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The Virginia Criminal Sentencing Commission
June 18, 2001
Meeting Minutes

Members Present:

Judge Gates, Gary Aronhalt, Judge Bach, Mark Christie, Frank Ferguson, Douglas Gynn, Judge Honts, Arnold Henderson, Judge McGlothlin, William Petty and Reverend Ricketts

Members Absent:

Jo Ann Bruce, Howard Gwynn, Judge Hudson, Judge Johnston, Judge Newman and Judge Stewart

Agenda

I. Approval of Minutes

Approval of the minutes from the March 19, 2001, meeting was the first item on the agenda. Dr. Kern offered some minor edits to the minutes and the Commission unanimously approved the revised minutes.

The second item on the agenda was a report on the final evaluation results from the Non-Violent Risk Assessment Pilot Project. Judge Gates asked Dr. Brian Ostrom from the National Center for State Courts to present this item on the agenda.

II. Final Evaluation Results – Non-Violent Risk Assessment Pilot Project

Dr. Ostrom began by saying that the National Center for State Courts (NCSC), with funding from the National Institute of Justice, has conducted an independent evaluation of the development and impact of the non-violent risk assessment instrument pilot project. It is hoped that the evaluation will provide important information to help the Commission decide whether to expand the risk assessment program throughout the entire Commonwealth.

Dr. Ostrom initiated his discussion with some general background on the Commission's study. In 1994, the General Assembly asked the Commission to study the feasibility of using an empirically-based risk assessment instrument to identify 25% of prison bound non-violent property and drug offenders for alternative (non-prison) sanctions (§17.1-803). Such an instrument can be used to identify those offenders who are likely to present the lowest risk to public safety. After analyzing the characteristics and historical patterns of recidivism of larceny, fraud and drug offenders, the Commission developed a risk assessment tool for integration into the existing sentencing guidelines system. The risk assessment instrument identifies those offenders recommended by the sentencing

guidelines for a term of incarceration who have the lowest probability of being reconvicted of another felony crime.

The risk assessment worksheet is completed for non-violent fraud, larceny and drug offenders who are recommended for some period of incarceration by the guidelines and who satisfy the eligibility criteria established by the Commission. Offenders with any current or prior convictions for violent felonies (as defined in §17.1-803) and offenders who sell an ounce or more of cocaine are excluded from risk assessment consideration. When the risk assessment instrument is completed, offenders scoring nine points or less on the scale are recommended for sanctions other than traditional incarceration.

Construction of the risk assessment instrument was based on a statistical analysis of the characteristics, criminal histories and patterns of recidivism of the fraud, larceny and drug offenders in the sample. The factors proving statistically significant in predicting recidivism were assembled on a risk assessment worksheet with scores determined by the relative importance of the factors in the statistical model. Some of the factors on that worksheet are gender, age, marital status, employment status, prior adult record, prior juvenile record and current offense information.

Dr. Ostrom and his associates conducted a series of interviews with justice system officials in the pilot sites. He noted that these interviews revealed some common themes among which was a concern about the inclusion of demographic factors on the risk scale. He said that some of the respondents felt that age, employment, and marital status made the instrument systematically biased or chauvinistic. An unemployed, unmarried male under the age of 20 begins with a score of 9 points and any additional scoring makes them ineligible for a diversion recommendation. While they were aware that past research shows this profile to be associated with higher recidivism rates, some of the interviewed officials also felt this was the group of offenders most in need of rehabilitative services.

As a group, the interviewed judges recommended that the risk assessment program be expanded statewide if the instrument is found to be effective and if the demographic factors (age, gender, etc.) are re-examined for evidence that they remain linked with higher recidivism rates. Judges also felt that it would be useful to get feedback from the Department of Corrections concerning which state and local alternative punishment programs work best for different types of offenders.

Interviewed probation officers also voiced the opinion that the instrument would be useful statewide if the demographic scoring factors were re-examined to determine their link to recidivism. Interviewed defense attorneys supported the greater use of alternative sanctions and generally favored expansion of the pilot project to other circuits. Dr. Ostrom noted that the responses of the surveyed prosecutors departed from the other groups. He observed that the interviewed prosecutors did not generally support programs intended to divert offenders who were recommended for prison under the guidelines. The surveyed prosecutors agreed with the notion that alternative sanctions are best suited for offenders guilty of a first non-violent felony conviction.

