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The Virginia Criminal Sentencing Commission
November 16, 1998
Meeting Minutes

Members Present:
Judge Gates, G. Steven Agee, Judge Bach, Jo Ann Bruce, Mark Christie, Frank Ferguson, Judge Honts, Lane Kneedler, Judge McGlothlin, Judge Newman, William Petty, and Reverend Ricketts

Members Absent:
Peter Decker, Judge Johnston, Henry Hudson, Judge Stewart and Bobby Vassar

The meeting commenced at 10:10 a.m. with Judge Gates asking the Commission members to approve the minutes from the last meeting.

Agenda

Approval of Minutes

Approval of the minutes from the September 28, 1998 meeting was the first item on the agenda. The Commission unanimously approved the minutes.

The second item on the agenda was a draft report of the 1998 Annual Report. Judge Gates asked Dr. Kern to discuss this item on the agenda.

Draft of the 1998 Annual Report

Dr. Kern presented a draft copy of the first three chapters of the 1998 Annual Report. These three chapters include introduction, guidelines compliance and the offender risk assessment study. He asked the Commission members to review the draft of these three chapters and provide any verbal or written comments to Dr. Kern by next week. The next couple of chapters will be mailed by next week. The next chapter in the report would address the impact of the new sentencing system. This chapter will detail the goals of the sentence reform and impact to date. The final chapter of the Annual Report would include Commission recommendations, which is a topic that is the primary focus of this meeting's agenda. Dr. Kern noted that any recommendations approved at today's meeting would take effect on July 1, 1999.

Judge Gates thanked Dr. Kern for his overview. He then asked Ms. Farrar-Owens to discuss the first recommendation on the agenda, a Review of Proposed Revisions to Sentencing Guidelines.

Review of Proposed Revisions to Sentencing Guidelines

Recommendation 1

Ms. Farrar-Owens began the presentation of the first recommendation by saying there are numerous offenses that receive a zero when they are scored as the primary offense. A worksheet score of zero has been interpreted by some to mean an offense has no value under the guidelines. There are several worksheets (Sections A and B) which include a primary offense that receives a score of zero. She then presented specific offenses and worksheets that contain a score of zero. The proposed revision is to modify the sentencing guidelines to increase the primary (i.e. most serious) offense scores by one point on every worksheet with an offense that currently receives a score of zero, simultaneously increasing by one point the accompanying scoring thresholds and recommendation tables. This proposal eliminates the score of zero without altering guidelines recommendations in any substantive way.

A motion to adopt this proposal was made and seconded and Judge Gates asked the Commission for a vote. The Commission voted 11-0 in favor of the recommendation.

Recommendation 2

Ms. Farrar-Owens then presented the second recommendation that involved adding a factor to the larceny worksheet. She said that the guidelines currently do not factor in the dollar amount or value of goods stolen or other potentially important factors related to the crime of embezzlement. Although compliance with the guidelines for embezzlement is high (85% for FY 1998), the guidelines have received some criticism for not taking into account dollar amount or value in these cases.

She continued by saying that the staff of the Commission studied embezzlement cases sentenced under truth-in-sentencing laws between January 1, 1995 and June 30, 1997. Pre-/post-sentence investigation (PSI) report narratives were obtained for these cases in an effort to collect information regarding dollar amount taken and other elements of the crime, such as the duration of the embezzlement act and the nature of the victim. She remarked that each section of the larceny guidelines was studied individually. Based on the study cases, there is a relationship between dollar amount embezzled and whether or not the offender received a sentence of more than six months incarceration. Only when the amount embezzled reached $75,000 or more did the sentencing pattern change substantially, with 50% receiving incarceration in excess of six months. She did note that the number of cases involving such large quantities is small.

The study also revealed a relationship between the nature of the victim (specifically, that the victim was a private citizen and not a business, bank, government agency or a charitable group) and whether or not the offender received a sentence of more than six months incarceration.

The analysis conducted on only those cases of offenders receiving probation or up to six months incarceration indicated a relationship between dollar amount embezzled and

whether or not an incarceration sentence was imposed. A simplified categorization of dollar amount (less than $15,000 or $15,000 or more) proved to be the most useful. The results show that judges were more likely to impose jail time up to six months if the amount embezzled was at least $15,000. The shift in the sentencing pattern is small but important statistically.

Ms. Farrar-Owens said that for offenders in the study who were sentenced to incarceration in excess of six months, no consistent relationship between amount embezzled and sentence length could be determined. More than 77% of the cases receiving incarceration of more than six months were given an effective sentence (imposed sentence less any suspended time) within the range recommended by Section C of the guidelines. Nearly all of the cases given sentences outside of the range recommendation were sentences exceeding the recommendation (21%). In over half of those, the judges cited a large dollar amount as the reason for giving a lengthier than recommended sentence. While judges may believe large embezzlements deserve longer sentences, there does not appear to be consensus in what defines a large amount or in how much additional time it should add to an offender's sentence.

She then stated the proposal, which is to modify the larceny sentencing guidelines to factor in the amount of money or the value of goods stolen in embezzlement cases. The larceny guidelines proposed amendment would add two new factors (amount embezzled and type of victim) on Section A. Under this modification, an offender who embezzles $75,000 or more from an individual would be automatically recommended for Section C. Offenders who embezzled lesser amounts but have multiple counts of embezzlement, other additional offenses, or some degree of prior record would be more likely to be recommended for Section C than in the past.

Because of the relatively weak statistical association, Ms. Farrar-Owens remarked that any modification to Section C of the larceny guidelines to account for amount embezzled would be a normative adjustment. No impact on state and local responsible beds is anticipated due to the proposed change.

Mr. Christie felt that the Commission should increase the recommendation for embezzlement offenses but he felt that nature of the victim should be omitted. He felt that types of victims should not be given weights measuring who is more highly valued. Mr. Christie said that this should be a matter left up to the judge's discretion. Judge Gates said that this recommendation is based on research statistics and not the Commission's personal views.

