MEETING OF THE
VIRGINIA CRIMINAL SENTENCING COMMISSION

April 14, 2014, 10:00 a.m.

Richard P. Kern Memorial Conference Room
Virginia Supreme Court Building
Fifth Floor

AGENDA

I. Approval of Minutes from Last Commission Meeting
   Judge F. Bruce Bach, Chairman

II. Report on the 2014 General Assembly & Legislative Impact Analysis
    Meredith Farrar-Owens, Director
    Joanna Laws, Research Manager

III. Proposed Methodology for Child Pornography Study
     Meredith Farrar-Owens, Director

IV. Immediate Sanction Probation Pilot Project – Status Update
    Joanna Laws, Research Manager

V. Sentencing Guidelines Compliance – FY2014 to Date
    Jody Fridley, Data Quality/Training Unit Manager

VI. Upcoming Sentencing Guidelines Training Seminars
    Kim Storni, Training Associate

VII. Issues from the Field
     Jody Fridley, Data Quality/Training Unit Manager

VIII. Miscellaneous Items
      Meredith Farrar-Owens, Director
Members Present:
Judge F. Bruce Bach (Chairman), Judge Malfourd W. Trumbo (Vice-Chairman), Harvey L. Bryant, Linda L. Bryant, Judge Bradley B. Cavedo, Delegate Benjamin L. Cline, Linda D. Curtis, Marsha L. Garst, H.F. Haymore, Jr., Judge Lisa Bondareff Kemler, Senator Henry L. Marsh, Judge Michael Lee Moore, Judge Charles S. Sharp, Rosemary Trible, Esther J. Windmueller, and Judge James S. Yoffy

Members Absent:
Judge Rossie D. Alston, Jr.

The meeting commenced at 10:10 a.m. Judge Bach introduced four new members of the Commission. Mr. H.F. Haymore, Ms. Rosemary Trible, Ms. Linda Bryant, and Senator Marsh were welcomed by Judge Bach and the other members. Judge Bach also introduced the Commission’s new Training Associate, Kim Storni.

Agenda

I. Approval of Minutes
Judge Bach asked Commission members to approve the minutes from the previous meeting, held on November 6, 2013. The Commission unanimously approved the minutes without amendment.

II. Report on the 2014 General Assembly Session & Legislative Impact Analysis
Ms. Meredith Farrar-Owens, the Commission’s staff director, presented an overview of the 2014 General Assembly. She began by saying that, while the Sentencing Commission had not made any recommendations for statutory changes in its most recent Annual Report, several pieces of legislation from the 2014 Session would be of interest to the Commission.

Ms. Farrar-Owens first described House Bill 504. In November, staff presented several proposals for revising the sentencing guidelines. The proposals were developed based on analysis of the most recent five years of actual sentencing practices. The approved proposals were presented in the Commission’s Annual Report, submitted to the General Assembly on December 1, 2013. One of the recommendations for guidelines changes pertained to child pornography. Under the recommendation, the guidelines for production of child pornography would increase, and the guidelines for reproduction or transmission of child pornography would increase in certain instances; however, the guidelines for possession of child pornography would be revised downward. The recommendations reflected the sentences judges have ordered in these cases over the last five years.

Ms. Farrar-Owens noted that General Assembly members asked numerous questions related to this last aspect of the proposal – changes to the guidelines for possession of child pornography. As had been presented to Commission members in November 2013, judges...
had been departing below the existing guidelines for possession of child pornography at fairly high rate. General Assembly members asked what factors were most associated with cases in which the judge sentenced below the guidelines. Ms. Farrar-Owens had responded to the legislators based on data available, but she explained to them that staff had exhausted the automated data available and examining other factors would require a special study. Several General Assembly members wanted to have such a study completed before any changes to the guidelines for possession of child pornography went forward. This led to the introduction of House Bill 504 and its companion, Senate Bill 433. These bills delay the proposed modifications to the sentencing guidelines for possession of child pornography until July 1, 2016; the Commission must complete its study by December 1, 2015. Any proposed modification to the guidelines in the Commission's 2015 Annual Report shall supersede the current proposed modifications. Ms. Farrar-Owens advised Commission members that the legislation had passed both houses and had been signed by the Governor. Accordingly, staff had developed a proposal for the special study, which would be presented to members later in the meeting.