Dr. Ostrom then spoke about how the National Center for State Courts analysis was structured. The strength of the instrument was measured by whether the individuals identified by the instrument were (1) more likely to successfully complete their imposed sanction and (2) less likely to recidivate. The utility of the risk assessment instrument was evaluated by following a group of diverted offenders for at least one year following their sentence to an alternative. A sample of offenders was drawn from 5,158 drug, fraud and larceny cases resolved in the six pilot sites between December, 1997 and September, 1999. To generate a sample that could be used to evaluate risk assessment, those offenders with missing files, offenders who received a prison sentence, and offenders with incomplete information were removed. The final sample for evaluation consisted of 555 offenders eligible for risk assessment who received an alternative punishment. Dr. Ostrom next presented statistics on judicial agreement with the risk assessment recommendation and the number of offenders diverted. He observed that judges agreed with the risk assessment recommendations in most cases.

The next area discussed was the factors that were related to the diversion decisions. Fraud and drug offenders were more likely to be diverted than larceny offenders. Offenders younger than 22 years of age or those who scored twelve or less on the risk assessment work sheet were also more likely to be diverted. Diverted offenders received a wide variety of sanctions that included intensive supervised probation, jail, electronic monitoring, day reporting, boot camp, diversion and detention centers and local treatment programs. Dr. Ostrom said the most frequently imposed local sanction was jail with the second most prevalent sanction being outpatient drug or alcohol treatment.

Dr. Ostrom then reviewed how successful the instrument was in predicting recidivism. Before presenting these findings, Dr. Ostrom provided several caveats as to why their findings might be different than that produced by the Commission's original research. He pointed out that there were significant methodological differences in the two studies. The evaluation methods applied by National Center for State Courts used arrest and arrest resulting in conviction as outcome measures. He noted that the Commission, in its original study, relied upon only felony convictions as the recidivism measure. Furthermore, in the original Commission research all convicted larceny, fraud, and drug felons were studied. In the National Center for State Courts study, only larceny, fraud and drug felons who were actually diverted were examined. Due to these differences in research methodology, Dr. Ostrom observed, recidivism rates and factors associated with recidivism could be expected to differ.

Dr. Ostrom listed the significant factors that predicted a new arrest. The factors included the age of the offender, gender, prior record and prior drug record.

He then introduced Matt Kleiman from the National Center of State Courts to discuss the analysis in detail. Mr. Kleiman explained how cumulative survival rates are interpreted. This technique estimates the probability of an event occurring, in this case a new arrest, over various periods of time, which can be measured in days. In the current study, an offender scoring nine or less had a 71% chance of surviving 720 days without a new

arrest while an offender scoring more than nine had a 61% chance of the same outcome. At this juncture, Mr. Christie inquired why the displayed chart went beyond a year since the offenders were only tracked for a year period. Mr. Kleiman responded that the statistical procedures being used allowed the calculation of the probability of success out beyond the observed time period. Dr. Ostrom also noted that the evaluation tracked some offenders for as little as one year and others for up to three years. This data was then generalized to the whole population of offenders. Mr. Ferguson asked if some of the recorded arrests did not lead to a new conviction. Dr. Ostrom responded that he did not know but thought that there was likely some number of the observed arrests that did not result in a conviction.

Mr. Kleiman presented detailed survival analysis charts that examined selected score threshold points plotted against offender demographics, the nature of the primary offense, other offense factors and prior record. He noted that if the threshold value for a diversion recommendation were raised from nine points more offenders would be eligible for alternatives. At the same time, however, there would be an increase in the raw number of offenders deemed low risk that would recidivate. In the analysis the only demographic factor found to influence recidivism was gender. Other factors such as age, marital status and employment played no significant role in predicting recidivism. The analysis revealed that larceny offenders were more likely to recidivate than drug and fraud offenders. A factor that measured whether the offender acted alone was not found related to rates of recidivism. Prior criminal record was, however, determined to play a statistically significant role in recidivism.