Mr. Petty asked the Commission to direct the staff to expand the study to include other larcenies like fraud and grand larceny. Ms. Farrar-Owens said that the study included only embezzlements and she does not have data on these specific crimes on the larceny worksheets. This data would have to be collected recommendation that there should be a Mr. Petty felt that this analysis could be applied to all larcenies instead of just embezzlement. Judge McGlothlin concurred with the intent of Mr. Petty's concern but felt that it would be improper to change the guidelines without statistical and historical

ammunition. Mr. Petty's motion for extending the embezzlement guidelines modifications to other larcenies died due to lack of a seconded motion.

Mr. Agee had the same concern as Mr. Christie about the type of victim. He felt that a victim is a victim regardless of being a citizen or a business. Dr. Kern said that the Commission is not shackled to statistical or historical data like the former Sentencing Guidelines Committee. Judge Bach said that he agreed with Mr. Christie about deleting type of victim. He also felt that the amount of embezzlement should be the entire amount of the embezzlement instead of what the offender plead guilty to. Dr. Kern said that the guidelines take into this into account in these types of cases.

Mr. Christie made a motion to omit the type of victim from scoring in embezzlement cases. This motion was seconded. The Commission voted 12-0 in favor of the motion.

A motion to adopt Recommendation 2, as amended, was made and seconded and Judge Gates asked the Commission for a vote. The Commission voted 11-1 in favor of the recommendation. Mr. Petty dissented.

Mr. Petty made a motion to begin another study to investigate the influence of additional factors in all larcenies. The motion was seconded. The Commission voted 12-0 in favor of Mr. Petty's recommendation.

Recommendation 3

Dr. Creech discussed the next recommendation on the agenda. He began by noting that the guidelines do not cover aggravated involuntary vehicular manslaughter (§18.2-36.1(B) of the Code of Virginia). Sentencing guidelines cover 95% of felony offense convictions in circuit court. There are a few offenses for which guidelines have not been developed. In these cases, the judge is without the benefit of sentencing guidelines - an estimate of how a similarly situated cases has been sentenced in the recent past. To increase the number of offenses covered by sentencing guidelines, the Commission monitors these offenses and develops guidelines as sentencing information becomes available. One manslaughter offense has been identified as a possible inclusion to the Homicide guidelines.

Dr. Creech then reported on the analysis. Aggravated involuntary vehicular manslaughter is an unclassed felony and has a statutory range of 1 year to 20 years. There are 15 cases of aggravated involuntary vehicular manslaughter in the PSI database for the calendar years 1996 – 1997. Every observed case was sentenced to a long term of incarceration, with a mean sentence of 144 months.

The staff proposed that aggravated involuntary vehicular manslaughter be added to the Homicide guidelines.

A motion to adopt this recommendation was made and seconded and Judge Gates asked the Commission for a vote. The Commission voted 12-0 in favor of the recommendation.

Recommendation 4

The next recommendation was that attempted capital murder should not be covered by the guidelines. Attempted capital murder is not covered by the guidelines when it is either the sole charge or when accompanied only by offenses that do not have a life maximum. He said that there are situations where an attempted capital murder is accompanied by an additional offense with a life maximum that is covered by the guidelines. In these circumstances, the attempted capital murder becomes an additional offense to the guidelines offense. The nature of the attempted capital murder is such that it should rarely be treated as a secondary offense.

Dr. Creech then spoke about the analysis. There were 12 attempted capital murders in the PSI database for the calendar years 1996 – 1997. Eight were for attempted capital murder of a law enforcement officer, with a mean sentence of 291 months. Four were for attempted capital murder in the commission of a robbery, with a mean sentence of 327 months. Neither has enough cases to develop a separate primary offense category on the Homicide guidelines, and, after controlling for factors on the Homicide guidelines, the combined offenses were not similar enough to develop a single primary offense category.

Dr. Creech asserted that to continue the practice of making attempted capital murder the additional offense is not satisfactory. Dr. Creech said, for example, if an attempted capital murder in the commission of a robbery case was scored on the Robbery guidelines, the guidelines recommendation would be significantly less than the actual effective sentence.

Dr. Creech proposed that the Commission should add language to the introductory portion of the sentencing guidelines manual to preclude using a sentencing guidelines worksheet when attempted capital murder is one of the offenses at conviction.

Mr. Ferguson made a motion not to adopt this recommendation. He felt that the Commission should not start deleting offenses from the guidelines. Mr. Ferguson asked that the staff re-analyze this problem and find another solution. Judge Gates asked the Commission to vote on Mr. Ferguson's recommendation. A motion to adopt this proposal was made and seconded and Judge Gates asked the Commission for a vote. The Commission voted 12-0 in favor of the recommendation.

Recommendation 5

Dr. Creech then discussed the next recommendation. Currently, a second or subsequent conviction under §18.2-248(C) of the Code of Virginia receives the same primary offense score on the sentencing guidelines as a first conviction for this offense. The guidelines have been criticized for treating first and second/subsequent convictions the same even though the Code of Virginia enumerates an enhanced penalty range for second/subsequent convictions.

An analysis of truth-in-sentencing cases received from January 1, 1995, through September 20, 1998, indicated a compliance rate for an initial sale-related conviction is 63%, with judges sentencing below the guidelines in more than a fourth (26%) of the

cases. By comparison, the compliance rate for a second or subsequent conviction for this offense is only 53%. For a second or subsequent offense, judges have sentenced a third (33%) of the offenders to prison terms in excess of the guidelines recommendation for the case.

The staff proposed that the drug guidelines should be amended to increase the recommended sentence length for a second or subsequent conviction under §18.2-248 (C) of the Code of Virginia.

A motion to adopt this proposal was made and seconded and Judge Gates asked the Commission for a vote. The Commission voted 12-0 in favor of the recommendation.

Recommendation 6

Dr. Creech then presented the sixth recommendation to the Commission. He began by saying that the guidelines have been criticized for not recommending a term of incarceration for offenders convicted of possession of a Schedule I/II drug when the offender has a prior conviction(s) for the same crime.

