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The Virginia Criminal Sentencing Commission
November 6, 2000
Meeting Minutes

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

Members Absent:
Judge Gates, Peter Decker and Bobby Vassar

Judge Stewart presided over the meeting in the absence of Judge Gates. The meeting commenced at 10:05 a.m. and Judge Stewart asked the Commission members to approve the minutes from the last meeting.

Agenda

I. Approval of Minutes

Approval of the minutes from the September 11, 2000 meeting was the first item on the agenda. The Commission unanimously approved the minutes. Judge Stewart then asked Mr. Kauder to present the second item on the agenda.

II. Non-Violent Offender Risk Assessment Evaluation Results

Mr. Kauder, of VisualResearch Inc. and a contractor with the National Center for State Courts, began by saying that the National Center for State Courts (NCSC), with funding from the National Institute of Justice, is conducting an independent evaluation of the development and impact of the risk assessment instrument. The purpose of this evaluation is to help the Commission decide whether to expand the risk assessment program statewide. In the spring of 2000, evaluators visited the risk assessment pilot sites to speak with judges, Commonwealth's attorneys, defense attorneys, and probation officers about the design and use of the risk assessment instrument (some judges and attorneys still remain to be interviewed, as well as officials from the Department of Corrections and officials in the Legislative branch). Respondents answered questions about the appropriate use of alternative sanctions, the mechanics of the risk assessment instrument, effects on local legal cultures, recommendations for improvements to the program, and whether they support expansion of the pilot project statewide. Although

responses and recommendations varied by locality and occupation, some common themes emerged. Mr. Kauder felt that all interviews would be completed by the summer of 2001.

The interviewed judges and probation officers generally support the idea of offender risk assessment and are comfortable with how the instrument was developed. However, the prosecutors did not generally support correctional programs intended to divert offenders recommended for prison. The prosecutors believed that alternative sanctions are best suited for first offenders and should be used in combination with straight probation.

Mr. Kauder said that the groups interviewed understood why risk assessment was developed and how it works. Some judges expressed concern that they didn't know if they were complying with the risk assessment guidelines. The probation officers said the risk assessment work sheets did not add more work for them. Judges also commented that they did not usually find a need to look at Section D (the risk assessment form). The judges were comfortable with viewing the risk assessment recommendation found on the guidelines cover sheet.

Although they felt that some type of punishment program should exist between probation and incarceration, Commonwealth's attorneys were not very concerned about the need for an adequate continuum of sanctions. Some Commonwealth's attorneys felt that straight probationers are the best candidates for alternative programs and treatments.

He continued by saying that defense attorneys support the greater use of alternative sanctions. However, some suggested that more care was needed to ensure that the sanction fit the offender and that judges not indiscriminately enhance sentences by adding an alternative to a jail or short prison sentence. Defense attorneys also stressed that their clients like the idea of "date certainty" – i.e., knowing the specific date that they would be released from criminal justice supervision.

Mr. Kauder made the observation that some offenders are given alternatives when the risk assessment instrument does not recommend them for such. Judges still rely heavily on arguments by attorneys, PSI information and the Department of Corrections' willingness to accept offenders for determining offender eligibility. Due to the voluntary nature of the sentencing guidelines, judges had little concern placing offenders in alternatives not recommended by the form.

Most interviewees expressed concerns about the scoring of offender demographic factors. Mr. Kauder noted that the respondents felt that age, employment, and marital status made the risk assessment instrument systematically biased or chauvinistic. The respondents recommended several changes to the form such as removing all demographic scoring factors or lessening the points for criminal history if convictions occurred a long time ago.

He then spoke on the issue of program expansion. The vast majority of judges felt that risk assessment is a good complement to sentencing guidelines. No interviewed judge was opposed to having the instrument being made available. In general, probation officers liked the risk assessment process because it brought objectivity to the diversion decision. Some probation officers did not recommend statewide expansion unless changes were made to eliminate the scoring demographic factors. Defense attorneys were only in favor of expansion if it would result in diverting more offenders from prison. Commonwealth's attorneys supported the idea of risk assessment only if it was applied to first offenders not being recommended for prison. They did not concur with the notion that risk assessment should target offenders who are recommended under the sentencing guidelines for prison terms.

As Mr. Kauder mentioned earlier, evaluators traveled to the six pilot sites to collect and code data from offender files housed within local probation offices. He pointed out that local probation staff was extremely helpful in pulling files, defining acronyms, interpreting entries, and providing support during the entire data collection process.

Of the 555 offenders tracked in the sample, 320 (58%) were successful in completing their package of alternative sanctions. He noted that program failures were due to technical violations (17%) and new crimes (25%) committed during the sanction time period. While program failure is only measured during the actual alternative sanction time period, an investigation into re-arrest rates covers the time during and after the completion of the alternative program. Thirty-three percent of studied offenders were re-arrested for any crime type. New non-felony arrests represented 16.2% of the diverted offenders in the sample, new felony arrests 19.5%, and probation revocations 10%. These figures do not sum to the total percent of new arrests (33.2%) because it was possible for an individual to be re-arrested for a non-felony, a felony, and also have his probation revoked.

