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The Virginia Criminal Sentencing Commission
November 10, 1997
Meeting Minutes

Members Present:
Judge Gates, G. Steven Agee, Judge Bach, Mark Christie, Frank Ferguson *(counsel to the Commission),* William Fuller, Judge Honts, Henry Hudson, Judge Johnston, Lane Kneedler, Judge Newman, Judge McGlothlin, William Petty, Reverend Ricketts, Judge Stewart and Bobby Vassar

Members Absent:
Jo Ann Bruce, Richard Cullen and Peter Decker

The meeting commenced at 10:05 a.m. with Judge Gates welcoming the two new members of the Commission, both of whom are new appointments made by Governor Allen. Mr. Steven Agee is a former Delegate in the General Assembly and is an attorney with the firm of Osterhoudt, Ferguson, Natt, Aheron and Agee in Roanoke. Mr. Agee succeeds Mr. William Fuller, Commonwealth's attorney from Danville. Mr. Henry Hudson is a former United States Attorney for the Eastern District of Virginia and is currently an attorney with the firm of Reed, Smith, Shaw and McClay in McLean. Mr. Hudson succeeds Mr. Robert Bobb, City Manager for Richmond. Judge Gates acknowledged the contributions and hard work of the two departing Commission members, Mr. Bill Fuller and Mr. Bob Bobb. Judge Gates commented that he had received a letter from Mr. Fuller expressing his pleasure in having served on the Commission.

Judge Gates then asked the Commission members to approve the minutes from the last meeting.

Agenda

I. Approval of Minutes

Approval of the minutes from the September 23, 1997 was the first item on the agenda. The Commission unanimously approved the minutes.

The second item on the agenda was the Inmate Population Forecast for Fiscal Year 1998-2007. Judge Gates reminded the Commission during the last meeting that it would be useful to get a briefing on the status of the inmate population and a report on the forecast of its projected growth. There was also interest in learning more about the Administration's plans with regard to the expansion of alternative punishment programs such as Detention and Diversion Centers. Judge Gates then introduced Mr. Barry Green, Deputy Secretary of Public Safety, to discuss the second item on the agenda.

II. Inmate Population Forecast: FY1998 - FY2007

Mr. Green said he would be discussing an overview of the projected number of prison inmates in the system and the number of alternatives available. He commented that the jail and prison population forecast was developed by two committees using a "consensus method" approach which began about five years ago. In the last two years, the process has expanded to include a forecast of the juvenile correctional center population. The first of the two forecast committees consists of the technical committee which employs quantitative methods to make projections based upon past trends and patterns. The second committee is the policy committee which examines projections presented by the technical group and offers modifications based on policy issues that are believed to likely affect future inmate populations.

Mr. Green noted that the state inmate population is projected to grow an average of 3.7 percent per year over the next ten years. Specifically, he said that the forecast is that the 28,700 inmates currently held in state prison is projected to grow to 32,500 by June, 2000. He indicated that with the enactment of truth-in-sentencing guidelines in January 1995 (new law), the composition of the admissions cohort of inmates has shifted from "old law" to "new law." By December 1996, 86% of the offenders admitted to prison were sentenced under the "new law."

Mr. Green added that recent arrest statistics illustrate that arrests for violent crimes such as murder/non-negligent manslaughter, forcible rape and robbery are down about 16% over recent trends. These arrest trends are also largely reflected in the inmate admission data. After posting an increase in 1992, admissions of violent offenders to state facilities began to decline. On average, from 1993 through 1996 violent offender admissions to state facilities declined by 1.6 percent per year. Another factor likely to affect the state responsible inmate forecast is the recent change in the definition of state responsible felons. The 1997 General Assembly enacted legislation changing the definition of state responsibility from felons with sentences of greater than six months to felons with sentences of one year or greater. This change took effect in July of this year. It is estimated that the net effect of this change will be a shift of approximately 248 inmates from the state responsible population to the local responsible (i.e., jail) population.

Detention and diversion centers house inmates called probates and are not counted in the state or local responsible inmate population because these offenders are considered to be sentenced to probation. Detention center can be compared to a boot camp for offenders over the age of twenty-four. The offenders must stay at the center unless authorized for a work detail under supervision. The offenders housed in a diversion center may work at the center or in the community but must report back to the center in the evening. In both cases, offenders will receive drug and alcohol treatment, education and mental health services. Detention centers can be located almost anywhere in the state but the diversion centers need to be located in a relatively urban area due to the employment factor. Mr. Green said there are three operating detention centers (two for men, one for women). He said that the Department of Corrections (DOC) is considering converting three field

units into detention centers. He observed that there is very little work or time needed in converting a field unit into a detention center. DOC is hoping to have at least another 100 beds of daily capacity for these correctional options by January 1998.