An analysis of the sentencing guidelines database indicates the compliance rate for possession of a Schedule I/II drug is 79%. Typically, offenders convicted of possession of a Schedule I/II drug are recommended for no incarceration unless there is a substantial prior record. The PSI database indicates that there is a relationship between the number of prior possession or sale, etc. of a Schedule I/II drug and the probability of incarceration for those convicted of a current possession of a Schedule I or II drug. With no prior possession or sale convictions, only 33% of offenders were incarcerated, but, with one prior possession or sale conviction, the incarceration rate rose 60%.

The staff recommended that the drug sentencing guidelines should be modified by adding a new factor to Sections A and B. The new factor adds 2 points on both sections A and B if the offender's current offense is for possession of a Schedule I/II drug and has two or more prior possessions or sales of a Schedule I/II drug. Such modifications will increase the likelihood that offenders convicted under these circumstances will be recommended by the guidelines for a short term of incarceration.

A motion to adopt this proposal was made and seconded and Judge Gates asked the Commission for a vote. The Commission voted 12-0 in favor of the recommendation.

Recommendation 7

The next recommendation was to amend the drug sentencing guidelines to add the crime of transporting five or more pounds of marijuana into the Commonwealth. Dr. Creech said this recommendation would increase the number of offenses covered by sentencing guidelines. According to the PSI database, during 1996-1997, 20 offenders were convicted for this crime under truth-in-sentencing provisions. More than 70% of these offenders were sentenced to an incarceration term of greater than six months, while most

of the others (25%) were sentenced to no incarceration. Of those sentenced to more than six months, the mean sentence was 6.8 years.

The staff recommended to the Commission amending the drug sentencing guidelines to include transporting 5 or more pounds of marijuana into the Commonwealth under §18.2-248.01 of the Code of Virginia. This offense would be scored the same as selling, etc. more than 5 pounds of marijuana for profit.

A motion to adopt this proposal was made and seconded and Judge Gates asked the Commission for a vote. The Commission voted 12-0 in favor of the recommendation.

Recommendation 8

Dr. Creech said that the next recommendation is to amend the drug sentencing guidelines to increase the likelihood that an offender convicted of manufacturing marijuana will be recommended for a term of incarceration.

The guidelines have been criticized for not recommending a term of incarceration for offenders convicted of manufacturing marijuana. An analysis of the pre-post sentence investigation data base for calendar years 1996-1997, indicate that there were a total of 64 cases during that time period. The compliance rate for manufacturing marijuana is 71% and judges sentence above the guidelines recommendation at a rate of 24 percent. The proportion of offenders being recommended to the three primary dispositions is out of sync with actual sentencing practice. In particular, the guidelines currently recommend a much higher proportion of offenders to no incarceration than is observed from actual sentences.

Dr. Creech recommended to the Commission that the drug sentencing guidelines for manufacturing marijuana should be amended by increasing the score for the primary offense on Sections A and B. Specifically, the score on Section A should be increased by 3 points and the score on Section B should be increased by 5 points. Such modifications will increase the likelihood that offenders convicted of manufacturing marijuana will be recommended by the guidelines for a short term of incarceration.

A motion to adopt this proposal was made and seconded and Judge Gates asked the Commission for a vote. The Commission voted 12-0 in favor of the recommendation.

Recommendation 9

Currently, selling, manufacturing, giving, distributing or possessing with intent to sell an imitation Schedule I or II drug under §18.2-248(G) of the Code of Virginia is not covered by the guidelines.

Sentencing guidelines cover 95% of felony offense convictions in circuit court. There are a few offenses for which guidelines have not been developed. In these cases, the judge is without the benefit of sentencing guidelines - an estimate of how a similarly situated case has been sentenced in the recent past. To increase the number of offenses

covered by sentencing guidelines, the Commission monitors these offenses and develops guidelines as sentencing information becomes available. One drug crime has been identified as a possible inclusion to the Drug guidelines.

There were 135 cases of sale, etc. of an imitation Schedule I/II drug in the pre/post sentence investigation database for the calendar years 1996 - 1997. About 37% of these cases received no incarceration, 36% received a short incarceration, and 27% received a longer incarceration. The mean sentence length was about 23 months (median = 12, n = 40). This crime is a Class 6 felony with a penalty range of 1 to 5 years.

Dr.Creech recommended that the drug sentencing guidelines be amended to include selling, manufacturing, giving, distributing or possessing with intent to sell, etc. an imitation Schedule I/II drug under §18.2-248(G) of the Code of Virginia.

A motion to adopt this proposal was made and seconded and Judge Gates asked the Commission for a vote. The Commission voted 12-0 in favor of the recommendation.

Recommendation 10

Carjacking under §18.2-58.1(A) of the Code of Virginia is not currently covered by the robbery sentencing guidelines. The penalty range for this offense is 15 years to life.

One robbery (carjacking) has been identified as a possible inclusion to the Robbery guidelines. Although carjacking is not covered by the sentencing guidelines, some work sheet preparers have scored carjacking as a street robbery.

There were 68 cases of carjacking in the pre/post sentence investigation data base for the calendar years 1996 - 1997. About 10% of these cases were sentenced to no incarceration, 2% to a short term of incarceration, and 88% were sentenced to a longer term of incarceration. The mean sentence length was 195 months (median = 120 months, n = 60), but for those with an additional felony of assault or abduction the mean sentence length increased substantially from 167 months (median = 96 months, n = 45) to 280 months (median = 252 months, n = 15).

The recommendation on this matter was that the Robbery guidelines be amended to include carjacking §18.2-58.1(A). On Section A, the primary offense portion would reflect the following: carjacking without a gun would receive 4 points, and carjacking with a gun would receive 6 points. On Section C, in addition to points to be assigned for the primary offense, a new factor is proposed. For carjacking cases only, if there is an accompanying felony of assault or abduction, then the offender would receive an additional 57 points. This new factor recommendation would apply only to carjacking because in a separate analysis, in two of every three carjackings with an accompanying felony assault or abduction, there was an increase in the sentence length beyond what could be explained through the other worksheet factors. By contrast, about one in four of all other forms of robbery exhibited a similar increase in sentence length (only robbery of

a residence, both with and without a gun, rose to one in three having an otherwise unexplained increase in sentence length).