Ms. Farrar-Owens next discussed House Bill 232, related to the Commission’s Immediate Sanction Probation pilot project. She provided a brief overview of the pilot project for the benefit of the new Commission members. Ms. Farrar-Owens stated that House Bill 232 will extend the end date for the pilot project from July 1, 2014, to July 1, 2016. She then informed the Commission of a discrepancy in the current budget bill, which would only extend the pilot period until July 1, 2015. Ms. Farrar-Owens had brought the discrepancy to the attention of the Senate Finance committee staff. Since the General Assembly had not yet approved the FY2015-2016 budget, the discrepancy in the budget bill could be corrected. Staff would continue to monitor the situation.

Ms. Farrar-Owens then reviewed Senate Bill 14. She commented that this bill was likely introduced in response to the issues raised in MacDonald v. Moose (2013) regarding the constitutionality of Virginia’s general prohibition against non-forcible sodomy (§ 18.2-361). The bill removes language in § 18.2-361(A) pertaining to acts of non-forcible sodomy and modifies several other statutes that reference § 18.2-361. The bill passed both the House and Senate unanimously and was sent to the Governor. The Governor returned the bill with a recommendation to increase a particular fee imposed for criminal convictions. The General Assembly was due back for the Reconvened Session (also known as the Veto session) on April 23 and would deal with the Governor’s recommendation at that time.

Describing House Bill 567, Ms. Farrar-Owens stated that the bill expands sexual battery to include situations in which someone sexually abuses, within a two-year period, more than one person or one person on more than one occasion, doing so intentionally and without the consent of the complaining witness. Force, threat, intimidation, or ruse was not be required, as it is under current law. The bill’s patron had stated that the legislation would address acts not currently covered by the existing statute.

Ms. Farrar-Owens summarized Senate Bill 476, which expands the definition of incest, and House Bill 708, which expands the list of offenses that count as prior convictions for the purpose of elevating assault and battery of a family or household member to a Class 6 felony. Next, she described House Bill 976, which increases the penalty for being an accessory after the fact to a capital or first-degree murder from a Class 1 misdemeanor to a Class 6 felony.
Ms. Farrar-Owens then discussed Senate Bill 65, will make it a Class 6 felony to recklessly handle a firearm when such recklessness causes bodily injury to another. Senator Marsh commented that he sponsored the bill after a young boy was killed by a falling bullet on the Fourth of July. Senator Marsh stated that the legislation will make it clear that random, celebratory shooting is a crime and, if anyone is killed or hurt, there will be serious punishment.

Ms. Farrar-Owens detailed the elements of Senate Bill 594. The bill amends the Code of Virginia to add synthetic marijuana compounds to the list of Schedule I controlled substances. In doing so, criminal penalties for synthetic cannabinoids will be the same as those for Schedule I/II drugs, with the exception of possession offenses. For simple possession, the bill specifies that any person who is not an inmate who possesses synthetic marijuana will be guilty of a Class 1 misdemeanor. The sentencing guidelines cover sales and distribution offenses involving Schedule I/II drugs. Beginning July 1, 2014, these guidelines will apply to offenses involving synthetic marijuana, with the exception of possession. Ms. Farrar-Owens noted that another bill, House Bill 575, adds certain drugs to those listed in Schedule III and Schedule IV of the Drug Control Act.

Ms. Farrar-Owens briefly reviewed House Bill 868. This legislation provides that a prisoner is ineligible for geriatric release if he was convicted of a felony act of violence (§ 19.2-297.1) and he was subject to a protective order (and the victim is the one who was protected by the order). She stated that, even under the existing provision, the Parole Board has approved only a limited number of releases for geriatric release.