Preliminary analysis illustrates that offenders who were recommended for an alternative sanction (i.e., those who scored nine or less points on the risk assessment instrument) were more likely to be successful (66%) than those offenders not recommended (53%). Offenders not recommended for an alternative sanction (i.e., those who scored ten or more points on the risk assessment instrument) who were not incarcerated were more likely to commit a new crime during their sanction period.

Mr. Kauder said there were noticeable differences in overall recidivism rates depending on whether an offender scored above or below the diversion recommendation threshold. Offenders recommended for diversion are less likely to have a new arrest (27%) as compared to offenders not recommended (37%). Offenders scoring ten or more on the risk assessment instrument had higher incidences of new non-felony arrests and new felony arrests.

Mr. Petty asked Mr. Kauder if the elected Commonwealth's Attorney was interviewed at the pilot sites. Mr. Kauder said that in all cases a deputy or assistant Commonwealth's attorney was designated to do the interview. Mr. Kneedler asked several questions about the success/failure rate of the offenders. He requested that the continuing research include a cost/benefit analysis. Judge Honts requested that the technical violation category of recidivism be broken out further to identify the specific type of violation. Judge Stewart suggested that the research committee of the Commission work with Mr. Kauder and the National Center of State Courts on the pursuit of these matters. Dr. Kern commented that Mr. Kauder and the National Center of State Courts would help the Commission staff to draft a chapter in the Annual Report that provided a status report on the project. Judge Stewart asked the Commission to approve referring this material to the research subcommittee for more detailed study. This was agreed upon.

Judge Stewart thanked Mr. Kauder for his presentations and then asked Ms. Celi and Mr. Barnes to discuss the next item on the agenda, Larceny/Fraud Special Study.

III. Larceny/Fraud Special Study

Mr. Barnes began by saying that the purpose of the larceny/fraud project is to study the relationship between the value of money or property stolen in larceny and fraud cases and judges' sentencing decisions. The Commission could elect to add a factor for value of items stolen to the sentencing guidelines worksheets that would provide additional points in larceny/fraud cases involving high dollar amounts. This addition would result in a harsher sentencing recommendation. As the result of a 1997 study of embezzlement cases, the Commission added a factor to the larceny sentencing guidelines to increase the sentencing recommendation for offenders who embezzle large sums of money.

Mr. Barnes reviewed the fact that the fraud study analyzed data from 440 randomly selected fraud cases. He then presented analytical results based on this data. Half of the fraud primary offenses were convictions for forgery or uttering. Many cases had multiple counts involving additional offenses. He presented a graph that illustrated the distribution of total dollar values involved in the fraud cases. The median value was $681.00. Over 50% of the cases had a dollar value at or below $1,000. Relatively few of these values were above $5,000 and the total dollar value was unknown in 15% of the fraud cases.

Almost 95% of the fraud cases involved cash or monetary benefit, with only a few involving specific types of property items. Mr. Barnes pointed out that this finding differs from the pattern observed in larcenies, which, he noted, Ms. Celi would be discussing in fuller detail later. He then discussed the types of victims in fraud offenses. Offenses committed against a business were observed in approximately 70% of these cases.

The next graphic presented by Mr. Barnes illustrated the frequency of specific types of victims in the fraud cases. As with larcenies, individuals and businesses were most often targeted. Non-bank businesses were victims in 41% of the fraud cases, versus a corresponding rate of 56% in the larceny cases. However, banks and government agencies were more frequently the victims of fraud.

Approximately 80% of the fraud cases involved a single victim. Victim injury was extremely rare, occurring in only two cases. Mr. Barnes asserted that offenders were frequently customers of a bank or other businesses. Employee, stranger, and acquaintance relationships occurred with low frequency, while family member and co-worker relationships were relatively rare.

Mr. Barnes said that recovery status was unknown in approximately 45% of these cases. Some money or items were recovered in about 6% of the cases and all money or items were recovered in 12.7% of the cases. Restitution was ordered in approximately 58% of the fraud cases. In comparison, restitution was ordered in only 43% of the larceny cases.

Over 90% of the time, there was no restitution made at sentencing or the information was not available. This was similar to the pattern observed in larceny cases.

In the analysis phase, all of these factors were evaluated to see if their inclusion in a statistical model would significantly increase the accuracy of prediction in the sample data. In addition, modified versions of certain variables, such as whether or not the total dollar value of a crime exceeded a certain level were created and similarly evaluated. At the general model level (prison in/out decision), the present model using only the current sentencing guidelines worksheet score predicts outcome with 84.3% accuracy. An alternative, new model 1, would add two factors - whether the offender's relationship to a victim is as a family member, and whether a bank is a victim. An offender whose relationship to the victim is as a family member would be less likely to receive a prison sentence, while an offender preying upon a bank would be more likely to receive a prison sentence. A model with these two additional factors predicts with 86.6% accuracy in the sample data, therefore the gain in predictive accuracy is slight.