Mr. Kneedler asked why the guidelines focused on robbery with a firearm and not other weapons. Dr. Creech responded that the guidelines do include additional points for other weapons like knives and explosives elsewhere on the worksheets. Mr. Petty asked that if carjacking is seen as a more serious crime than robbery by the General Assembly why does it score lower on the guidelines than other robberies. Dr. Creech said that the proposed numbers were based on research data and not on the actions of the General Assembly. He said that it was the prerogative of the Commission to propose modifications to the empirically derived numbers. Mr. Christie responded that he would like to increase the seriousness score for carjacking without a gun. Mr. Ferguson agreed and said that the number for carjacking without a gun on Section A should be increased to five points to ensure the offender would be recommended for prison. Dr. Kern remarked that the offender would likely be recommended to Section C due to additional factors on the worksheet. Mr. Ferguson agreed and decided to withdraw his recommendation.

Mr. Petty made a recommendation to move carjacking without a gun to the same offense seriousness category as residence, bank, business or street robbery without a gun. A motion to adopt this proposal was made and seconded and Judge Gates asked the Commission for a vote. The Commission voted 12-0 in favor of the recommendation.

Ms. Smith Mason was introduced at this juncture and asked to continue the presentations of recommendations for guidelines revisions.

Recommendation 11

Ms. Smith Mason began by saying the guidelines for habitual traffic offenses have been criticized for (1) having sentence length recommendations that are too low, (2) too small of an increase for multiple counts, and (3) no increase for an additional offense of DWI or a DWI appealed from General District Court. These criticisms give the impression that the guidelines are too lenient and out of sync with actual sentencing practice. Ms. Smith Mason pointed out, however, that in actuality the guidelines currently in place were unrealistic translations of mandatory minimum sentences under a parole-based system to a no-parole system. This, she noted, is why guideline users are instructed to change the range of any sentence recommendation that falls below a mandatory minimum to the mandatory minimum. To encourage the guideline user to accurately reflect recommendations involving mandatory minimums, several cosmetic changes can be made to the manual: 1. The beginning of each offense chapter can be modified to include the mandatory minimum for any offense covered by the guidelines in that section, and 2. The Virginia Crime Code section of the manual can be modified to identify all felonies and misdemeanors that have mandatory minimums.

An analysis of the sentencing guidelines database (all no-parole guidelines cases since January, 1995) indicates the compliance rate for habitual traffic offenders is 79%, with an aggravation rate of 19% and a mitigation rate of 2%. She noted that this compliance

picture changes when compliance is examined in conjunction with the number of counts and whether there is an additional offense of DWI. With respect to the number of counts, compliance is at 79% for one count, but falls to 70% for two counts, and 61% for three counts; the corresponding aggravation rates are 19% for one count, 23% for two counts, and 33% for three counts. Similarly, when there is an additional offense of DWI, the compliance drops from about 82% down to 61%, with the aggravation rate more than doubling (16% vs. 38%).

Ms. Smith Mason said that the analysis supports a suggested revisions to the sentencing guidelines for habitual traffic offenses such that the midpoint recommendations under §46.2-357(B,2i) and §46.2-357(B,3) be increased. In addition, the proposed recommendation is that the guidelines be amended by adding a factor to Section C of the miscellaneous sentencing guidelines to increase the total work sheet score for cases involving habitual traffic offenses and driving while intoxicated convictions. Under this proposal, the guidelines would recommend a midpoint of 1 year 6 months and a sentence range of 12 months to 1 year 8 months. Such modifications increase the midpoint recommendation by 11 months for those offenders sentenced for habitual traffic offenses accompanied by driving while intoxicated convictions. The combined modifications to Section C are expected to improve the compliance rate by about seven percentage points.

Mr. Petty suggested that the new crime description of being a habitual offender with driving under the influence be included in the definition so the guideline users know that all habitual offenders are included.

Judge McGlothlin asked if the points would be added if the DWI was handled in General District Court. Ms. Smith Mason said the DWI would be counted only if it was part of the same sentencing event.

A motion to adopt this proposal was made and seconded and Judge Gates asked the Commission for a vote. The Commission voted 10-1 in favor of the recommendation. Mr. Kneedler dissented.

Recommendation 12

Ms. Smith Mason began by saying that currently when there are multiple victims, points are assigned based on the victim receiving the most serious injury in a sentencing event. The assault sentencing guidelines have been criticized for not enhancing sentence recommendations in cases where there are multiple victims.

An analysis of the sentencing guidelines database (all no-parole guidelines cases since January 1995) indicates the compliance rate for malicious wounding was 63%, with 22% mitigating and 15% aggravating. When looking at the number of counts for malicious wounding when there is serious physical injury, the aggravation percentage rose dramatically from 17% for one count to almost 38% for 3 or more counts. The pre/post sentence investigation database for the calendar years 1996 - 1997 indicated that there was a relationship between the sentence length and the number of counts of malicious wounding when there was serious physical victim injury. With one count, the mean

sentence length was 102 months (median = 60, n = 331), with two counts, it rose to 120 months (median = 102, n = 18), and when the offender had three or more counts, the mean sentence length was 181 months (median = 141, n = 6).

This analysis supports the recommendation that the Assault sentencing be amended by replacing the factor for any serious physical victim injury with one that takes the number of victims suffering serious physical injury into account. This modification will give judges a sentencing recommendation that is more proportional to the gravity of the crime.

A motion to adopt this proposal was made and seconded and Judge Gates asked the Commission for a vote. The Commission voted 11-0 in favor of the recommendation.

Recommendation 13

Ms. Smith Mason remarked that one assault crime has been identified for possible inclusion to the Assault guidelines.