Dr. Ostrom drew some conclusions about the risk assessment instrument. He felt it was successful in doing what it was intended to do - predict recidivism. The factors associated with adult prior record were the best predictors of recidivism. He suggested that it might be possible to streamline the instrument without significantly compromising the predictive ability.

He then detailed the results of a cost-benefit analysis on the use of the risk assessment instrument. The cost benefit analysis estimates the monetary value of all significant benefits and costs associated with the diversion of non-violent felons from traditional incarceration. The analysis then compares the benefits and costs of diverted felons to the benefits and costs of offenders not diverted. The benefits of reduced prison (363 offenders diverted from prison) and jail (192 offenders) populations saved the Commonwealth an estimated \$8.7 million dollars. Beyond the reduced incarceration costs, the additional benefits accruing from the diverted population included more productive citizens, decreased recidivism, and enhanced quality of life for offenders and the value of their community service. He admitted that it is very difficult to place a monetary value on these benefits and, to be conservative, no monetary benefit amount was assigned to these outcomes.

These benefits must then be compared to the costs of the diversion of non-violent felons. The first cost to be considered is the actual monetary price of the alternative sanction programs for the diverted offenders. A total of 1,006 alternative sanctions were

prescribed for the 555 diverted felons. The cost of these alternative sanctions was \$6.2 million. Fifty-six percent of this total alternative sanction cost was attributed to jail as an alternative to prison. Dr. Ostrom then spoke about the other costs of diversion that are experienced when offenders fail in the assigned programs and become recidivists. He then presented specific data on the costs associated with failing diversion. During the entire study period, a total of 184 diverted felons recidivated, with 97 of those recidivating during the actual diversion program period. The 97 recidivists committed a total of 193 crimes. Sixty-two of the 97 recidivists were re-incarcerated at a cost of \$728,000. Among the recidivists, 39 offenders committed 61 crimes with direct victim costs of \$230,000. The total system and victim costs of the observed recidivism were \$958,000.

Mr. Petty commented that when Dr. Ostrom calculated prison costs he took the total operating budget of the Department of Corrections divided by the number of people to figure out the cost per inmate. Mr. Petty felt that the study should also include the total budget of the police agencies, courts, probation, parole, and the prosecutor's office divided by the number of offenders and add that to the costs associated with failing diversion. Dr. Ostrom responded that this was a wonderful idea in theory but very difficult to compile in the same fashion as that done for the Department of Corrections. Mr. Petty remarked that by not including these costs the analysis would make diversion seem more cost effective than it truly is. Dr. Ostrom remarked that he would look more closely at this issue before issuing their final report.

Continuing with his presentation, Dr. Ostrom summarized that the total benefits savings of \$8.7 million were compared to the total diversion costs of \$7.2 million to produce a net benefit of \$1.5 million due to the diversion of non-violent felons through risk assessment. If the risk assessment instrument were used statewide during 2000, the estimated net benefit would have been between \$3.7 and \$4.5 million in reduced costs.

In addition to the cost savings, Dr. Ostrom observed that the risk assessment instrument formalized the diversion process for judges. He noted that many judges said that the risk assessment tool made them more cognizant of diversion possibilities. He also pointed out that another benefit of risk assessment as related to diversion is that offenders who scored above the threshold were given closer scrutiny concerning diversion.

Mr. Petty questioned a slide presented earlier in the meeting. He inquired about a statistic on a chart that indicated that the factors on the work sheet correctly predicted 19% of the offenders who recidivate. He asked about the practical interpretation of the figure. Dr. Ostrom said that 555 diverted offenders in the study were followed for at least one year. The basic design of the instrument is to determine who has a relatively low probability of recidivism. Among the 555 offenders, 187 did recidivate in the study and the risk assessment instrument factors were able to account for 19% of the variation in a multivariate statistical model used to predict this recidivism. He observed that such a finding is impressive in social science circles and that the statistic could not be interpreted as an 81% failure rate. Dr. Ostrom revealed that he thought that the risk assessment factors were very good indicators of the future likelihood of recidivism but

were obviously not perfect. He noted that the type of statistical measure being used in their study had no easy to understand practical meaning in the sense being alluded to in the question. Unfortunately, Dr. Ostrom had indicated he had no better measure to provide at this time. At this juncture Judge Gates noted that a tremendous amount of material had been presented and that the Commission would need some time to study and digest it before taking any action.