Mr. Green said that DOC has two operating diversion centers in the state (one for men, one for women). Chesterfield's diversion center is under-populated at this time because it just opened in July. DOC estimated that the facility would be filled to capacity by December, 1997. He continued in his presentation by noting the Adult Residential Centers (ARC) which are private, mostly non-profit, facilities are another place to house probates. Most offenders in this program are probates. This program is similar to a halfway house or a diversion center but the offenders will usually find their own jobs. The offenders need the additional supervision because they currently have no stable environment to live in. Mr. Green pointed out that DOC is still operating one boot camp in Southampton and that it is not filled to capacity at this time. The qualifications for boot camp are that the offender must be under twenty-four years of age and a first-time felon. This program involves more physical training than the detention and diversion centers. DOC considered opening a women's boot camp but there is not enough demand. Michigan's Department of Corrections operates a women's boot camp and our DOC has an ongoing agreement with Michigan and has sent at least three women in the past from Virginia to participate in their program. The demand is still very low and currently no women are participating in the boot camp program. He then spoke on day reporting centers which are generally opened in a highly populated area. Offenders who are given a sanction that includes supervision in a day reporting center have their actions controlled throughout the day as they report to work or school and must stay at home during the nighttime hours. The offender must report to the center in the morning and possibly participate in programs like drug screening, counseling, education or alcohol and drug treatment.

Mr. Green then concluded his remarks and, with no questions being offered, Judge Gates thanked Mr. Green for coming to the meeting and presenting the inmate population forecast.

During the last session of the General Assembly, House Joint Resolution 443 was adopted. This resolution directed the Virginia State Crime Commission to study methods for providing substance abuse services to offenders in the criminal justice system. The Crime Commission has finished its work on this study and the Commission could be involved in their recommendations. Judge Gates asked Ms. Judy Philpott from the Crime Commission to discuss the next item on the agenda, Substance Abuse Treatment Services for Offenders.

III. Substance Abuse Treatment Services for Offenders

Ms. Philpott presented a series of charts to summarize the Substance Abuse Treatment Services for Offenders. The Crime Commission is recommending to the legislature the development of a comprehensive system for the identification of drug-involved offenders that integrates levels of substance abuse treatment with criminal punishment. Ms. Philpott said the Crime Commission has modeled this approach after Colorado's substance abuse model. She explained that Colorado's model provides drug screening and assessment for every felon prior to sentencing. She noted that Virginia's system, as proposed, would mirror Colorado's model except for the exclusion of misdemeanors. The goal of this system would be to reduce criminal recidivism among drug-involved offenders.

She continued by noting that the Crime Commission is proposing that defendants convicted of felonies, Class I misdemeanors and certain delinquent juveniles be screened and assessed for substance abuse. The screening and assessment would occur as part of the existing pre-sentence investigation process (§19.2-299, Code of Virginia). At this time, pre-sentence investigations (PSI) are conducted in about 55% of all felony cases because the PSIs are often waived in a plea bargain situation. She noted that this proposal would require a PSI in all felony convictions. Therefore, the PSI report would be revised to include more detailed substance abuse assessment information in order to integrate appropriate substance abuse treatment recommendations. Treatment would be provided through existing and/or expanding networks and systems.

Ms. Philpott said that the proposed drug screening and assessment program would be funded through offender fees. The funding sources would vary based on the treatment setting. She said that the proposal included a plan that an information system be put in place for offender tracking and performance. She then spoke about the proposed implementation of the substance abuse screening and assessment system. She observed that the Crime Commission realizes that it will take some time to revise the PSI instrument to include the substance abuse assessment component and that training of staff would then have to follow. Returning to the proposed funding mechanism for the new program, she noted that the Crime Commission would request legislation to adjust the fees currently paid by drug offenders. Drug offenders now are assessed a fee of $100 on felony drug offenses and a $50 fee on misdemeanor drug crimes. She said the proposal would be to raise these fees and to use the funds to support development and training.

The drug screening and assessment for felony cases would be handled by specialized probation & parole staff. The responsibility for handling Class I misdemeanor convictions would fall to the local VASAP (Virginia Alcohol Safety Action Program) programs while delinquent juvenile dispositions would be overseen by the specialized court services unit staff from the Department of Juvenile Justice.

Judge Honts asked Ms. Philpott if the proposed drug assessment and screening would cover all misdemeanor conviction cases. She answered yes except that traffic offenses would not be included. Ms. Philpott commented that there is some risk here in terms of required resources since the Crime Commission has no idea of the number of

misdemeanors convictions handled in General District Courts. She indicated that the data bases maintained by the Supreme Court were inadequate in this regard.

Ms. Philpott went on to say that, if the proposed legislation was accepted by the legislature, one senior officer in probation & parole and court services units would be hired to conduct the assessments of drug-involved offenders. Hiring for these new positions would begin July 1, 1998. The first year positions would be funded through the collected fees. Mr. Hudson commented that there were thousands of misdemeanor convictions each year and he questioned if a judge could exempt an offender from this mandatory screening process if there was no indication of drug abuse. Without such an exception, he observed, the volume of offenders would be staggering and overwhelm the capacity to perform effective screening. Ms. Philpott responded that the current legislative proposal does not include any exception provisions but that such a clause might be added during the upcoming General Assembly Session.