A second alternative, new model 2, would also add the family relationship variable, but would substitute whether dollar value of the crime is $1000 or more for the bank-as-victim variable. An offender whose crime exceeds the $1000 level would be more likely to receive a prison sentence. Mr. Barnes said, however, this alternative achieves only 85.9% accuracy. Both these models offer only a small increase in predictive power over the current guidelines model and would add more complexity to the forms. He observed that it might be difficult to define and integrate the family relationship variable into the worksheet.

For the fraud probation/jail decision analysis, the present model predicts the outcome with 71.9% accuracy. An alternative, new model 1, would add two new factors – whether the offender is acquainted with a victim, and whether the dollar value of the crime is $500 or more. Sample data showed that offenders with an acquaintance relationship were more likely to receive a jail sentence. Offenders whose crimes exceeded the $500 level were also more likely to receive a jail sentence. A model with these two additional factors predicts with 75.2% accuracy in the sample data.

A second alternative, new model 2, would add only the acquaintance relationship variable to the present model. This factor was more strongly related to outcome than the dollar value $500 or more factor. New model 2 predicts outcome with 74.8% accuracy in the sample data. Like the family relationship factor, acquaintance may be difficult to define and implement on the worksheet. It would exclude family members, members of the same church or club, co-workers, employees, strangers, and customers, since those relationships have been separately recorded and tested and found not significantly related to outcome. This new model offers a slight improvement in explanatory power over the present model.

With regard to the prison length model, a new model 1 would add two new factors to the sentencing guidelines worksheet C. The factors would be the offender's relationship to the victim and dollar value of $2,501 to $5,000. This new model would also offer a slight improvement in predictive ability over the current model.

Judge Hudson asked what would happen if the dollar amount was in excess of $5,000. Mr. Barnes thought that, against common sense, the recommended sentence length would actually go down. Given the fact that these factors were not intuitive and did not dramatically improve the ability of the guidelines model to predict sentencing, doubts were expressed about the pragmatic usefulness of these particular study results. Judge Stewart then asked Ms. Celi to continue the presentation on the larceny study.

Ms. Celi began by saying that she would review characteristics of the larceny sample and then move on to general models, models that apply to probation and jail cases, and conclude with prison cases. The majority (75%) of the primary offenses in the 343 larceny cases sampled are grand larceny with a value of $200 or more. The value of items stolen is concentrated at the low end with 67% falling below $2,500. She also noted that in more than 19% of the cases the value of the dollar amount was unknown. The most common item stolen was cash followed by electronics. Ms. Celi pointed out that the most common victim location for the larcenies was a business. The money or item stolen was recovered in nearly 36% of the cases, but in more than 38% of the larcenies the item(s) were never recovered. Ms. Celi continued by saying that in nearly 60% of the cases, no restitution was made at the time of sentencing.

The current guidelines model that is based on all cases predicted prison in/out outcomes with 93.92% accuracy. In alternative models, the staff tried all the variables discussed and in various combinations to try and improve the accuracy of prediction. Some of the models were statistically significant but all were problematic. She said that the best new model the staff was able to generate actually reduced the predictive accuracy from 93.92% to 93.52%. None of the new models were able to predict accuracy as well as the present model.

Ms. Celi said the staff had more success with the probation/jail cases. She noted that the current guidelines model predicted these sentence outcomes with 79.59% accuracy. The staff came up with two models that can slightly improve on that accuracy. The first model presented added one factor, the value of $2,500 or more, and this alteration increased the accuracy of prediction by two percentage points. The second model also added the value of $2,500 or more and a factor to document whether some of the restitution was paid by the time of sentencing. This model increased the predictive accuracy by approximately three percentage points.

Ms. Celi then reviewed the last decision model that predicts the length of the prison sentence. In the staff's analysis, one alternative model was found that adds two factors to the present guidelines model. The first was a factor for whether or not the item was recovered and the second factor was value of items stolen. This model produced only a slight increase in explanatory power over the model currently in use.

Ms Celi then reviewed some information, presented at the last Commission meeting, on a 50 state survey on the dollar value thresholds that constitute felony larceny. She presented a brief summary of these findings and then asked for questions.

Judge Johnston asked if she knew why restitution was ordered in only half of the larceny convictions. Ms. Celi answered that some of the items stolen were recovered and therefore no restitution was ordered. Judge Stewart observed that, in his experience, it is often acknowledged that restitution of stolen items is hopeless and is therefore not ordered. Mr. Ferguson concurred. He said he did not believe that all the items were recovered in the cases where restitution was not ordered; he felt that restitution was just not ordered due to the hopelessness factor alluded to by Judge Stewart.