Ms. Farrar-Owens then presented bills introduced during the 2014 Session that did not pass. House Bill 224 and Senate Bill 379 would have increased Virginia’s felony larceny threshold from $200 to $500. Failed legislation also included bills related to mandatory sentences for using a firearm to commit a felony, sentence credits for drug felons, parole release, judicial authority to modify sentences, human trafficking, and the sending of sexually explicit images between minors.

Ms. Joanna Laws, Research Unit Manager, presented a report on the fiscal impact analyses prepared by Commission staff and provided to the 2014 General Assembly. Ms. Laws first described the requirements pertaining to fiscal impact statements. She reviewed the provisions of § 30-19.1:4, which became effective in 2000. The Commission is required to prepare a fiscal impact statement for any bill that would result in a net increase in the state prison population. This includes proposals to add new crimes to the Code of Virginia, increase statutory penalties, create or increase mandatory minimum sentences, or modify laws governing the release of prisoners. Effective July 1, 2002, the impact statement must include an analysis of the impact on local and regional jails, as well as state and local community corrections programs. In preparing the impact statement, the Commission must note any adjustments to the sentencing guidelines that would be necessary if the legislation were adopted.

To prepare the impact statement, the Commission must estimate the increase in annual operating costs for state adult correctional facilities that would result if the proposal were to be enacted. Pursuant to § 30-19.1:4, a six-year projection is required. The highest single-year increase in operating costs is identified. This amount must be printed on the
face of the bill. Per § 30-19.1:4, for each law enacted that results in a net increase in the prison population, a one-year appropriation must be made. The appropriation is equal to the highest single-year increase in operating costs during the six years following enactment. Appropriations made per § 30-19.1:4 are deposited into the Corrections Special Reserve Fund. Ms. Laws further explained that the 2009 General Assembly had changed one of the requirements for fiscal impacts statements. The change was made through language inserted into the budget (§ 30-19.1:4 itself was not amended). It states that, for any fiscal impact statement for which the Commission does not have sufficient information to project the impact, the Commission must assign a minimum fiscal impact of $50,000. This requirement has remained in each budget adopted by the General Assembly in succeeding years.

Ms. Laws then described the process for developing the impact estimates. The impact figure is calculated by estimating the net increase in the prison population likely to result from the proposal during the six years following enactment and identifying the largest single-year impact; that figure is multiplied by the cost of holding a prison inmate for a year (operating costs, not to include capital costs). The cost figure is provided each year by the Department of Planning and Budget and, for FY2013, the annual operating cost per prison inmate was $30,006. Additional impact analyses may be conducted when requested by the House Appropriations staff, Senate Finance staff, Department of Planning and Budget, or Secretary of Public Safety.

Ms. Laws presented an overview of the number and kinds of legislative impact statements prepared for the 2014 General Assembly. The Commission produced 251 impact statements, a number significantly lower than in the previous year. The most frequent types of proposals involved the expansion or clarification of an existing statute (60.6%), the definition of a new crime (47%), creating or revising existing mandatory minimums (3.6%), or raising a crime from a misdemeanor to a felony (15.1%). Ms. Laws displayed a slide to show the diversity of the legislative proposals assessed by staff. She highlighted bills with fiscal impacts that were adopted by the 2014 General Assembly.