Before proceeding to the next item on the agenda, Judge Gates asked Dr. Kern to comment on his meeting with the Judicial Council who had asked him to appear to answer questions about the use of the gender factor on the risk assessment instrument. Dr. Kern remarked that the Judicial Council simply wanted to better understand why the gender factor appeared on the risk assessment tool. Dr. Kern said he reviewed the research methodology with the Judicial Council and that there were a few questions about the constitutionality of the use of such a factor. Dr. Kern noted that both Judge Bach and Judge McGlothlin sit on the Judicial Council and that they had responded to the legal questions. Dr. Kern concluded that he did not think that the Judicial Council was likely to take any action on the matter.

Judge Gates then thanked Dr. Ostrom for his presentation. He then asked Ms. Farrar-Owen to cover the next item on the agenda, Methamphetamine Study.

III. Methamphetamine Study – Progress Report

Ms. Farrar-Owens began by discussing the legislation that requires the Commission to develop proposals for specific sentencing guideline recommendations for methamphetamine cases. The legislative directive states specifically that the Virginia Criminal Sentencing Commission shall develop discretionary guidelines midpoint and range recommendations for convictions related to possessing, manufacturing, selling, giving, distributing, or possessing with the intent to distribute methamphetamine. The legislative directive further states that the Commission shall conduct an assessment of the quantity of methamphetamine seized in such cases with regard to the recently amended SABRE drug law provisions and shall complete the work by December 1, 2001.

Ms. Farrar-Owens stated that she had some preliminary data to present. The number of methamphetamine convictions in Virginia's circuit courts has increased over the last decade. In 2000, the number of methamphetamine convictions reached 125 compared to just 20 convictions registered in 1992. Also, in 1998, 160 offenders were sentenced for methamphetamine related crimes, the largest single-year figure. During the General Assembly Session, it was suggested by members of the Virginia Regional Drug Task Force that methamphetamine was becoming a growing problem in the western part of Virginia. Accordingly, Ms. Farrar-Owens divided the state data into two regions for this analysis. The western region of Virginia has exceeded the eastern in the number of methamphetamine convictions. However, both parts of the state saw a dramatic jump in these cases in 1998. In 2000, circuit courts in the western region sentenced two and half times more methamphetamine offenders than those in the eastern region.

After discussions with the Regional Drug Task Force and legislators, the Commission agreed that it would be prudent to analyze methamphetamine cases resolved in the federal courts. The United States Sentencing Commission provided the federal court data. Between 1995 and 1996, the number of cases sentenced in federal court in Virginia rose from 6 to 19. The number of methamphetamine offenders sentenced in federal court jumped dramatically in 1998, but receded in the following year. In 1998 and 1999, the Eastern District contributed two-thirds of the methamphetamine cases sentenced in Virginia's federal courts.

The state and federal data will be combined for this study. The largest shares of the cases (46%) are convictions in Virginia's circuit courts for possession of methamphetamine. Possession cases outweigh distribution cases in state courts while nearly all of the federal cases involve trafficking. Mr. Christie asked if the possession cases were straight possession or possession with intent to distribute. She responded that they were simple possession cases.

Preliminary data on the quantity seized in methamphetamine distribution cases was presented. The Eastern region far outweighed the Western region in terms of the amount of quantity seized. Ms. Farrar-Owens then compared the sentencing guidelines for Virginia to the federal system for distribution of methamphetamine mixture for an offender with no prior record and one with a prior violent record. According to data from Virginia circuit courts, offenders sentenced for distributing methamphetamine who have felony records receive longer sentences than given to first-time felons. For first-time felons, drug quantity does not appear to be correlated with the length of sentence. However, she observed that all of the data is preliminary at this point. Ms. Farrar-Owens said that the study is going well and she would present more findings at the September meeting.

Judge Gates thanked Ms. Farrar-Owens for her presentation. He then asked Mr. Fridley to cover the next item on the agenda, Sentencing Guidelines Training Program.