Mr. Petty reminded the Commission as to the genesis of this special Commission study. About two years ago, the prosecutors from Henrico County and Virginia Beach attended one of the Commission meetings. A discussion ensued at this meeting that the guidelines should include a dollar amount in embezzlement cases. Mr. Petty felt that given the precedent of the decisions made previously, that other larcenies should also be treated the same as embezzlement cases.

At this juncture, Dr. Kern displayed a current larceny guidelines worksheet that included the dollar amount enhancements for embezzlement cases. He then spoke about the graduated dollar amounts for embezzlement and the corresponding sentencing guidelines enhancements. Judge Stewart asked Mr. Petty what his specific proposal was for. Mr. Petty responded that he would propose using the same breakdown in dollar amounts/sentence enhancements for larceny as was being done for embezzlement. Judge McGlothlin asked if the embezzlement figures were grounded in a historical analysis or were a product of normative decision-making. Ms. Farrar-Owens responded that the embezzlement results were supported by empirical data and that the adoptions of the enhancements were, indeed, grounded in historical analysis. Mr. Kneedler observed that, in his view, embezzlement was a more serious crime than other larcenies in that it involves a breach of trust.

Mr. Petty acknowledged that the statistical analysis did not make as strong a case for guidelines adjustments as in the case of embezzlement. He noted, however, that while the Commission has based almost all of its decisions on historical data analysis, that this did not preclude some decisions being made on a prescriptive basis if it is the best policy for the Commonwealth. He felt that such decision-making was consistent with the view that the Commission is a policy-making body. Judge Honts stated that the Commission would be getting beyond its legislative charge if it started making such public policy decisions without data/research findings to support the revision. Judge McGlothlin concurred and said that the guidelines should remain as accurate a historical sentencing barometer as possible. Mr. Ferguson offered an opinion that such a perspective should still not forbid the Commission from making some fine-tuning policy adjustments in certain instances. He noted that the Commission is often in possession of much more information than what would be available to members of the General Assembly. Furthermore, he observed, all of the Commission recommendations must be reviewed by the General Assembly before they can go into effect. Thus, as a matter of policy, the General Assembly always has veto power over the recommendations of the Commission. Mr. Ferguson was inclined to support Mr. Petty's perspective.

Judge Stewart returned to the point that, in many judge's minds, embezzlement was perceived to be a more serious crime than other larcenies. Mr. Ferguson acknowledged this point but also added that many offenders who commit other larcenies are those who commit them over and over again. Mr. Christie noted that the Commission should use its best judgment and information to make recommendations on policy changes because that is included in the legislative charge to the Commission. He felt that the General Assembly created the Commission so that this precision type of work on sentencing guidelines adjustments could be accomplished in a non-political environment.

At this juncture, Judge Agee pointed out that there was no specific proposal before the Commission to vote on. Mr. Kneedler then made a motion to ask the staff to empirically

test the larceny/fraud data with the current enhancement thresholds tied to dollar amounts that are used in the embezzlement sentencing guidelines.

The motion was seconded. Judge Stewart asked the Commission for a vote. The Commission voted 14-0 in favor of the motion. The Commission did not see an urgency to complete this study in time for recommendations for the 2001 General Assembly Session. Accordingly, the research will be among the topics discussed during the Commission's 2001 deliberations.

Judge Stewart thanked Mr. Barnes and Ms. Celi for their presentations and then asked Dr. Creech to discuss the next item on the agenda, SABRE Drug Legislation.

IV. SABRE Drug Legislation

Dr. Creech began by noting that the SABRE drug legislation (House Bill 383/Senate Bill 153) passed by the General Assembly during the 2000 general session stipulated that the Commission shall review the minimum discretionary felony sentencing guidelines midpoint and the sentencing recommendation for convictions related to possessing, manufacturing, selling, giving, distributing, or possessing with intent to distribute a Schedule I or II drug or marijuana when the defendant has previously been convicted of such an offense. The legislation goes on to say that the Commission shall examine the minimum midpoint and the sentencing recommendations with respect to deterring recidivism. The Commission's review shall be completed in time to make recommendations to the General Assembly on or before December 1, 2000. Dr. Creech proceeded to give a quick overview of the study elements that was discussed in more detail at the last Commission meeting.

Dr. Creech said that the question as to whether sentencing guidelines recommendations are adequate to deter recidivism is a complex one that cannot be fully answered with available data. Virginia's sentencing guidelines only recommend a criminal justice sanction. The likelihood of recidivism for released drug offenders involves the interplay of personal (e.g., addiction, amenability to treatment, fear of detection, return to criminal activity) and criminal justice system (e.g., resources available for detection, detection of criminal activity) variables, as well as how long an offender is tracked in the search for recidivism.