III. Proposed Methodology for Child Pornography Study

Before presenting the staff’s proposed methodology for studying possession of child pornography offenses, Ms. Farrar-Owens provided Commission members with pertinent background information. She noted that the guidelines are designed to provide judges with a benchmark of the typical, over average, case. Judges are then free to depart from the guidelines based on the specific facts of the cases before them. She described the process by which the Commission considers and adopts recommendations for revisions to the sentencing guidelines to keep the guidelines up to date with current judicial practice. She stressed that the proposals are based on analysis of actual sentencing practices and reflect the best fit for the data. Under § 17.1-806, any recommendations for modifications to the guidelines must be presented in the Commission’s Annual Report, due to the General Assembly each December 1. Unless otherwise provided by law, the changes recommended by the Commission become effective on the following July 1.
Ms. Farrar-Owens reviewed the Commission’s recommendations for changes to the child pornography guidelines, which were included in the 2013 Annual Report. During FY2009-FY2013, compliance rates for both production and possession of child pornography were between 64% and 65%, well below the overall average compliance rate of 79%. In production cases, the aggravation rate was much higher than the mitigation rate (24.6% versus 10.5%), indicating that, when departing from the guidelines, judges are significantly more likely to sentence above the guidelines recommendation than below it. For possession/reproduction cases, judges were more likely to sentence below the guidelines range than above it (mitigation rate of 22.9% versus aggravation rate of 13.0%). Based on the data analysis, the Commission had adopted several recommendations to modify the sentencing guidelines for child pornography to bring the guidelines more in sync with sentencing practices for these offenses. Proposed modifications would increase the guidelines for production of child pornography and, in certain instances, for the reproduction/transmission of child pornography. The proposed changes would decrease the guidelines for possession of child pornography.

According to Ms. Farrar-Owens, General Assembly members asked numerous questions about the proposed changes to the guidelines for possession of child pornography. After explaining that the Commission had exhausted the automated data available and that examining other factors would require a special study, General Assembly members were interested in having such a study completed before any changes to the guidelines for possession of child pornography went forward. House Bill 504 and Senate Bill 433 delay the proposed changes to the guidelines in order to give the Commission time to complete such a study. The Commission must complete its work by December 1, 2015. Any proposed modification to the guidelines for possession of child pornography contained in the Commission's 2015 Annual Report shall supersede those presented in the 2013 report.

Ms. Farrar-Owens briefly discussed a recent study of child pornography offenses completed by the United States Sentencing Commission (USSC). According to the USSC, the current federal guidelines produce overly severe sentencing ranges for some offenders, unduly lenient ranges for other offenders, and there is widespread inconsistent application. The US Sentencing Commission recommended to Congress that three categories of offender behavior be incorporated into the imposition of sentences for non-production child pornography: the nature of the offender’s collecting behavior, involvement with other pornography offenders, and any predatory conduct.

Ms. Farrar-Owens then described the staff’s proposed methodology for the new study. She stated that the goal of the special study was to gather additional offender and case details not available in the automated data systems that may help to explain sentencing outcomes in these cases. This would require staff to manually review the case files. The staff would examine offenders sentenced for possession of child pornography during FY2009-FY2013 (293 sentencing events). She presented a list of offender characteristics and case details for which staff proposed collecting additional data. The list included such things as: the number of still images and videos, types of sexual conduct depicted, age of youngest subject portrayed, the subject’s relationship with the offender (if any), how the material was obtained, the offender’s participation in any online pornography “communities,” dates of initial and most recent involvement, any access the offender might have to minors, and whether or not the case involved a plea agreement.
Ms. Farrar-Owens continued by reviewing the potential sources of data available for the study. While Pre-Sentence Investigation (PSI) reports typically contain offense detail and victim information, judges do not order a pre-sentence report in every case. Additional sources will be needed, such as police reports, court records, Commonwealth’s Attorneys’ files, and victim impact statements. Ms. Farrar-Owens noted that manual review of case files would likely require a significant amount of staff time. Staff would travel to different jurisdictions, which would involve cost to the Commission.