IV. Sentencing Guidelines Training Program – Status Report

Mr. Fridley reported that over a period of six weeks that staff would complete forty-one training seminars in 19 different locations. The Commission will also offer four classes in July that will be conducted in Roanoke, Richmond, Virginia Beach and Fairfax. A registration form was included in the member's meeting materials. Mr. Fridley said that the Norfolk's Commonwealth's attorneys office requested a special training during one of their staff meetings. Over 600 guidelines users are expected to attend training seminars by the end of the summer. The majority of the participants are probation officers followed by Commonwealth's attorneys. Mr. Fridley said that the turnout of private defense attorneys has been somewhat disappointing. Mr. Christie asked if the training had MCLE credit approval. Mr. Fridley confirmed that the training seminar was approved for MCLE credits.

He then discussed a training issue that has been brought up in field. The issue deals with the sex offender risk assessment instrument and whether female offenders should be scored on the instrument. The staff's recommendation was to score female offenders with the sex offender risk assessment instrument.

Mr. Christie made a motion to score women on the sex offender form. The motion was seconded. Judge Gates asked the Commission for a vote. The Commission voted unanimously in favor.

Judge Gates thanked Mr. Fridley for his presentation. He then asked Dr. Kern to cover the last item on the agenda, Miscellaneous.

V. Miscellaneous

Dr. Kern wrapped up the meeting by discussing a letter sent by Janet Moran, a private attorney. The letter expressed dissatisfaction with the manner in which the sentencing guidelines score sex offenses committed against young victims. Dr. Kern asked Ms. Moran, who was present, if she would like to present her concerns to the Commission. Ms. Moran asked if she could present her material after hearing first from Dr. Kern on the matter. Dr. Kern agreed and provided the Commission with some historical data on the issue.

The specific issue deals with different sentencing guidelines point values for rape and forcible sodomy crimes committed against victims less than age 13 and those victims age 13 and older. Dr. Kern reviewed the scores for each of these variations of sex crimes. A person who is convicted of rape of a victim under age 13 receives 34 less points than a person convicted of raping someone age 13 or older. This scoring difference grows to a 90-point difference if the offender has a very serious violent record. This latter score variation was the one specifically alluded to in the letter from Ms. Moran. Dr. Kern proceeded to present the compliance rates for rape, victim less than age 13 and age 13 or older. Compliance jumped twenty-three percentage points to 79% from FY1998 to FY2000 for rape, victim age less than 13. The improvement in compliance was derived largely from a decrease in the rate of mitigation for that offense. In contrast, compliance inched up only four percentage points to 66% from FY1998 to FY2000 for rape, victim age 13 or older. Almost all the guidelines departures for these cases were mitigated. In general, this offense exhibited the highest rate of mitigation among the guidelines offenses.

Dr. Kern then presented the most common reasons for mitigation for the two variations of rapes under discussion. These findings indicated that judges were citing different reasons for mitigation for these rape cases. The mitigation reasons revealed that judges often cite offender psychological problems as a departure reason in cases of rape, victim under the age of 13. The most common reason for mitigation in cases of rape, victim 13 or older, was weak evidence or witness problems. He also referred to the most common reasons

for aggravation in these cases as well. Once again, the departure reasons were different for the two variations of rape cases. Dr. Kern stressed that the sentencing patterns for the two rapes crimes were distinctly different – the compliance rates were much different and the departure reasons were dissimilar. He presented a chart that displayed what the compliance rate would be if rape, victim less than age 13 cases were scored the same as rape, victim over age 13. Treating the two rape offenses in this fashion under the sentencing guidelines would have resulted in a 27% drop in compliance and a 30% increase in mitigation. For these reasons, Dr. Kern stated, the sentencing guidelines treat these variations of sex crimes in different fashions on the worksheets.