Ms. Philpott then presented the proposed implementation schedule which would include the revision of the PSI reports, analysis of current and optimum substance abuse treatment continuum, recommended graduated sanctioning system for probation/parole violations, and the development of substance abuse and treatment performance outcome measures. The proposal would call for all of these goals to be completed by January 1, 1999. She noted that an implementation work group must be created in order to complete this work. The Crime Commission recommended that the Sentencing Commission serve as the lead agency for the implementation work group. Mr. Kneedler asked if a treatment component is included after the assessment and screening has been completed. Ms. Philpott said there is a treatment component but it is not mandated. She added that treatment options are available but the next step of this study would be to develop expanded treatment options for the judiciary. She felt that the first step should be to identify the problem and see how best to treat these offenders. She indicated that at this time there are no new treatment proposals. Mr. Kneedler remarked that the Sentencing Commission would not be the right agency to lead this implementation work group. This Commission, he said, is a statistical/policy group, not an implementation group. Ms. Philpott commented that the implementation group would only work on the development of the instrument and not on treatment issues. An advisory group would be in place that is treatment oriented and would work only on those issues.

Ms. Philpott continued her presentation by saying that the implementation work group would report its findings to the Crime Commission, House and Senate Courts of Justice, House Appropriations Committee and Senate Finance Committee by January 1, 1999. She said that the Crime Commission is proposing that the fees which are currently charged to drug offenders (§14.1-112) be increased to $75 for misdemeanor drug crimes and $150 for felony drug crimes. Language would also be added to the legislation that would limit implementation to the availability of funding.

Judge Gates asked Dr. Kern how this proposed legislation would affect the Commission. Dr. Kern said that the emphasis on expanding the PSI to include substance abuse screening would likely help judges and the Sentencing Commission. The Sentencing

Commission relies heavily on the data collected from the PSI reports. He felt that the proposed role for the Commission would be limited and not include the development of any treatment options. Dr. Kern remarked that one advantage of the proposal for the Commission would be that probation officers would be required to complete a PSI in every felony case which, therefore, would also likely mean that they would be filling out the sentencing guidelines worksheet. With probation officers completing all guidelines forms, they would be more reliable and complete than those completed by prosecutors. He pointed out that requiring a PSI in every felony case would be put some new resource demands on certain local probation and parole offices. However, Dr. Kern noted that there were pending proposals which would provide for additional probation officer manpower for these offices. Mr. Savage, director of the Crime Commission, commented that he appreciates the work of the Sentencing Commission and would be glad to volunteer the Crime Commission's services as needed in the work of the implementation work group. Ms. Philpott concluded her remarks by speaking very briefly on the drug courts in Virginia which are currently being operated in Richmond and Roanoke.

Mr. Petty commented that he is concerned how this proposal would affect local jail incarceration due to the fact that it takes several weeks for the PSI to be completed. He felt that many of the convicted felons would be held in jail while the PSI was being prepared and that this would have an overwhelming impact on local jail bed space. Judge Honts further added that the requirement for a PSI would have a large impact on the courts.

With no further comments, Judge Gates thanked Ms. Philpott for coming to the meeting and presenting the legislative proposal pursuant to House Joint Resolution 443 . Judge Gates then asked Judge Bach to discuss the next item on the agenda, the Commission's legislative subcommittee proposals to modify the Code of Virginia.

IV. Legislative Proposals

Judge Bach began by reviewing the recommendations of the Legislative Subcommittee. He noted that most of the recommendations for legislative action could be termed "house-keeping" measures.

The first proposal was a modification to §17-234 to provide that all future appointments to the Commission be for varied terms. This proposal is needed to prevent an exceedingly large amount of membership turnover in three years. However, to ensure some continuity in membership, the legislative proposal would include a clause that would allow members initially appointed prior to January 1, 1998 to serve again. Mr. Christie asked Judge Bach about the wording that involved staggered terms and how the proposed term lengths were developed. Dr. Kern responded that Mary Devine of Legislative Services selected the initial terms as a discussion starting point and that these numbers could be changed as desired by the Commission. Judge Bach said that the duration of the proposed terms was calibrated around the current three year terms in the Code.

The second legislative proposal dealt with the scoring of prior criminal record and the so-called "16 year rule". The law currently reads that when scoring past record, "only convictions or adjudications (i) occurring within sixteen years prior to the date of the offense upon which the current conviction or adjudication is based on or (ii) resulting in an incarceration from which the offender was released within sixteen years prior to the date of the offense upon which the current conviction or adjudication is based shall be deemed to be previous convictions." The intended purpose of the clause was to ensure that someone convicted of certain non-violent crimes who has been crime free for an extended time would not receive a large midpoint enhancement for a prior conviction that occurred a long time ago. Judge Bach said that, in reality, the provisions of the "16 year rule" are rarely applicable. More importantly, he observed, it is almost impossible for those responsible for filling out the forms to apply this rule in a fair and consistent manner. In most cases, information on the date of release from a prior incarceration for a violent crime is required in order to properly apply this rule. This information is never present on a prior record "rap sheet" and, consequently, it is impossible for those in the field to apply a scoring rule contained in the law.

The subcommittee proposed to recommend to the legislature the elimination of the "16 year rule" and leave it up to the judge's discretion to decide the merit of a guideline midpoint enhancement for a prior violent crime in the distant past. Mr. Kneedler asked if the proposal would just eliminate the clause of the "16 year rule". Judge Bach said the bill would only strike the language that concerned this matter. Judge McGlothlin asked if all the old violent felonies were going to be scored with the elimination of this rule. Dr. Kern said that the entire record would be scored. Mr. Vassar remarked that very old convictions for some felons would now be scored and treated in the same fashion as more recent convictions for other felons. He felt this would be unfair. He asserted that the Commission should keep the rule so offenders would not be penalized for offenses that occurred long ago. Judge Bach answered that while the objective of the rule was a good one, in practice the rule could not be applied. He said that the source material for applying this rule is the criminal history "rap" sheet and this type of data is simply not found on criminal history records. The point of the proposal was to eliminate a scoring requirement that cannot be determined.