There were 9 cases of assault and battery against a law enforcement officer, etc. in the pre/post sentence investigation database for the calendar years 1996 - 1997. About 22% were sentenced to a short term of incarceration, and 88% were sentenced to a longer term of incarceration. The mean sentence length was 27 months (median = 12 months, n = 7). This crime is a Class 6 felony with a penalty range of 1 to 5 years, with a mandatory minimum sentence of 6 months.

Ms. Smith Mason proposed that the Assault guidelines be amended to include assault and battery against a law enforcement officer, fire or rescue personnel under §18.2-57(C) of the Code of Virginia. In 22% of the observed cases for this crime, the offender was sentenced to the mandatory minimum of six months while the remaining offenders received sentences greater than six months.

Under the proposed modifications, offenders convicted of this offense would be recommended for Section C of the guidelines. On Section C, the base score for this crime would be eight points with enhancements for any prior violent offenses being added to that base score.

A motion to adopt this proposal was made and seconded and Judge Gates asked the Commission for a vote. The Commission voted 11-0 in favor of the recommendation.

Recommendation 14

Ms. Smith Mason noted that the next recommendation involves the consideration of a particular felony assault crime for possible inclusion to the Assault guidelines.

There were 70 cases of assault and battery against a family member, third or subsequent conviction in the pre/post sentence investigation database for the calendar years 1996 - 1997. About 16% were sentenced to no incarceration, 31% were sentenced to a short term of incarceration, and 53% were sentenced to a longer term of incarceration. The

mean sentence length was 20 months (median = 12 months, n = 37). She said that this crime is a Class 6 felony with a penalty range of 1 to 5 years.

Ms. Smith Mason proposed that the Assault guidelines be amended to include assault and battery against a family member, third or subsequent under §18.2-57.2(B) of the Code of Virginia. She illustrated a breakdown of how these offenders would likely score under the proposed guidelines.

Ms. Bruce commented that the proposed score for this offense did not appear to be sufficient when compared to the offense seriousness values for other assault crimes. She recommended that the offense seriousness weight for assault and battery against a family member be increased by one point on Section A. A motion to adopt Ms. Bruce's proposal was made and seconded and Judge Gates asked the Commission for a vote. The Commission voted 11-0 in favor of the recommendation.

Recommendation 15

Ms. Smith Mason presented the next recommendation that was a request from the Commission on Family Violence Prevention. Specifically, this Commission was requesting that the Sentencing Commission reexamine guidelines for marital sexual assault because the guidelines do not recommend incarceration on most cases involving marital sexual assault.

There were 19 cases of marital sexual assault in the PSI database for the calendar years 1996 – 1997. About 42% were sentenced to no incarceration, 26% were sentenced to a short term of incarceration, and 32% were sentenced to a longer term of incarceration. When these cases are scored, the proportion of offenders being recommended to the three primary dispositions were out of sync with actual sentencing practice. In particular, the guidelines currently recommend a much higher proportion of offenders to no incarceration than observed from actual sentences. The analysis indicates that on Section A, the probability of marital sexual assault being scored on Section C should be increased. The analysis also reveals that for those persons scored on Section B, the possibility for a recommendation of short term of incarceration should be increased also.

Ms. Smith Mason recommended that the Other Sexual Assault work sheet be amended. On Section A, marital sexual assault should receive 3 points as a primary offense. On Section B, two new factors should be included on the work sheet to be applied only to marital sexual assaults: 1. victim injury – physical injury or serious physical injury should receive 2 points, and 2. weapon use – any weapon used, threatened, or brandished should receive 1 point.

Mr. Kneedler added that he chairs a Task Force for the Commission on Family Violence Prevention. He remarked on the serious nature of this crime and recommended that the offense seriousness value for marital sexual assaults (all counts) be increased from 3 to 6 points. Ms. Bruce wondered if the offenders that are not recommended for incarceration are sentenced to some type of alternative sanctions or rehabilitative program. Judge

Newman said that when such offenders receive an alternative punishment that it is not the sole sentence but, rather, is part of a suspended prison sentence with special conditions that the offender successfully complete the program.

Mr. Christie spoke against the proposed modification by Mr. Kneedler saying that the Commission should defer to actual practice in these types of cases. Mr. Ricketts agreed with Mr. Christie that the proposed normative increase in offense seriousness points and likelihood of incarceration is substantially out of sync with historical practice.

Mr. Kneedler's recommendation to increase the offense seriousness score from 3 to 6 died due to a lack of a second. A motion to adopt the staff's proposal was made and seconded and Judge Gates asked the Commission for a vote. The Commission voted 11-0 in favor of the recommendation.

Recommendation 16

Mr. Jody Fridley of the Commission staff presented the next series of recommendations. Mr. Fridley said the next recommendation concerned the offense of grand larceny froma person. He noted that the guidelines had been criticized for not more frequently recommending a sentence of over six months for offenders with extensive prior records convicted of grand larceny from a person. Some of these critics argue that since grand larceny from a person convictions are often plead down from robberies or purse snatching with injuries, the guidelines should recommend a term of incarceration for this offense. Others argue that not all grand larcenies from a person have the potential of violence and do not require a period of incarceration. The determining factor, historically, has been the offender's prior record; the more extensive the offender's prior record the more likely the offender would receive a guidelines recommendation of more than six months.

Mr. Fridley observed that there were 518 cases of grand larceny from a person in the PSI database for the calendar years 1996 - 1997. Thirty-one percent of these cases were sentenced to no incarceration, 31% were sentenced to a short term of incarceration, and 38% were sentenced to a longer term of incarceration. When these cases were scored on the guidelines, the proportion of offenders being recommended to the three primary dispositions was out of sync with actual sentencing practice. In particular, the guidelines recommended a much higher proportion of offenders to a short term of incarceration than observed from actual sentences. The analysis indicates that on Section A, the probability of grand larceny from a person to be scored on Section C should be increased. If, however, the person is still scored on Section B, then the person should be less likely to be recommended for a short term of incarceration

Mr. Fridley said that the recommendation is to amend the Larceny guidelines to better reflect recent judicial sentencing patterns. One point should be added to the offense seriousness score on Section A and 2 points deducted from Section B.