Judge Bach commented that, despite additional research, any recommendation to lower the guidelines for possession of child pornography most likely would not be accepted by the General Assembly. He asked if the Commission should devote such a significant amount of time and expense to the project. Commission members discussed the National Association to Protect Children (PROTECT), an advocacy group that opposed the recommended change. Judge Trumbo asked that staff, for the next meeting, prepare an estimate of the cost of conducting the study, so that the Commission could consider the cost relative to the significant opposition he expected would be encountered in response to any recommendation to lower the guidelines for this offense. Noting how staff-intensive the proposed methodology would be, Ms. Windmueller asked if the staff could provide options for scaling back the study. Ms. Farrar-Owens responded that staff could present alternatives at the June meeting. Ms. Windmueller commented that the language used in House Bill 504/Senate 433 directed the Commission to “review” these guidelines. She asked members if the discussion the Commission was having could be considered the “review.” Judge Cavedo indicated that he believed the Commission had to respond with at least a review of the research. Judge Sharp felt that the proposed data collection could be scaled back; he also expressed concern about the availability of the information staff proposed to collect. Mr. Bryant stated that, in his experience, the information is available in most cases. Ms. Bryant, the new Attorney General representative, agreed that the information typically is available. Judge Sharp stated that in many cases, particularly those involving plea agreements, the judge does not receive the type of case details described; thus, the information does not factor into the sentencing decision.

Judge Bach directed staff to provide cost estimates at the next meeting, along with options for responding to the legislative directive.

IV. Immediate Sanction Probation Pilot Program – Status Update

For the benefit of the new Commission members, Ms. Laws gave a brief overview of the Immediate Sanction Probation pilot program, including the 2012 legislative directive, the success of the model program in Hawaii (known as HOPE), the eligibility criteria for participation in Virginia’s pilot program, and the sanctions given for program violations. Ms. Laws noted the four pilot sites: Henrico County, the City of Lynchburg, Harrisonburg/Rockingham County, and Arlington/Falls Church.

Ms. Laws then presented a status report on the pilot project. As of April 9, 2014, a total of 64 offenders in the four pilot sites were participating in the Immediate Sanction Probation program (24 in Henrico, 25 in Lynchburg, 14 in Harrisonburg, and one in Arlington). A total of 12 participants had been removed from the program. While only
four of those had received a prison sentence, another four had moved out of the jurisdiction and had to be administratively removed from the program for that reason. Of the total 81 who had been placed in the program, 37 had not had any violations. Of the 44 participants who had violated, 18 had committed only one violation. As of April 9, five offenders had completed the program.

Ms. Laws noted that the Commission’s director had submitted a request to the General Assembly to extend the pilot period until July 1, 2015, to give the two newest pilot sites, Arlington/Falls Church and Harrisonburg/Rockingham, sufficient time to test the program. The extension was made in budget language; however, the General Assembly had yet to approve the budget for FY2015-FY2016. At the same time, House Bill 232, now adopted and signed by the Governor, would extend the pilot period until July 1, 2016. As noted earlier, the Senate Finance committee staff was made aware of the discrepancy. If the date in the budget bill is not changed, it will take precedence over House Bill 232. Ms. Laws indicated that staff would continue to monitor to situation.

Ms. Laws then reviewed a consultant’s report on Virginia’s Immediate Sanction Probation pilot project. In April 2013, the Secretary of Public Safety’s Office was contacted by a consultant experienced with HOPE-style programs. The Secretary of Public Safety’s Office determined that a consultant experienced with this type of program might offer helpful insight and Commission staff was open to such input. After meeting will all of the stakeholders, the consultant provided recommendations to the Department of Corrections and Commission staff. Ms. Laws shared some of the consultant’s comments and recommendations. For example, the consultant noted that administrative support from the Commission had been excellent and that the Commission staff had been responsive to the needs of the sites, to the extent possible.

V. Sentencing Guidelines Compliance – FY2014 to Date

Mr. Jody Fridley, Manager of the Training/Data Quality Unit, presented a preliminary compliance report for FY2014 to date. A total of 12,661 guidelines worksheets had been submitted to the Commission and automated as of March 13, 2014. For that time period, judicial concurrence with the guidelines was 78.2%. Departures from the guidelines were nearly evenly split between aggravations (10.7%) and mitigations (11.1%). Mr. Fridley pointed out the high rate of dispositional compliance (defined as the degree to which judges agree with the type of sanction recommended by the guidelines). For example, when a longer jail sentence or a prison term was recommended by the guidelines, the judges concurred with that type of disposition 87.7% of the time. Durational compliance (defined as the rate at which judges sentence offenders to terms of incarceration that fall within the recommended guidelines range) was also high for the fiscal year to date, at 79.9%.