Judge Newman added that most judges will take into account an offender who has been crime-free for an extended period of time even if the entire record is scored on the guidelines worksheet. Mr. Kneedler felt that the Commission should recommend the elimination of this rule and leave it up to the judge's discretion the merit of the guidelines recommendation. Judge Bach felt that judges should be given the discretion to decide on the scoring weight accorded past criminal convictions. He further stated that the choice of a sixteen year crime-free period was arbitrary and that some judges may feel a shorter crime-free period is appropriate to justify a discounting of a prior conviction.

A motion to adopt this proposal was made and seconded and Judge Gates asked the Commission for a vote. With only one dissenting vote the Commission voted in favor of this proposal to modify §17-237 by eliminating the "16 year rule."

Judge Bach also asked the Commission to vote on the recommendation that provides for staggered appointment terms so that turnover on the Commission is gradual and continuity is provided. Judge Stewart added that modifying the proposed Senate appointment terms to three years instead of two would create some other succession problems in the long run. Judge Bach asked Mr. Christie if he would agree to the proposal as presented. Mr. Christie responded that the proposal as it reads was fine.

A motion to adopt this proposal was made and seconded and Judge Gates asked the Commission for a vote. The Commission voted 15-0 in favor of the recommendation.

The third legislative proposal involved juvenile record access in order to complete guidelines worksheets. At the urging of the Commission, the legislature modified §16.1-306 in 1996 to allow juvenile records to be maintained in order to support the complete scoring of the sentencing guidelines worksheets. However, probation officers and Commonwealth's attorneys still continue to encounter difficulties in obtaining juvenile record information in a timely fashion. Judge Bach said that in some jurisdictions the prosecutors and probation officers are required to hand write all information they require to accurately prepare the guidelines worksheets. The written transcription of the juvenile record information is extremely time consuming and can be unreliable when notes are illegible. The recommended proposal would modify the Code to permit probation officers and prosecutors to receive photocopies of juvenile petitions and disposition information as required for sentencing guidelines work sheet computations.

A motion to adopt this proposal was made and seconded and Judge Gates asked the Commission for a vote. The Commission voted 15-0 in favor of the recommendation.

The fourth legislative proposal was to modify §19.2-298.01 to clearly state that the sentencing guidelines forms are open records and shall not be sealed upon entry of the sentencing order. It has been the understanding of the Commission that the guidelines forms are open records and available for review by the public. There is no specific language in the Code that requires a court clerk to seal guidelines work sheets.

A motion to adopt this proposal was made and seconded and Judge Gates asked the Commission for a vote. The Commission voted 15-0 in favor of the recommendation.

The fifth and last legislative proposal involved modifying §19.2-298.01 (C) to make it clear that if there is not concurrence of the accused, the court and the attorney for the Commonwealth, with regard to the prosecutor preparing the worksheet, that the court *shall* instruct the probation officer to prepare the forms. The clause in the current the law has been interpreted by a few to mean that guidelines worksheets are not required in plea agreement cases. This interpretation derives from the use of the word "may" with reference to both the probation officer and Commonwealth's attorney options for worksheet preparation in cases not involving a jury or bench trial.

A motion to adopt this proposal was made and seconded and Judge Gates asked the Commission for a vote. The Commission voted 15-0 in favor of the recommendation.

Judge Gates asked if the appointment of a Vice-Chairman was added in the first recommendation that dealt with membership of the Commission. Judge Bach said the language covering this subject was included in the legislative proposal. The legislative proposals all being adopted, Dr. Kern indicated that he would seek out legislators to patron the bills and would monitor their progress throughout the legislative process.

Judge Gates then said that at the last meeting, Dr. Kern reviewed a detailed outline of the proposed content of the 1997 Annual Report of the Commission. The Commission is required to submit an Annual Report to the Chief Justice, Governor, and the General Assembly by December 1 of each year. Judge Gates asked Dr. Kern to discuss the next item on the agenda, the draft of the 1997 Annual Report.

V. 1997 Annual Report Draft

Dr. Kern began the discussion on this item by saying that a draft of the report has been included in the member's packet. He asked the members to read the draft and return any comments and edits to him within the next two weeks. He then turned the presentation over to Ms. Farrar-Owens to present the sentencing guidelines compliance chapter of the report.

A. Sentencing Guidelines Compliance Report

Ms. Farrar-Owens presented a series of charts to summarize the compliance rate patterns and trends. She explained that the presentation is condensed and a complete compliance update is in the packets distributed to each member. The analysis in the annual report includes all cases received through September 30. There is a special section in the report which focuses on the cases affected by the modifications to the guidelines which took effect last July 1.