A motion to adopt this proposal was made and seconded and Judge Gates asked the Commission for a vote. The Commission voted 10-1 in favor of the recommendation. Mr. Petty voted against the proposal.

Recommendation 17

Mr. Fridley noted that the next recommendation concerned the suggested addition of two specific larceny crimes to the Larceny guidelines.

There were 21 cases of failure of bailee to return animal, vehicle, or boat, etc. $200 or more in the PSI database for the calendar years 1996 - 1997. About 53% of these cases were sentenced to no incarceration, 14% to a short term of incarceration, and 33% were sentenced to a longer term of incarceration. The mean sentence length was 19 months (median = 24 months, n = 7). This crime is an unclassed felony with a penalty range of 1 to 20 years.

There were 28 cases of grand larceny of a firearm in the PSI database for the same years. About 39% of these cases were sentenced to no incarceration, 29% to a short term of incarceration, and 32% were sentenced to a longer term of incarceration. The mean sentence length was 23 months (median = 19 months, n = 9). This crime is an unclassed felony with a penalty range of 1 to 20 years.

Based on the analysis, Mr. Fridley proposed the following scoring scheme for these larceny crimes. On Section A, the score for the Primary Offense factor would be 4 points for failure of bailee to return animal, vehicle, etc. and 1 point for grand larceny of a firearm. Both offenses would score 1 point on Section B. On Section C, failure of bailee to return animal, vehicle, etc. would score the same as "any other larceny offense with a maximum penalty of 20 years." The score on Section C for persons convicted of grand larceny of a firearm with a Category I prior record would be 88 points. With a Category II prior record, the score would be 44 points.

Mr. Fridley concluded this recommendation by saying that the larceny guidelines should be amended to include (1) failure of bailee to return animal, vehicle, etc., $200 or more (§18.2-117) and (2) grand larceny of a firearm under §18.2-95(iii) of the Code of Virginia.

Mr. Petty proposed that the Commission include §18.2-117 in the same category as grand larceny on Section C. A motion to adopt Mr. Petty's recommendation of adding failure of bailee to return animal, vehicle, etc., $200 or more to the same category as grand larceny on the Larceny worksheet was made and seconded and Judge Gates asked the Commission for a vote. The Commission voted 11-0 in favor of the recommendation.

A motion to adopt the recommendation of adding grand larceny of a firearm to the Larceny worksheet was made and seconded and Judge Gates asked the Commission for a vote. The Commission voted 11-0 in favor of the recommendation.

Recommendation 18

Mr. Fridley said that after the abolition of parole in 1995, judges were given the option to sentence an offender to a post release term and a post release supervision period. However, less than 1% of cases are sentenced to a post release term and period. Following their release from incarceration, the majority of offenders are being placed under a traditional probation supervision period.

For the factor "legal restraint" there is a distinction between probation and parole/post release supervision on three work sheets. Currently, offenders who are released from prison and placed on probation will not pick up the additional points for post incarceration supervision. Technically these offenders are not on parole or post release supervision. Historically, however, these offenders would have scored higher on the factor legal restraint.

Judges have utilized probation instead of post release term and period as the preferred method of post incarceration supervision. The conditions of supervision are the same, but the name of the supervision is different. The analysis indicates that by changing the wording of the legal restraint factor, a minor change can be made to better reflect judicial behavior and historical trends; instead of "parole/post release supervision" the factor would read "post incarceration supervision." In order to maintain historical time served recommendations a number of worksheets would need to be modified to capture those offenders on probation that traditionally would have been released on parole.

Thus, this recommendation is to have probation supervision after a period of incarceration for a felony be scored the same as parole or post release supervision on the Assault, Miscellaneous and Other Sexual Assault worksheets.

A motion to adopt the recommendation was made and seconded and Judge Gates asked the Commission for a vote. The Commission voted 11-0 in favor of the recommendation.

Recommendation 19

Mr. Fridley said that there have been new statutes added or modified since 1995 that include violent offenses that are not currently included in the list of crimes that trigger midpoint enhancements (Category I or II). Also, he stated that there are some other offenses which may have been overlooked during the abolition of parole process that also could be considered for classification as violent (Category I or Category II) offenses.

New crimes added since January 1, 1995, that may be considered as additions to the list of violent felony offenses which trigger midpoint enhancements in the sentencing guidelines: Code of Virginia §17.1-805 (C) should be amended to include the following violent offenses: §§ 18.2-52.1(A), 18.2-52.1(B), 18.2-51.4, 18.2-57(B), 18.2-57(C), 18.2-32.1, 18.2-51.3, 18.2-36.1(B), and 18.2-67.5:1. The reference to §18.2-154 should be expanded to include both Class 4 and Class 6 felonies as violent offenses.

A motion to adopt the recommendation of adding assaults with biological substances to the Category II list was made and seconded and Judge Gates asked the Commission for a vote. The Commission voted 11-0 in favor of the recommendation.

A motion to adopt the recommendation of adding driving under the influence with reckless disregard resulting in permanent injury to the Category II list was made and seconded and Judge Gates asked the Commission for a vote. The Commission voted 11-0 in favor of the recommendation.

A motion to adopt the recommendation of adding simple assault on a law enforcement officer or fire/rescue personnel to the Category II list was made and seconded and Judge Gates asked the Commission for a vote. The Commission voted 11-0 in favor of the recommendation.

A motion to adopt the recommendation of adding a hate crime of simple assault to the Category II list was made and seconded and Judge Gates asked the Commission for a vote. The Commission voted 11-0 in favor of the recommendation.

A motion to adopt the recommendation of adding murder of a pregnant victim without premeditation to the Category II list was made and seconded and Judge Gates asked the Commission for a vote. The Commission voted 11-0 in favor of the recommendation.

A motion to adopt the recommendation of adding unlawful injury by throwing object from a roof top, etc. to the Category II list was made and seconded and Judge Gates asked the Commission for a vote. The Commission voted 11-0 in favor of the recommendation.