Mr. Fridley provided information on the departure reasons most frequently cited by judges. In mitigation cases, judges most often reported the decision to sentence an offender in accordance with a plea agreement as the reason for departing from the guidelines (37% of the mitigation departures). Plea agreement was also the most common reason reported in aggravation cases. Mr. Fridley found a sizeable number of departure cases for which a departure reason was not provided.
Mr. Fridley then presented compliance rates across the 31 judicial circuits. The highest compliance rate for the fiscal year to date, 87.2%, was found in Circuit 20 (Loudoun area). Circuit 13 (Richmond City) had the lowest compliance rate, at 71%. Showing compliance by offense group, Larceny had the highest compliance rate at 82.6%. The Murder offense group recorded the lowest compliance rate (56.8%). Mr. Fridley advised that some of these results should be interpreted cautiously since they were based on a relatively small number of cases received for the period under study. He briefly reviewed compliance and departure rates for other offense groups.

Mr. Fridley gave an overview of the Commission’s new nonviolent offender risk assessment instrument, used in conjunction with the guidelines for fraud, larceny and drug offenses. The purpose of this instrument is to identify offenders who are statistically less likely to recidivate so that judges may consider them for alternative sanctions in lieu of prison or jail incarceration. The Commission implemented the risk assessment instrument statewide in 2002. Because it had been a number of years since the risk assessment instrument was last examined, the Commission, in 2010, directed staff to begin a new recidivism study to evaluate the current instrument and potentially update instrument based on more recent felony cases from Virginia’s circuit courts. This complex, multi-stage project was completed in 2012. The Commission recommended that the existing risk assessment instrument be replaced with the instruments developed using the results of the new study of felony recidivism. The General Assembly accepted the recommendation and the new instruments were implemented on July 1, 2013. Mr. Fridley reported that, for FY2014 to date, overall compliance for all drug, larceny and fraud offenses was 86%. In 18% of cases, judges were in compliance with the guidelines because they had concurred with the recommendation for an alternative sanction. The most common alternatives used by judges were supervised probation and/or a short jail sentence given in lieu of a prison term. Mr. Fridley noted that staff would continue to monitor the use of the new risk assessment tools.

Mr. Fridley then presented compliance results for other modifications to the guidelines that became effective on July 1, 2013. He emphasized that the FY2014 figures were preliminary.

VI. Upcoming Sentencing Guidelines Training Seminars

Ms. Kimberly Storni, Training Associate, presented the Commission’s 2014 training schedule. She stated that the Commission’s training staff had already planned nine “Introduction to Virginia’s Sentencing Guidelines” seminars, in seven different locations. The Introduction seminars provide general background information about guidelines and then progress to detailed instruction for scoring the guidelines worksheets. Ms. Storni announced that Commission staff will conduct a specialized training session for judges at the upcoming Judicial Conference in Williamsburg. In addition, staff members are working with Judge David Carson from Roanoke to develop guidelines training for new circuit court judges, which will be provided as part of the Supreme Court’s annual pre-bench training. Ms. Storni concluded by saying that the Commission’s training seminars are all approved for Continuing Legal Education (CLE) credits for attorneys who attend.
VII. Issues from the Field

Mr. Fridley presented three issues raised by guidelines users and requested guidance and/or clarification from the Commission on each.

Expungement of Juvenile Record (§ 16.1-306). Members were provided printed materials describing § 16.1-306, which requires the clerk of the juvenile and domestic relations court to destroy its files, papers, and records, including electronic records, connected with any proceeding concerning a juvenile, if the juvenile has attained the age of 19 years and five years have elapsed since the date of the last hearing in any case of the juvenile which is subject to this section. Certain exceptions apply; for example, the clerk must retain indefinitely records for a juvenile found guilty of a delinquent act that would be a felony if committed by an adult. Mr. Fridley stated that, currently, Commission staff advises guidelines preparers not to score juvenile adjudications that should have been expunged.