Recommended and Actual Disposition: For the time period January 1, 1995 through September 30, 1997, over 38,000 work sheets were submitted to the Commission. She said that the guidelines recommended that 46% of the offenders be sentenced to imprisonment in excess of 6 months and, in fact, 41% received such a sanction. An additional 19% were recommended for incarceration for some period less than 6 months but 22% were actually sentenced to such a term. Mr. Christie asked if the new change in the definition of a state prison term would skew the overall statistics. He wondered if it would be possible to look at the whole data set with the definition change. Ms. Farrar-Owens said that would be possible to present that data in the future for those cases affected by the change. She continued by saying that the remaining 35% of felons were recommended for probation or a non-incarceration sanction with 37% actually receiving

such a sanction. She concluded that actual dispositions reflect a high degree of consensus with the guidelines recommendation for type of disposition.

Overall Sentencing Guidelines Compliance: Ms. Farrar-Owens commented that overall compliance with the guidelines was nearly 76%. The aggravation rate was reported as 13% and the mitigation rate, 11%. She noted that isolating departure cases does not reveal a strong bias toward sentencing above or below guidelines recommendations. Among the departures, 54% are cases involving aggravation while 46% are those involving instances of mitigation. She said that these patterns of compliance have been stable since the sentencing guidelines were instituted in 1995.

Durational Compliance: Durational compliance is defined as the rate at which judges sentence offenders to terms of incarceration that fall exactly within the recommended guidelines range. Ms. Farrar-Owens noted the high rate at which judges agree with the type of disposition recommended by the guidelines. Dispositional compliance with the guidelines was 84% while durational compliance measured 76%. This result indicates that judges agree with the type of sentence recommended by the guidelines more often than they agree with the specific term recommended in incarceration cases. In cases that received incarceration but were sentenced below the guidelines, terms have fallen short of the guidelines minimum by a median value of 8 months. For offenders receiving terms longer than recommended sentences, the effective sentence exceeded the guidelines maximum by a median value of 12 months. She pointed out that departures from the guidelines in these cases are typically short, which indicate that disagreement with the guidelines recommendation is, in most cases, not of a dramatic nature.

Compliance by Offense: Ms. Farrar-Owens observed that compliance rates within offense groups range from a high of 83% in the larceny offense group to a low of 59% among the kidnapping offenses. In general, property offenses demonstrate rates of compliance higher than the violent offense group categories. Larceny, fraud, drugs, and the miscellaneous offense group all have compliance rates above 70%. The violent offenses which include assault, homicide, rape, robbery, and sexual assault offenses, all have compliance rates below 70%, with kidnapping falling below 60%.

Burglary of a dwelling, which receives statutorily mandated midpoint enhancements as a violent offense, registers a compliance rate similar to that of assault and robbery crimes (67%). Burglary of an other structure (non-dwellings), which does not receive a midpoint enhancement when a primary offense, exhibits the lowest compliance rate of all property offenses (72%).

Specific Offense Compliance: Ms. Farrar-Owens proceeded to discuss compliance by specific felony crimes because this type of analysis will assist the Commission in detecting and pinpointing those crimes where judges disagree with the sentencing guidelines most often. She observed that 159 distinct felony crimes collectively account for 95% of all felony sentencing events in Virginia's circuit courts. Among these 159 unique crimes, only 48 have occurred with enough frequency to produce 100 or more cases on the Commission data base.

The most frequently occurring offense, simple possession of a Schedule I/II drug, which comprises one out of every five guidelines cases, has a compliance rate of 80%. Two assaults, malicious injury, a Class 3 felony, and unlawful injury, a Class 6 felony, appear on the list of most frequently occurring crimes. The compliance for unlawful injury cases (74%) approximates overall compliance while malicious injury cases exhibit a compliance rate more than ten percentage points lower. Compliance in first degree murder cases is exceedingly high (82%), but second degree murder has the lowest compliance rate of all offenses (55%) except one. Nearly all the departures in second degree murder cases are sentences which exceed the guidelines range. Ms. Farrar-Owens offered as possible reasons for this pattern the occurrence of frequent jury sentences in these cases and the fact that many of these cases involve the result of a plea agreement which officially reduces the charge from first degree murder.

The only rape offense which produced a sufficient number of cases to analyze was that of forcible rape by threat, force or intimidation. Compliance for these crimes was only 58%. In a third of these rapes, judges sentenced offenders to punishment that was less severe than that recommended by the guidelines. Two sexual assaults, aggravated sexual battery (victim less than 13 years old) and carnal knowledge (victim 13 or 14 years old), yielded low compliance rates accompanied by high rates of aggravation. Ms. Farrar-Owens noted that there were four robberies offenses analyzed. Robberies committed without a gun or simulated gun had a higher compliance rate than those robberies committed with a gun or simulated gun, though all were below the overall compliance rate. The majority of these departures favored mitigation.

She remarked that burglaries of other structures with the intent to commit larceny (no weapon) demonstrated the highest compliance rate of all burglaries examined (71%), except for possession of burglary tools (76%). Burglaries of dwellings at night (no weapon) achieved a compliance rate less than 60%.

Ms. Farrar-Owens observed that the fraud and larceny offenses all had very high rates of compliance. She also said that many of the analyzed drug offenses report a high rate of compliance particularly the crimes of obtaining drugs by fraud and possession of a Schedule I/II drug. Most drug sales were characterized by lower compliance rates. Sentences for the sale, distribution, manufacture, or possession of a Schedule I/II drug with intent to distribute were within the guidelines only 63% of the time. Sentences for the sale of more than five pounds of marijuana had a compliance rate of 62%. Guidelines departures for both these drug offenses favor mitigation. In many of these guidelines mitigations, judge deemed the offender amenable for placement in an alternative punishment such as boot camp incarceration or detention center incarceration.