A motion to ***NOT*** adopt the recommendation of adding grand larceny from a person $5 or more to the Category II list was made and seconded and Judge Gates asked the Commission for a vote. The Commission voted 11-0 in favor of the recommendation.

A motion to adopt the recommendation of adding aggravated vehicular involuntary manslaughter to the Category II list was made and seconded and Judge Gates asked the Commission for a vote. The Commission voted 11-0 in favor of the recommendation.

A motion to adopt the recommendation of adding third conviction sexual assault to the Category II list was made and seconded and Judge Gates asked the Commission for a vote. The Commission voted 11-0 in favor of the recommendation.

A motion to adopt the recommendation of adding vandalism to a vehicle without malice to the Category II list was made and seconded and Judge Gates asked the Commission for a vote. The Commission voted 11-0 in favor of the recommendation.

Recommendation 20

Mr. Fridley said that this recommendation deals with guidelines for offenses that span on and into 1995 where no specific date is attributed to a crime. When the court order reads that the offense occurred between January 1, 1993 and January 1, 1995, the guidelines preparer must complete two sets of guidelines. The old guidelines are prepared if an offense date prior to January 1, 1995, is used by the court and the current guidelines if the court selects January 1, 1995, as the date of offense. In cases that involve multiple counts that include a mixture of offense date periods that begin prior to January 1, 1995, and continue thereafter, the number of work sheets prepared balloons. Mr. Fridley said that this uncertainty in worksheet directions leads to increase workload for attorneys for the Commonwealth and probation officers. He recommended to the Commission that only one worksheet be prepared for any count of an offense with a date period spaning into 1995 or after. As a result, offenders will not be parole eligible and must serve 85% of any sentence given for a felony.

A motion to adopt the recommendation was made and seconded and Judge Gates asked the Commission for a vote. The Commission voted 11-0 in favor of the recommendation.

Recommendation 21

Mr. Fridley continued his presentation by saying there is an apparent contradiction in the Code of Virginia concerning the amount of time felons must serve. The provisions of §53.1-202.3 that accompanied the abolition of parole, limits earned sentence credit to a maximum of 4 ½ days per thirty days served for any felony committed on or after January 1, 1995. However, §53.1-129 of the Code of Virginia allows a judge to award sentence credit to felons for work performed on state, city or county property. There is no limit to the amount of earned sentence credit that the judge may award for the work performed.

Offenders who earn additional sentence credits under §53.1-129 undermine the intent of the truth-in-sentencing no parole laws. Programs exist that allow offenders to earn up to one day earned sentence credit per each day worked. This is in addition to any other earned sentence credits awarded through §53.1-202.3 of the Code of Virginia. Sentencing under this statute returns the Commonwealth to the time served practices of the past -- before parole was abolished.

Mr. Fridley said it appears that application of this statute is regional in nature. Consequently this means that not all courts consider this statute when structuring a sentence. As a result, the statute is introducing another form of disparity in the sentencing process.

Mr. Fridley recommended that the Commission propose a legislative amendment to §53.1-129 to eliminate any additional sentence credits earned by felons who work on state, city or county property. Sentence credits should be determined by the provisions of 53.1-202.3. Consequently, with these changes in effect all felons would be required to serve a minimum of 85% of their sentence.

A motion to adopt the recommendation was made and seconded and Judge Gates asked the Commission for a vote. The Commission voted 11-0 in favor of the recommendation. Judge Gates asked Dr. Kern to check with the Sheriff's Association before having the bill introduced.

Recommendation 22

Anne Jones presented the next recommendations. She began by noting that the Department of Corrections proposed modifying the sentencing guidelines for drug offenses involving offenders with no prior felony record who sell one gram of cocaine or less to include Diversion Center Program or the Boot Camp Incarceration Program as a sentencing option for judges.

Ms. Jones said that currently the sentencing guidelines for drug offenses recommend incarceration of seven to 16 months or Detention Center Program for offenders who sell one gram or less of cocaine and have no prior felony record. Judge McGlothlin disagreed with one aspect of the recommendation. He felt that Boot Camp was a reasonable alternative because it is hard time, but not the Diversion Center Program. He recommended that Diversion Center Incarceration Program should be deleted from this recommendation.

Some discussion ensued with the sentiment favoring the addition of the option to sentence such offenders to the Boot Camp Incarceration Program. This would result in three recommendations for applicable cases: incarceration from seven to 16 months, Detention Center Incarceration Program or Boot Camp Incarceration Program. Upon the adoption of this proposal, a judge sentencing an offender to any of the recommended options would be considered in compliance with the sentencing guidelines.

Both the Detention Center and Boot Camp programs are highly-structured alternative incarceration programs operated by the Community Corrections division of the Department of Corrections. The Department of Corrections, Ms. Jones added, would support this recommendation.

The modified proposal was to add Boot Camp Incarceration program to the current incarceration recommendations for drug offenses in cases involving offenders with no prior felony record who sell one gram of cocaine or less.

A motion to adopt the modified recommendation was made and seconded and Judge Gates asked the Commission for a vote. The Commission voted 10-1 in favor of the recommendation. Mr. Petty voted against the proposal.

Recommendation 23

Ms. Jones began the presentation by saying that effective October 1, 1998, Title 17 (Courts of Record) and Title 14.1 (Costs, Fees, Salaries and Allowances) of the Code of Virginia have been repealed and replaced by Title 17.1. Chapter 11 of Title 17 pertained to the Virginia Criminal Sentencing Commission. The same provisions are now

contained in Chapter 8 of Title 17.1. However, three Code sections citing the Commission in other Titles were not amended when Title 17 was re-codified

Ms. Jones recommended that the Commission propose an amendment to §§ 19.2-298.01, 19.2-368.2, and 30-19.1:5 of the Code of Virginia which refer to matters pertaining to the Virginia Criminal Sentencing Commission, substituting the Code sections which became effective October 1, 1998, for repealed Code sections.