The staff can, however, report on some baseline drug offender recidivism rates. He said that although these recidivism figures cannot be used to answer the question raised by the SABRE enactment clause, it could provide the foundation for a future analysis that seeks to establish a trend in recidivism. The recidivism data comes from the Commission's study on non-violent offender risk assessment. Dr. Creech displayed a chart that had recidivism rates broken down by original sentence type. The overall recidivism rate (as measured by a new conviction) was 19%, and varied by type of sanction originally

imposed. When the offender had been sentenced to no incarceration or probation, the rate was only 14%. However, 19% of those sentenced to jail were reconvicted within three years, as were 27% of those originally sentenced to prison.

The next chart presented the observed three-year recidivism rates by original offense. Offenders who were convicted for a subsequent sale of a Schedule I or II drug were far more likely to be re-convicted within three years than any other drug offender; at 41%, these offenders were more than twice as likely as the average drug offender to be re-convicted. He noted that it is important to remember that there are a number of reasons why there can be no definitive answer about the relationship between sentencing guidelines and deterrence. Deterrence is hard to measure. Dr. Creech said it is clear that Virginia's truth-in-sentencing system and the truth-in-sentencing guidelines are having an incapacitation effect. Virginia's truth-in-sentencing laws mandate sentencing guidelines recommendations for violent offenders (those with current or prior convictions for violent crimes) that are significantly longer than the terms violent felons typically served under the parole system, and the laws require felony offenders, once convicted, to serve at least 85% of their incarceration sentences. The relationship between this incapacitation effect and any deterrent effect can be difficult to examine through scientific measurement

The impact of drug addiction on the potential deterrent effects of sentencing guidelines and criminal sanctions is unclear. Dr. Creech observed that criminal sanctions alone may not be enough to deter some addicted offenders from repeat criminal behavior. For some offenders, the addiction drives the crime, either by the act of possessing the drug, or the need to generate cash through theft or drug sales in order to purchase more drugs for personal use. The treatment component of the SABRE legislation is aimed at this type of offender with the objective of reducing recidivism by treating the addiction.

Dr. Creech said to address whether sentencing guidelines recommendations are adequate to ensure the opportunity for substance abuse treatment, it is important to have an understanding of what treatment services are available, both through the Department of Corrections (DOC) and the Community Services Boards (CSB). He then discussed some of the treatment services and programs that are available. The substance abuse treatment program for most offenders ranges from 18 to 24 months for those undergoing treatment in a Therapeutic Community, and six to 12 months for those undergoing other forms of treatment. The decision of how to treat an offender for substance abuse is based on a combination of the severity of the offender's addiction and the duration of the offender's criminal justice sanction (incarceration and/or probation). The sentencing guidelines do not provide any specific recommendation for the length of a probationary term or treatment programming. A judge has wide discretion in making a sentencing decision. The judge can order the offender to participate in treatment, and completion of probation can be made contingent on meeting certain conditions, any of which can be imposed without the sentencing guidelines making a specific recommendation. The more information a judge has about a particular offender and the choice of treatment programs,

the better able that judge is to ensure that the offender has the opportunity to complete recommended and/or ordered treatment.

Dr. Creech continued by saying that during the 1998 session of the General Assembly, legislation was passed that required many offenders, both adult and juvenile, to undergo screening and assessment for substance abuse problems related to drugs or alcohol. A goal of this legislation was to provide judges with information relating to the substance abuse problems and treatment needs of an offender before the court, so that the balance between public safety and treatment needs could be addressed more fully at sentencing. The new law targets all adult felons convicted in circuit court and adults convicted in general district court of any drug crime.

After discussions with staff members from the Departments of Corrections (DOC), Criminal Justice Services (DCJS), and Mental Health, Mental Retardation, and Substance Abuse Services (DMHMRSAS), it is clear that there is some degree of integration among the three components (screening/assessment, criminal justice sanctions, and treatment services). While the framework for integration exists, the actual degree of integration could be improved. The greatest barriers to integration seem to be lack of communication and misperceptions about state and federal confidentiality laws. Dr. Creech noted that for the integration of substance abuse treatment and criminal justice sanctions to be effective, information must flow between the treatment program and the criminal justice system. He pointed out that every decision maker in the criminal justice system needs detailed information to make the best decision, not only for offender, but also for the public safety.

However, Dr. Creech observed that conclusions regarding the integration of screening and assessment, substance abuse treatment, and criminal justice sanctions may be premature. Substance abuse screening and assessment for offenders began on a statewide basis on January 1, 2000. Many treatment services are now being expanded due to the influx of funding as a result of the SABRE legislation that became law on July 1, 2000. DOC has recently made changes to both its intake and transfer forms to aid in its ability to communicate information about an inmate both within institutions and upon release from the institutions. Officials at DOC feel that there is now a good framework for treatment in place, as well as a way to identify those most in need of treatment. Time is needed to locate and fill any remaining gaps in coverage. Furthermore, DCJS' Criminal Justice Research Center has been assigned the task to evaluate the screening and assessment program over the next two to three years.