Some time ago, preparers were advised to score juvenile record if the adjudication could be verified in court records; however, Commission staff have since been informed that not all juvenile records were being expunged as required by the statute and some of these adjudications are still shown in automated data systems. According to guidelines users in numerous jurisdictions, judges have not allowed the scoring of juvenile adjudications on the sentencing guidelines if the juvenile records should have been expunged under § 16.1-306. To be consistent with the judges’ interpretation of the statute, guidelines users are now advised by staff not to score adjudications that should have been expunged per the statute.

Materials provided to members described an unofficial opinion released by the Attorney General’s Office stating that juvenile adjudications still maintained in court records could be included in a Pre-Sentence Investigation (PSI) report, even if the records should have been expunged by the clerk.

Commission members agreed that the staff should continue advising guidelines preparers not to score juvenile adjudications on the guidelines if the record should have been expunged.

Applicability of Mandatory Minimums in Certain Drug Cases (§ 18.2-248(C)). Printed materials provided to members included background information on § 18.2-248(C). In 2006, the General Assembly amended § 18.2-248(C) to add a mandatory minimum penalty of five years for persons who distribute certain quantities of Schedule I/II drugs; however, this mandatory minimum sentence does not apply if the court finds the following criteria are met: the defendant does not have a prior violent record, the defendant did not use violence or a firearm in connection with the current offense, the offense did not result in death or serious bodily injury to another, the defendant was not the leader/organizer of the offense, and the defendant assisted the prosecution. Prior to 2006, there was already a mandatory minimum specified in paragraph C for persons convicted of a third or subsequent distribution-related offense. The 2006 amendment added the new mandatory minimum with the exception provision described above. As a result, the Commission’s Virginia Crime Code (VCC) booklet indicates that the exception provision only applies to the offenses added in the 2006 legislation.
According to Mr. Fridley, attorneys in the field recently have asked if the mandatory minimum exception applies to all offenses defined in paragraph C (not just to the subset offenses added to paragraph C in 2006). Commission members directed staff to monitor court decisions and modify the VCCs only after a court rules in the matter.

**Mandatory Minimums for Felony DUI.** Members were provided printed materials related to § 18.2-270. Per paragraph C1 of § 18.2-270, a third DUI conviction in ten years is a Class 6 felony requiring a mandatory minimum sentence of 90 days. Paragraph F of § 18.2-270 states that mandatory minimums imposed pursuant to § 18.2-270, such as those specified for high blood alcohol content or having a child in the car, must be cumulative and served consecutively. In 2013, the General Assembly added a provision to § 18.2-270 (now paragraph C2) to specify that any person who has been convicted of involuntary manslaughter or maiming by vehicle or boat or of felony DUI shall, upon conviction of a subsequent DUI violation, be guilty of a Class 6 felony and subject to a one-year mandatory minimum term.

Mr. Fridley described a recent call on the Commission’s hotline phone. In a case involving a third DUI conviction, a Commonwealth’s attorney advised Commission staff that he will ask his circuit court to impose the 90-day mandatory minimum for the third DUI under § 18.2-270 (C1) and, because the offender had a prior involuntary manslaughter conviction, the one-year mandatory minimum under § 18.2-270 (C2), for a total of one year and 90 days of mandatory time. The prosecutor asked Commission staff to add new VCCs reflecting the combination of these two mandatory penalties.

Mr. Fridley created a new VCC, as requested; however, staff were not certain the court would rule that both mandatory minimums could be applied in this particular case. He asked Commission members if this were possible and, if so, should staff create the additional VCCs to reflect all of the different possible combinations of mandatory minimum sentences. After some discussion, the Commission reached a consensus that the judge in this particular case will need to make the determination as to whether or not both mandatory minimums can be applied. The Commission directed staff to create the new VCCs but, until a court has ruled in this case, the new VCCs should be made available only in automated systems (not in printed materials published by the Commission).