Compliance by Circuit: Ms. Farrar-Owens stated that compliance rates varied greatly across circuits. Overall, 15 of the state's 31 circuits demonstrate compliance rates in the 70% to 79% range, with an additional seven circuits reporting compliance rates of 80% or above. Only nine circuits have compliance rates below 70%. She said that both high and low compliance circuits were found in close proximity with no geographic pattern

being discernible. She did, however, point out that most of the circuits in the Hampton Roads area of Virginia maintain compliance rates at or above the statewide average.

The highest compliance rate among all the circuits, 87%, is found in Newport News (Circuit 7), but both Hampton (Circuit 8) and Portsmouth (Circuit 3) report 85% compliance figures. She also noted that Circuit 29 in Southwest Virginia and Circuit 23, encompassing the city of Roanoke, have the lowest compliance rates at 65%. Roanoke has the highest mitigation rate in the state at 21%. Roanoke, she noted, is a circuit with a drug court. She observed that the existence of the drug court may explain a significant portion of the mitigations. Circuit 22 (Danville, Franklin and Pittsylvania counties) retained the highest aggravation rate in the state, 27%.

Reasons for Departure: Ms. Farrar-Owens 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 community treatment more frequently than any other mitigation departure reason. She said that the use of alternative sanctions has increased from one out of every seven mitigation departure reasons in 1995 to one out of every four mitigations in 1997.

The most common reason for sentencing above the guidelines, cited in 13% of the aggravations, is that the offender's criminal lifestyle or history of criminality far exceeds the contents of his formal criminal record of convictions or juvenile adjudications of delinquency. In almost 12% of the aggravation cases, judges reported that the facts of the cases, or extreme aggravating circumstances, merited an upward departure.

Midpoint Enhancements: One out of every five cases have qualified for midpoint enhancements due to a current or prior conviction for a violent crime. The compliance rate in midpoint enhancement cases is 66% which is lower than the overall compliance rate. Low compliance in midpoint enhancement cases is suppressing the overall compliance rate. Overall, when judges depart from the guidelines in these cases, they are choosing to mitigate in the vast majority. She noted that compliance rates across the different types of midpoint enhancements were not consistent. Enhancements for a Category II prior record generated the highest rate of compliance of the midpoint enhancements (71%) and the lowest mitigation rate (22%). The most severe midpoint enhancement, that for a combination of a current violent offense and a Category I prior record, yielded the lowest rate of compliance (less than 62%), although compliance in cases receiving a Category I enhancement was almost as low (62%). Mr. Christie asked that the title of this chart be changed in the Annual Report for better clarification. Mr. Petty agreed with Mr. Christie that the label in the chart should be changed or a footnote could be added.

Ms. Farrar-Owens remarked that the Commission plans to initiate a complete reanalysis of all cases sentenced under the no-parole guidelines in the year ahead. She said this would allow the Commission to better assess the relationships between an offender's current offense, his prior record, guidelines midpoint enhancements and judicial sentencing.

Sentencing Guidelines Compliance in Jury Cases: Ms. Farrar-Owens proceeded to discuss sentencing guidelines compliance in jury cases. She presented data which illustrated that since 1986, the overall rate at which cases in the Commonwealth are adjudicated by a jury has been declining. Between 1986 and 1989, the overall rate of jury trials was around 6%. Beginning in the 1990s, the jury trial rate began to fall. During the 1994 legislative session, the General Assembly enacted provisions for a system of bifurcated jury trials which became effective beginning July 1, 1994. The first year of this process, the overall rate of jury trials dropped slightly to just under 4%, the lowest rate over the previous ten year period. The overall rate of jury trials sank to 2% in the first year of the truth-in-sentencing provisions in FY1995. The rate has risen slightly since 1995 to 2.6% of all felony cases adjudicated in Virginia's circuit courts.

Ms. Farrar-Owens commented that with the implementation of truth-in-sentencing, jury trials across all offense types have declined slowly. Over the past decade, jury trials for person, property and drug crimes all dropped nearly by half. Since 1995, the jury trial rate for crimes against person has rebounded from a low of 7% to nearly 11%, approaching the rate just prior to the adoption of truth-in-sentencing. She pointed out, however that jury trial rates for property and drug crimes have not rebounded.

The Commission has received 902 cases tried by juries. The compliance rate for cases adjudicated by a judge or resolved by plea agreement exceeds 76%. In constrast, the sentences handed down by juries fell into compliance with the guidelines in only 43% of the cases. Judges modified jury sentences in less than a third of the cases. Of the cases in which the judge lowered the jury sentence, nearly half were cases in which the final sentence was still out of compliance with the guidelines recommendation for the case. Judges brought a high jury sentence into compliance with the guidelines recommendation in only 12% of all jury cases.

Sentencing Guidelines Compliance and 1997 Revisions: Ms. Farrar-Owens then presented data included in the "impact section" of the Annual Report. She then focused on the modifications to the guidelines which took effect July 1, 1997.