Moving to a related topic, Dr. Creech noted that, in a letter, the Northern Virginia Regional Drug Task Force requested that the Commission consider enhanced sentence recommendations for distributors of methamphetimine. In particular, the Task Force was requesting enhanced sentencing recommendations for larger amounts of methamphetimine similar to those found in the current sentencing guidelines for cocaine. An examination of

recent data from the Pre/Post-Sentence Investigation (PSI) database found only three offenders convicted for a drug crime involving 50 grams or more of methamphetimine; no offenders were convicted with 100 or more grams of methamphetimine in Virginia's circuit courts. Dr. Creech went on to note that the crimes raised by the Northern Virginia Regional Drug Task Force are completely subsumed under the SABRE legislation. The Virginia Criminal Sentencing Commission already has a policy in place with respect to mandatory minimum sentences. Under the Commission's policy, those who prepare guidelines are instructed to replace any part of the sentencing guidelines recommendation that is less than an existing mandatory minimum with the mandatory minimum.

Given the enactment of SABRE and the Commission's existing policy relating to mandatory minimum sentences, Judge Stewart stated that there would appear to be no need for the Commission to enhance its recommended range of penalties further for crimes involving large amounts of methamphetimine. With no objections, the Commision concluded that no further action regarding the sentencing guidelines for drug offenders is needed at this time.

Judge Stewart thanked Dr. Creech for his presentation and then asked Ms. Farrar-Owens to discuss the next item on the agenda, Possible Guidelines Revisions.

V. Possible Guidelines Revisions

Ms. Farrar-Owens said that she would be presenting, for the Commission's consideration, proposals for revisions to the sentencing guidelines system.

Proposed Recommendation 1-5
These five recommendations all related to the special study on sex offenders and dealt with the sex offender risk assessment instrument. Judge Stewart noted that recommendations 1 through 5 were previously voted on and approved at the June 2000 meeting so he made a motion to skip the presentation since it was an overview.
The motion was seconded. The Commission voted 14-0 in favor.

Proposed Recommendation 6
Ms. Farrar-Owens continued her presentation by presenting the sixth proposal that involved the possible expansion of the non-violent risk assessment project to other sites. Instead of taking any immediate action, the Commission agreed to include the information that Mr. Kauder presented at the meeting as a chapter in this year's Annual Report. A specific recommendation on further expansion of the program or adjustments in the instrument would await the final evaluation report.

Proposed Recommendation 7

Ms. Farrar-Owens said that the next proposal dealt with the fraud/larceny study that was discussed earlier. The issue was whether the Commission wished to vote on any proposed changes to the larceny and fraud guidelines based on the research results. Alluding to the earlier vote taken on the special study that would examine the larceny/fraud cases using the embezzlement guidelines, the Commission deferred any action at this time. The staff would continue to work on this study.

Proposed Recommendation 8

Mr. Fridley presented this proposal. He commented that the guidelines have been criticized for not scoring all counts of the primary offense in all cases. In some cases, the offender receives the same number of points on the guidelines for five counts as he or she receives for one.

This proposed modification would require users to score counts of an offense not scored under the primary offense factor as additional offenses. This would eliminate the impression that offenders are getting a "free ride" when they are sentenced for multiple counts of a primary offense and receive no additional points on the guidelines. Furthermore, overall compliance is projected to increase from 78% to 98% for the small number of cases impacted by this change.

A motion to adopt this proposal was made and seconded. Judge Stewart asked the Commission for a vote. The Commission voted 13-0 in favor of the recommendation.

Proposed Recommendation 9

Ms. Celi presented this proposal. She noted that under current rape guidelines, higher numbers of points are awarded in cases that involve multiple counts of the same offense than in cases that involve single counts of more than one of the rape guidelines offenses. The result of this method of awarding points is that offenders who commit multiple counts of a rape guidelines offense are recommended for a significantly higher prison sentence than offenders who commit single counts of more than one rape guidelines offense.

Although the design of the guidelines results in significantly different sentence recommendations depending on whether the case involved multiple counts of the same offense or multiple offenses that are covered in the guidelines, the prevalence of this problem is not significant. Sentencing guidelines, she observed, are not designed to take into account the unusual circumstances found in rare cases. In the instance of the rape guidelines, the potential problem described above affects an extremely small number of cases.

Ms. Celi asked the Commission if it wanted to take any action on this issue. The Commission decided that an adjustment to the guidelines was not warranted by the data at this time. However, a discussion ensued about whether it would be worthwhile to conduct a fuller analysis of the rape sentencing guidelines for some alternative solutions.

