, staff requested and received data on release dates from the Department of Corrections.

She concluded by saying, as with prior studies, recidivism will be measured as a new felony conviction within three years of release. Two analysts work largely independently of one another using two different statistical techniques. A total of 137 cases had to be excluded from the analysis due to a prior or current violent felony. For the analysis, the sampled cases were weighted to reflect each subgroup's actual proportion in the population. Staff has developed preliminary models.

Of the 1,662 offenders in the study more than half (55.8%) were black. Well over one-third of the offenders (36.4%) were between 21 and 29 years of age. Most of the offenders (70%) were male. The majority of the offenders examined by the staff had no prior felony record. Of the offenders in the study, data revealed that 66.4% had been arrested in Virginia only. The remaining 33.6% were arrested outside of Virginia. Ms. Farrar-Owens noted that more than half (54%) of the out-of-state records have been examined in detail to determine the specific states in which offenders have charges or arrests. She said she would present more information on out-of-state records at the November meeting.

She then explained that a new conviction is measured as a new arrest within three years of release that ultimately resulted in a conviction. Of the 1,509 offenders tracked in the sample for the full three years, fifty-four percent of offenders were re-arrested for any crime type. New felony arrests represented 40% of the sample. Nearly 43% of the offenders had a new conviction for any type of crime. New felony conviction comprised 27% of the study group.

Ms. Farrar-Owens explained that the offenders in the study who recidivated, data revealed that 24% had been convicted of a drug offense. The remaining 59% of the recidivists were convicted mostly of larceny and fraud offenses. She presented a chart of the significant factors in assessing risk by relative degree of importance. The selected model contains factors related to the

offender's age, prior history of felony convictions, offense type, prior juvenile record, offender's sex, prior history of incarceration, and arrest or confinement within 18 months. Staff will continue analysis and will present the final model to the Commission in November 2011. If the Commission approves the new instrument and recommend its adoption, it will be included in the 2011 Annual Report.

IV. Possible Topics for Sentencing Guidelines Revisions

Judge Bach asked Mr. Fridley to begin the next item on the agenda: a summary of possible topics for possible sentencing guidelines revisions.

Mr. Fridley explained that the topics for possible guidelines revisions had been suggested by guidelines users (via the hotline or in training seminars) and staff. Analysis of these topics would proceed if the members approved. The suggested topics were:

1. Explore revisions to the sentencing guidelines for the 3rd or Subsequent Sale of a Schedule I/II drug

2. Explore the feasibility of adding the Manufacture of Methamphetamine (§ 18.2-248(C1)) to the Drug-Schedule I/II Worksheet

3. Explore the feasibility of adding DWI-Victim Permanently Impaired (§ 18.2-51.4 (A)) to the Assault Worksheet

4. Explore the feasibility of adding Driving on Suspended License after a DWI - 3rd Offense within 10 Years (§ 18.2-272(A)) to the Felony Traffic Worksheet

5. Examine the possible modification of the factor "Mandatory Firearm Conviction for Current Event" on the Weapon/Firearm Worksheet

6. Reanalyze the factor for "Primary Offense Additional Counts" on the Drug Other Worksheet

Judge Humphreys made a motion to analyze the recommendations presented. The motion was seconded by Judge Alper. Judge Bach called for the vote. The Commission voted 12-0 in favor. In conclusion, Mr. Fridley asked the members to contact the staff if they had any other suggestions for possible sentencing guideline revisions.

Dr. Kern concluded by reminding the members of the date for the remaining Commission meeting for the year. The Commission is scheduled to meet on November 14.

With no further business on the agenda, the Commission adjourned at 12:20pm.