Drug Guidelines: In response to criticism that the guidelines did not account for the amount of drug involved in sales related offenses, the Commission approved changes which consider the weight of cocaine. Since the modification to the drug guidelines took effect, the Commission has received 15 cases which qualified for the three year enhancement and two cases which qualified for the five year enhancement for the sale of large quantities of cocaine. Mr. Vassar asked if the change included both forms of cocaine, crack and powder. Ms. Farrar-Owens said it includes both forms. Judges have elected to sentence roughly half of the offenders within the new range recommended by the guidelines and have departed below the guidelines in remaining cases. Ms. Farrar-Owens observed that the number of cases is far too few to draw any conclusions about compliance under the new quantity enhancements.

The Commission has received 60 cases of first-time felons convicted of selling a gram or less of cocaine. These cases were targeted for the dual option guidelines recommendation of either traditional incarceration or Detention Center Incarceration. In 15% of these cases, judges have opted for incarceration in a detention center. In 8% of these drug cases it appeared that the boot camp incarceration program was selected. Although 12% of these drug felons received no incarceration, 5% received incarceration of six months or less. The remaining 60% of first-time cocaine sellers received traditional incarceration of seven months or more. The Commission will be studying the impact of this change to drug guidelines over the next year.

Sex Offenses Against Children: The Commission also added a factor to the sexual assault guidelines for crimes in which the victim was less than 13 years old at the time of the offense. The addition of this factor increases the likelihood that offenders who commit sex crimes against the very young will be recommended for incarceration, particularly prison. Ms. Farrar-Owens continued by saying that we have received 29 sexual assault cases since July 1 which involved victims less than 13. Judges have complied with the new sentence recommendation at a rate of nearly 66%. While this compliance rate is somewhat higher than before the modification, it is interesting to note that the pattern of departures in these cases has reversed itself. Prior to this guideline modification, the overwhelming majority of departures were above the recommended maximum in the guidelines. Now, she noted, the majority of departures for the cases receiving the new enhancement are falling below the minimum recommended by the guidelines. Mr. Vassar commented that perhaps the Commission over calculated what the appropriate enhancement should be in these cases. Ms. Farrar-Owens responded that the number of cases this conclusion is based on is still very small and it is too early to draw any conclusions about the effect of this change to the guidelines.

Habitual Traffic: Ms. Farrar-Owens then spoke about the early impact of changes in the habitual traffic offender statute. This particular alteration, she remarked, was not a change in the guidelines but a revision in the Code of Virginia that was recommended by the Commission and passed by the General Assembly. This modification allows judges to suspend the 12 month mandatory minimum incarceration term and sentence offenders to detention center, diversion center or boot camp.

Of the 128 habitual traffic cases sentenced since July 1, only 7% have had the mandatory minimum sentence suspended and been sentenced to one of the alternative sanctions. Nearly two-thirds still received the 12 month sentence. Because of its potential impact on Virginia's prison population, the Commission will be closely monitoring the impact of this change in the upcoming year.

Special Study of Embezzlement Cases: Ms. Farrar-Owens provided a status update on the special study of embezzlement cases. She said that the Commission is pursuing a study of embezzlement cases to examine if the dollar value embezzled or other factors have an impact on sentencing. Since there is no automated source of dollar value

involved in embezzlement cases, the Commission initiated a plan for manual data collection. She noted that the Commission is still reviewing PSIs and the characteristics of the embezzlement offense are being coded. The process has been slow due to the preparation of this year's annual report.

Judge Gates then asked Dr. Hunt to discuss the next item on the agenda, an update on the Risk Assessment Component to the Guidelines.

B. Risk Assessment Component on Guidelines System

Dr. Hunt asked Judge Stewart, Chair of the Research Subcommittee, if he would like to say anything before he started his presentation. Judge Stewart reminded the Commission about the change of the name of the Risk Assessment worksheet to Section D.

Dr. Hunt began his presentation with a brief introduction of offender risk assessment. The General Assembly required that the Sentencing Commission undertake a study of those incarcerated for property and drug crimes. The Commission was required to study the feasibility of placing 25% of these offenders in alternative sanctions based on a risk assessment instrument that identifies those offenders with the lowest risk to public safety. The Commission members were provided with a copy of the new work sheet (Section D). Section D will be incorporated within the current guidelines system as an additional work sheet to be filled out when the primary offense is either a drug, fraud, or larceny crime and the recommended sentence is incarceration. If the offender scores nine points or less on Section D, that offender would be recommended for alternative sanctions. The judge would then decide if the offender was a good candidate for alternative sanctions.

After selecting potential test circuits, staff from the Commission met with judges and other professionals such as Commonwealth's attorneys, probation officers, and defense attorneys who will be involved in the project in each of the circuits. Staff explained the legislative mandate and what would be involved in the pilot test. Dr. Hunt reported that three judicial circuits have agreed to serve as pilot jurisdictions: Circuit 5, (the cities of Franklin and Suffolk and the counties of Southampton and Isle of Wight), Circuit 14 (Henrico), and Circuit 19 (Fairfax). Implementation of the risk assessment project will begin on December 1. The staff visited Circuit 31 (Prince William) but the judges in this circuit decided not to participate in the risk assessment study. He acknowledged that there is still a possibility that Circuit 22 (Danville, Franklin and Pittsylvania) will participate in the study and that a meeting has been arranged to discuss this matter. Dr. Hunt discussed the substantial staff time which was devoted to training at the pilot sites in October and early November. The goal of the training and education seminars was to familiarize individuals with the risk assessment component of the guidelines and explain how the risk assessment worksheets and cover sheets should be completed. He indicated that the risk assessment worksheets will be ready for delivery to the pilot sites by December 1.