Mr. Christie moved that the Commission adopt this study. A motion was made and seconded. Judge Stewart asked the Commission for a vote. The Commission voted 9-0 in favor of the recommendation. While on this topic, Mr. Petty noted that he felt that the offense title "forcible sodomy victim age thirteen or under" that is found on the guidelines should be changed. He proposed that the terminology on the worksheet and instructions should simply read "sodomy of a child under thirteen (not forcible)." Mr. Kneedler responded that the guidelines were written that way because it is the title of the offense statute. Mr. Petty remarked that it was his impression that all sodomies of children under the age of thirteen were considered forcible. Mr. Christie commented that this discussion could be taken up after the study was complete and that any changes at this juncture would be premature. The issue was subsequently tabled.

Proposed Recommendation 10

Ms. Kepus presented this proposal. She said that based upon recent analysis the guidelines do not recommend sufficient prison time for second-degree murder/felony homicide cases. Under current guidelines, all completed second-degree murder/felony homicide cases are recommended for prison terms. However, she commented that judges are departing above the recommended guidelines range significantly more often than they are sentencing within the range.

To address this issue, a proposal was drafted that would increase scores for second-degree murder/felony homicide under the primary offense factor on Section C of the murder/homicide worksheet. The proposed scores under the primary offense factor would increase the midpoint recommendation for an offender with no prior violent felony convictions by 72 months over current guidelines recommendations. Under the proposal, scores for defendants with a Category I or II violent prior record classification would remain unchanged. She displayed a chart that illustrated current compliance rates for second-degree murder as well as how the proposed increase would affect these compliance rates. With judges currently sentencing offenders in non-jury cases to incarceration periods averaging six years above the recommended guidelines range, the proposed increase is expected to have little effect on overall compliance in second-degree murder cases. Rather, the proposed increase in scoring would serve to reduce the high aggravation rate in second-degree murder cases by providing more balance between both mitigation and aggravation departures.

Judge Stewart asked how many of these murder cases were plea-bargained down to second-degree murder. On this point, Mr. Petty responded that there is no indictment for second-degree murder. All murders, he continued, are presumed to be murder in the second-degree. He expressed surprise that the statewide data revealed that 40% of the murder cases were indicted on more serious charges and reduced down to second-degree murder. Dr. Kern remarked that the source of the data is the form filled out by the probation officers on the pre-sentence investigation. Mr. Petty commented that an

indictment for murder is murder in the second degree until the proof elevates the murder to first degree. Accordingly, he felt that the forms were being filled out incorrectly in the field.

A motion to adopt the proposal for raising the score value for second-degree murder was made and seconded. Judge Stewart asked the Commission for a vote. The Commission voted 14-0 in favor of the recommendation.

Proposed Recommendation 11

Ms. Kepus then discussed the next proposal. She pointed out that the majority of offenders convicted of child abuse and neglect are recommended for probation/no incarceration under the miscellaneous guidelines. Nearly all of the cases involve some form of physical injury, half of which are categorized as serious physical victim injury. Under current guidelines, she noted, it is virtually impossible for an offender who is referred to the probation/jail worksheet (Section B) to be recommended for a period of incarceration. Therefore, judges are sentencing above the guidelines recommended sanction in nearly 40% of child abuse cases.

The staff proposed increasing scores for victim injury on the probation/jail worksheet (Section B) of the miscellaneous guidelines to ensure that all offenders convicted of child abuse/neglect who score victim injury are recommended for incarceration of at least one day to six months. This modification would address the abnormal compliance/departure pattern for this particular crime.

A motion to adopt this proposal was made and seconded. Judge Stewart asked the Commission for a vote. The Commission voted 14-0 in favor of the recommendation.

Proposed Recommendation 12

Mr. Barnes presented this recommendation. He noted that felony construction fraud offenses described in §§18.2-200.1 and §43-13 are not covered by the sentencing guidelines. Numerous calls to the Commission's hotline have requested that felony construction fraud be included as a primary offense covered by the sentencing guidelines. Although plagued by a lack of data on these cases in the past, the staff now feels a

sufficient number of cases have accumulated to allow for meaningful data analysis and the making of recommendations.

The staff recommends adding these two felony offenses to the guidelines for fraud.

A motion to adopt this proposal was made and seconded. Judge Stewart asked the Commission for a vote. The Commission voted 14-0 in favor of the recommendation.

Proposed Recommendation 13

Dr. Creech presented this proposal. He mentioned that prior to July 2000, any second or subsequent sale of Schedule I or II drug was covered by the guidelines. Following enactment of the SABRE legislation, a third or subsequent sale of a Schedule I or II drug was no longer covered by the guidelines. Although the new crime carries the same penalty range as the crime it replaced, it also carries a three-year mandatory minimum term of incarceration. The staff proposal was to score a third or subsequent sale of a Schedule I or II drug as it had been scored prior to enactment of the mandatory minimum penalty. As the crime carries a mandatory minimum term of incarceration, per the Commission's policy toward mandatory minimum sentences, any part of the sentence that falls below the mandatory minimum will be replaced by the mandatory minimum on the coversheet.