A motion to adopt the recommendation was made and seconded and Judge Gates asked the Commission for a vote. The Commission voted 11-0 in favor of the recommendation.

Recommendation 24

Dr. Kern presented the next recommendation. He noted that in felony cases tried upon a plea of guilty, the court may direct the probation officer to prepare the guidelines or with "the concurrence of the accused, the court and the attorney for the Commonwealth, the worksheets may be prepared by the attorney for the Commonwealth." Audit results indicate that worksheets prepared by the Commonwealth's Attorney are more likely to contain significant errors than worksheets prepared by probation officers.

A sample of 2400 worksheets was taken from the six judicial regions; the sample contained equal number of worksheets from each preparer group (probation officers and Commonwealth's Attorneys) from each region. The objective of the 1998 scoring reliability study was to determine the accuracy rate of guideline preparers in scoring violent criminal history. The results of the 1998 study indicate that worksheets prepared by Commonwealth's Attorneys had an error rate of 36.5% while the error rate for probation officers was 16.6%.

In 72% of the cases when a preparer failed to score a violent prior conviction (i.e., Category I or II) enhancement on the worksheet, the worksheet was prepared by the Commonwealth's Attorney. In contrast, probation officers were responsible for this error 28% of the time. This is a significant factor because the majority of points assigned on the worksheet are based on the proper classification of the offender's prior record.

Dr. Kern continued by stating that another common error was the improper classification of the prior record whereby those with the most serious violent prior conviction (Category I), were classified with a less serious violent offense (Category II). Again, 83% of this type of error was committed by the Commonwealth's Attorneys while probation officers were responsible for only 17% of these cases.

In 119 of the sample cases, an offender was recommended for probation or a short incarceration period when the correct recommendation should have been a significant period of incarceration in prison. In 81% of these cases, the Commonwealth's Attorneys failed to score a violent prior conviction, which resulted in the prison guidelines not being completed. Dr. Kern recommended to the Commission that they modify §19.2-

198.01(C) of the Code of Virginia to require probation officers to complete sentencing guidelines worksheets in all felony conviction cases.

Judge Newman commented that he was surprised that some circuits waived pre-sentence investigation reports. Mr. Petty was concerned about the impact on local jail population. He said it takes six weeks to complete a pre-sentence investigation and that this would have a significant impact on the local jails.

A motion to adopt the recommendation was made and seconded and Judge Gates asked the Commission for a vote. The Commission voted 10-0 in favor of the recommendation.

Recommendation 25

Dr. Kern began the last recommendation by saying that when the General Assembly abolished parole and restructured good time in the 1994 Special Session, part of the intent was to eliminate the artificial boundary between 12 months and one year. That is, if a person was sanctioned to serve one year, 12 months, or 365 days, the length of time to be served would be the same. When the General Assembly redefined the distinction between state and local inmates in 1997, some overlooked language remained in the Code of Virginia that has led to misinterpretations.

Dr. Kern noted that based on a telephone conversation with an Assistant Attorney General, the Department of Corrections (DOC) began a new policy of treating 12 month sentences as local inmates as of September 1, 1998. Persons with one year sentences are considered state inmates. In a more recent informal Attorney General's opinion, the distinction between state and local inmates was muddled further. According to the informal opinion, individual sentences need to be considered separately when the aggregate sentence is between 12 months and 2 years. If none of the individual crimes are sentenced to a term of incarceration of one year or more, then the person is a state-responsible inmate only at the discretion of the Director of DOC.

Dr. Kern reminded the Commission that the sentencing guidelines provide no distinction between a 12 month sentence and a one year sentence. This latest interpretation of the law provides a distinction where none was intended. The sentence reform law of 1994 aimed to simplify the sentencing system and eliminate nonsensical distinctions such as this one.

Dr. Kern recommended to the Commission that they should propose an amendment to §53.1-20(B) to read: Persons convicted of felonies on or after January 1, 1995, and sentenced to *incarceration of 12 months or more* shall be placed in the custody of the Department. Code of Virginia §53.1-20.1 should be modified so that compensation is paid to the local jail for any person convicted of a felony committed on or after January 1, 1995, and who is required to serve *incarceration of 12 months or more.* Finally, subsection 4 of §53.1-21(B) should be updated to reflect that no person convicted of a felony on or after January 1, 1995 should be transferred to the Department of Corrections when the combined length of all sentences to be served *totals less than 12 months.*

A motion to adopt the recommendation was made and seconded and Judge Gates asked the Commission for a vote. The Commission voted 9-0 in favor of the recommendation.

Judge Gates thanked all the staff members for their presentations. He then asked Dr. Kern to discuss the next item on the agenda, an update on the offender risk assessment project.

Update on Risk Assessment Program

Dr. Kern began by saying that the staff is trying to recruit new pilot sites for the risk assessment program. Since the last meeting, the staff has met with circuit court judges in Newport News and Norfolk. In both instances, the circuits unanimously agree to participate in the pilot study. The staff has scheduled risk assessment training in the coming months for these sites. The projected start date for risk assessment in these jurisdictions will be sometime in early 1999. Dr. Kern noted that the addition of these sites brings the pilot project up to six sites. Dr. Kern said he is still trying to negotiate a meeting with Chesterfield Circuit Court.

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

Miscellaneous Items

Dr. Kern proposed that the meeting schedule for 1999 follow the same procedure as last year. The staff will send the members a list of tentative dates.

Judge Gates asked that the staff and members of the public leave due to an executive session meeting. He noted that the executive session would consist of personnel and budget matters that were proposed earlier. All non-members left the room and the executive session lasted 15 minutes. The members discussed budget and personnel matters only.

All non-members returned to the Judicial Conference Room. Judge Gates recommended that the staff receive a 4.55% salary increase beginning on November 25, 1998. A motion to adopt the recommendation was made and seconded and Judge Gates asked the Commission for a vote. The Commission voted 9-0 in favor of the recommendation.

With no further business on the agenda, the Commission adjourned at 1:30 p.m.