He then summarized the chapter on risk assessment in the annual report and focused on the statistical prediction, selection of risk factors and the selection of risk threshold

sections. He encouraged the members to make comments on these sections and the entire chapter and to return their suggestions as soon as possible.

Judge Gates turned to the next item on the agenda and asked Dr. Kern to provide an overview of the 1997 Annual Report section on the impact of the new sentencing system.

C. Impact of New Sentencing System

Dr. Kern provided an overview of a planned section in the Annual Report that has not been completed yet. He informed the members that they would receive this material by the following week. He then presented a series of charts which summarized the various impacts of the new sentencing system.

He first discussed the impact of the new sentencing system on the percentage of sentence being served in prison under the new system. The goal of the new system was to establish truth-in-sentencing to ensure that offenders were serving a significant share of their prison terms. According to a snapshot of our current prison population, inmates sentenced under the new system are, on average, serving nearly 90% of the sentences imposed in the courtroom. The rate at which inmates are earning sentences credits does not vary significantly across major offense groups. He said that larceny and fraud offenders, on average, are earning credits such that they are serving a little more than 89% of their sentences, while inmates convicted of robbery are serving about 90% of their sentences.

Dr. Kern then spoke about the new policy for the application of earned sentence credits which was modeled after the old system. Under the new program established by the Department of Corrections (DOC), there are four different rates at which inmates can earn credits: 4 ½ days for every 30 served (Level 1), three days for every 30 served (Level 2), 1 ½ days for every 30 served (Level 3) and zero days for every 30 served (Level 4). Analysis revealed that the majority (69%) of offenders are earning three days for every 30 served which is considered Level 2. Over one-fifth (22%) are earning the highest level, Level 1. Only 4% of inmates are earning Level 3 and 5% are earning no sentence credits at all. Judge Johnston asked if the figures presented are current. Dr. Kern said yes and that these statistics portray a snapshot of today's prison population.

The next section of the presentation dealt with the impact of the new sentencing system on incarceration periods for violent offenders. In assessing the impact of the new system, there is significant evidence that violent offenders are indeed serving longer sentences behind bars than they historically served prior to sentencing reform. Dr. Kern presented a series of charts that reported values of incarceration time served under the parole law (1988-1992) and after sentencing reform (1/1/95 - 9/30/97) that were represented by the median. The values for current practice represent expected time served on no-parole sentences (90%) for cases recommended for, and sentenced to, more than six months of incarceration. Dr. Kern started with the offense of first degree murder. First degree murderers who had no prior record of violence served, on average, 12 ½ years under the

parole system (1988-1992). After sentencing reform, offenders convicted of first degree murder with no prior record of violence are expected to serve, on average, sentences of 36 years in prison. For those offenders with a Category II (prior violent felony which carries a maximum statutory penalty of less than forty years) prior record, who served, on average, a median of 14 years under the previous system, are now receiving terms which will result in a typical time to serve of over 46 years. The most violent offender, those convicted of first degree murder who have a more serious violent record, Category I (prior record which is a prior violent felony which carries a maximum statutory penalty of forty years of more), having served, on average, less than 15 years in the past, are being sentenced to terms which will produce a median time to serve of 85 years under truth-in-sentencing. Mr. Kneedler asked Dr. Kern the age of the average offender that commits a homicide with no prior record in their background. Dr. Kern said that the staff did not analyze that data but, without looking at the data, he estimated that the offender would be in their mid 20s. Dr. Kern then reviewed other offenses like second degree murder, voluntary manslaughter, forcible rape, forcible sodomy and several more violent and nonviolent felonies.

After presenting all of these charts, Dr. Kern stated that there is unequivocal evidence that the sentences being imposed under the new system for violent offenders are producing lengths of stay dramatically longer than those historically seen. He said that it was the intent of the reform that offenders with violent criminal histories serve longer than those with less serious records. Dr. Kern said that the Commission members would be mailed a version of this section and the remaining sections, recommendations of the Commission and future plans, by next week. He asked the members to give the staff their comments by November 25. He reminded the members that the annual report must be delivered to the Governor, Chief Justice of the Supreme Court and the General Assembly by December 1.

VI. Miscellaneous Items

Judge Gates next asked Dr. Kern to cover a number of miscellaneous items left on the agenda.

Dr. Kern said that the Commission has hired a new research associate, Linda Birtley. She will oversee the project(grant funded) to develop a proposal for a new juvenile sentencing database. Ms. Birtley will begin shortly.

With no further business, Judge Gates then asked the Commission to discuss future meeting dates for 1998. Dr. Kern said that historically the Commission has always met in early April, late June, early September and in early November. Judge Gates asked if this general schedule for meetings for the next year was agreeable. Judge McGlothlin expressed that the first and second weeks in the month, especially June, September and

November, would not be a good time for him. The members and the Chairman said a meeting schedule would be proposed to address this concern.

With no further business on the agenda, the Commission adjourned at 1:20 p.m.