A motion to adopt this proposal was made and seconded. Judge Stewart asked the Commission for a vote. The Commission voted 14-0 in favor of the recommendation.

Proposed Recommendation 14

The next proposal dealt with the same issue but as applied to marijuana. Prior to July 2000, any sale of marijuana was covered by the guidelines. Following the enactment of the SABRE legislation, a third or subsequent sale of marijuana was no longer covered by the guidelines. The new crime increased the penalty range to five years to life and added a three-year mandatory minimum term of incarceration. The staff proposal was to score a third or subsequent sale of marijuana as the most serious form of marijuana sale (sale of more than five pounds). As the crime carries a mandatory minimum term of incarceration, per the Commission's policy toward mandatory minimum sentences, any part of the sentence that falls below the mandatory minimum will be replaced by the mandatory minimum on the coversheet

A motion to adopt this proposal was made and seconded. Judge Stewart asked the Commission for a vote. The Commission voted 14-0 in favor of the recommendation.

Proposed Recommendation 15

Dr. Creech said that §18.2-258.1 of the Code of Virginia defines five related crimes having to do with obtaining drugs by forgery, fraud or deceit. Currently, only one of these

crimes, obtaining drugs by fraud, is covered by the guidelines. The four other crimes (furnishing false prescription information in records, using a fictitious or revoked distribution license, assuming title of doctor or pharmacist to obtain drugs, and filling a prescription without a valid written request) are not currently covered by the sentencing guidelines system. The staff proposed that the four crimes delineated by §18.2-258.1 that are not covered by the Drug-Other sentencing guidelines be added as guidelines offenses. These four prescription fraud crimes would be scored the same as obtaining drugs by fraud.

A motion to adopt this proposal was made and seconded. Judge Stewart asked the Commission for a vote. The Commission voted 13-0 in favor of the recommendation. Mr. Petty abstained from voting.

Proposed Recommendation 16

Mr. Fridley presented this proposal. He noted that the guidelines return a significantly higher recommendation for offenders sentenced for repeat distribution of a Schedule I or II drug under the enhanced penalty section of the Code. Currently, the decision to sentence under the enhanced penalty provisions is often made at the time of sentencing—after the guidelines are completed. As a result, guidelines are not prepared consistently across the Commonwealth for offenders who commit the same crime and have similar backgrounds.

Currently, an offender does not have to be convicted of second or subsequent distribution nor does the indictment have to allege a second or subsequent conviction for the enhanced penalty (up to life) to be imposed at sentencing. Throughout the Commonwealth, there are different guideline procedures, initiated by judges and Commonwealth's Attorneys, to address this issue.

The staff proposed that an amendment to §18.2-248 be considered that would require that it must be alleged in the warrant, indictment, etc., that the defendant has previously been convicted of distribution of a Schedule I or II drug, prior to the date of the instant offense. Mr. Petty inquired as to whether this issue could be simply addressed by a change in the instructions. He asked if the instructions could be changed to say that if there is a prior drug distribution offense the instant drug sale should be scored as a second or subsequent offense. Mr. Fridley was dubious that an instruction change would ensure that the statute would be applied evenly across the Commonwealth. Much discussion ensued about the merits of both approaches. After some discussion, Judge Stewart concluded that there was no consensus on how to address this particular issue and that the proposal should be tabled.

Proposed Recommendation 17

Mr. Fridley presented the next proposal. This proposal concerned the Commission's policy for recording recommendations for sentencing events that include multiple

mandatory minimums that exceed the guidelines recommendation. Specifically, the issue was whether the guidelines should reflect concurrent or consecutive sentencing when there were multiple mandatory minimums. There was some confusion in the field with regard to how to treat these crimes per the sentencing guidelines recommendations. For the most part, the Code of Virginia is silent on the matter.

There are several possible alternatives to deal with this issue and Mr. Fridley reviewed each of them and provided examples. After some discussion, Judge Stewart concluded that there was no clear consensus on the matter and that it should be referred to committee for further study. Mr. Kneedler made a motion that the matter be studied further and revisited at a later date. The motion was seconded and agreed upon.

Judge Stewart thanked everyone for their presentations and then asked Dr. Kern to discuss the next item on the agenda, Miscellaneous Items.

VI. Miscellaneous

Dr. Kern advised the members that a draft of the Annual Report and the Sex Offender Risk Assessment Report was included in their packets. He reviewed a schedule and identified cut-off dates whereby edits needed to be provided to staff to ensure their inclusion in the final version of each report. He noted that the Annual Report would be submitted on December 1 and that the Sex Offender Risk Assessment report would be published in mid-January.

He also advised the members that were up for re-appointment that he had not been informed about any re-appointments at this time. He indicated that meeting dates for the year 2001 were pending notice of Commission appointments but, at the latest, would be made by the end of January.

With no further business on the agenda, the Commission adjourned at 1:35 p.m.