Judge Gates then asked Ms. Janet Moran to present her views to the Commission. Ms. Moran stated that she is an attorney from Henrico County who practices in the juvenile courts. She thanked Dr. Kern for his presentation. Dr. Kern's presentation led her to conclude that the State of Virginia does not value its children. The presentation reveals that if you rape a child who is less than age 13 you will do less time in prison than if you rape a person age 13 or older. That, she said, sends a negative message that says Virginia values our children victims less than we value other victims. She stated that the scoring for this sex crime was an abomination. She noted that she had received a letter from Dr. Kern that detailed the reasons for the scoring differences in these cases but questioned the validity of the offered reasons. The letter discussed the fact that the scoring differences reflected the historical manner in which the cases were sentenced. Ms. Moran felt that even if the guidelines accurately reflected historical sentencing patterns that they should not institutionalize a difference that is objectionable. Dr. Kern's letter also pointed out that many of the sex cases involving young children are difficult to prosecute for many different reasons and result in more frequent plea agreements that favor the defendants. The letter alluded to the departure reasons cited by judges as evidence of this trend. Ms. Moran disagreed with that conclusion and pointed out that a deputy Commonwealth's attorney in Chesterfield County told her that she had much success in prosecuting such cases and often was able to secure sentences above the guidelines. Finally, Dr. Kern's letter noted that when children are the victims of sex crimes the perpetrators are often family members of the victim and it is the family that requests leniency for the offender. Ms. Moran remarked that the family of the victim almost always requests leniency in any type of case so this factor should not merit any special consideration in cases where a child is raped. She observed that many of the cases involving rapes of young children can be won at trial and should not be plea-bargained. Perhaps, she commented, that the answer is more training for prosecutors in how to successfully deal with these types of cases. In summary, Ms. Moran requested that the Commission review its scoring for these crimes and correct the disparate scores that are tied to the age of the victim.

Judge Gates thanked Ms. Moran for her presentation. Judge Gates commented that the guidelines have been based on historical data but also are voluntary and they do not bind judges. Mr. Petty remarked that Ms. Moran's issue is one that he has brought before the Commission previously. He detailed a sex crime case that he prosecuted where there were two victims of different ages, one below age 13 and one over age 13 that resulted in two dramatically different scores depending upon how the case was handled. Mr. Petty said that the crime of rape §18.2-61 is not broken down into two separate offenses. If a

victim is over age thirteen, the Commonwealth must prove rape was by force, threat or intimidation. In a case where the victim is under than age of 13 the Commonwealth does not need to prove the rape was by force, threat or intimidation. Children under the age of thirteen cannot consent to sexual intercourse. Mr. Petty agreed with the fact that judges treat these cases differently and, he noted, Dr. Kern's data confirmed that. Mr. Petty felt the problem was with the term "forcible." He felt strongly that steps should be taken by the Commission to eliminate any scoring differences in these crimes.

Judge Gates thought it would be appropriate to ask the staff to conduct a new analysis on the sentencing of these rape crimes to determine if there was an alternative scoring method that would address the concerns being raised and, at the same time, be historically grounded. He observed that the Commission had a difficult issue before it and needed to proceed carefully since it would be setting precedent if it simply changed the scoring without any reference to historical data. Without objection, the staff was asked to conduct such an analysis and present the findings at the September meeting.

Dr. Kern then discussed the annual meeting of the National Association of Sentencing Commissions. The Kansas Sentencing Commission will host the next conference. It is scheduled for August 5-7, 2001. Dr. Kim S, Hunt, former employee of the Commission, is the current Chairperson of the Association and he has asked Virginia to host the next conference in the summer of 2002. Dr. Kern remarked that if the Commission were to host the conference the Commission should ask the National Center for State Courts if it is interested in helping out. Judge Gates questioned whether the Commission would have to pay to host the conference. Dr. Kern responded that the Association, via the registration fees, would cover the cost of the conference but that there would have to be a commitment of staff time. Judge Gates asked the Commission if they would like to host the next annual conference in Williamsburg.

Judge McGlothlin made a motion for the approval to host the conference. The motion was seconded. Judge Gates asked the Commission for a vote. The Commission voted unanimously in favor.

Dr. Kern then returned to the earlier discussion on the non-violent risk assessment study and asked the Commission to authorize the staff to do a re-validation study to see what factors continue to be important in predicting recidivism. Judge Gates asked the Commission if it was their wish to proceed in this fashion. They agreed to authorize the staff to conduct the study.

With no further business on the agenda, the Commission adjourned at 12:45 p.m.