**VIII. Miscellaneous Items**

Ms. Farrar-Owens announced the location and dates for the 2014 conference of the National Association of Sentencing Commissions. The Connecticut Sentencing Commission will host the conference in New Haven on August 3-5, 2014. She asked members to let her know as quickly as possible if any one wished to attend.

She concluded by reminding the members of the dates for the remaining 2014 Commission meetings. The Commission is scheduled to meet on June 9, September 8 and November 5.

Mr. Bryant complimented Ms. Farrar-Owens on the presentation she gave in February to a federal panel charged with improving responses to sexual assault in the military.

With no further business on the agenda, the Commission adjourned at 12:17 p.m.
MEETING OF THE
VIRGINIA CRIMINAL SENTENCING COMMISSION

June 9, 2014, 10:00 a.m.

Richard P. Kern Memorial Conference Room
Virginia Supreme Court Building
Fifth Floor

AGENDA

I. Approval of Minutes from Last Commission Meeting
   Judge F. Bruce Bach, Chairman

II. Review of the Pre-Sentence Investigation Report
    Marcus Hodges, Lester Wingrove, and Scott Richeson
    Virginia Department of Corrections

III. Options for Child Pornography Study
     Meredith Farrar-Owens, Director

IV. Sentencing Guidelines Automation Project Demonstration
     Jody Fridley, Training/Data Quality Manager

V. Probation Violation Guidelines – FY2013 and FY2014 to Date
     Jody Fridley, Training/Data Quality Manager

VI. Two Decades of Truth-in-Sentencing in Virginia
    Meredith Farrar-Owens, Director

VII. Miscellaneous Items
     Meredith Farrar-Owens, Director
Members Present:
Judge F. Bruce Bach (Chairman), Judge Malfourd W. Trumbo (Vice-Chairman), Judge Rossie D. Alston, Jr., Harvey L. Bryant, Gene Fishel for Linda L. Bryant, Judge Bradley B. Cavedo, Delegate Benjamin L. Cline, Linda D. Curtis, H.F. Haymore, Jr., Judge Lisa Bondareff Kemler, Judge Michael Lee Moore, Judge Charles S. Sharp, Esther J. Windmueller, and Judge James S. Yoffy

Members Absent:
Senator Donald McEachin, Marsha L. Garst, and Rosemary Trible

The meeting commenced at 10:10 a.m. Judge Bach announced that Senator A. Donald McEachin will join the Commission to represent the Senate Courts of Justice Committee in place of Senator Marsh.

Agenda

I. Approval of Minutes

Judge Bach asked Commission members to approve the minutes from the previous meeting, held on April 14, 2014. The Commission unanimously approved the minutes without amendment.

II. Proposal for Review of the Pre-Sentence Investigation Report

Judge Bach introduced representatives of the Virginia Department of Corrections (DOC), who had requested some time on the Commission’s agenda in order to propose a new joint project. Representing DOC were Marcus Hodges, Regional Director; Scott Richeson, Re-Entry and Programs Director; and Lester Wingrove, Administrator of Evidence-Based Practice Operations. Mr. Hodges stated that DOC would like to partner with the Commission in a comprehensive review of the content and format of Virginia’s Pre-Sentence Investigation (PSI) report. Mr. Hodges noted that the project idea came out of a conversation with judges at the recent Judicial Conference. Several judges had inquired about the risk/needs assessment tool used by DOC, called the Correctional Offender Management Profiling for Alternative Sanctions, or COMPAS, instrument. Some judges expressed interest in having the risk/needs information from COMPAS at the time of sentencing, as it could assist them as they make their sanctioning decisions. After the Judicial Conference, Mr. Hodges reviewed PSI forms used in other states, and found some states had incorporated risk/needs assessments.

DOC would like to determine what information Virginia’s judges are most interested in having in the PSI report and to explore the possibility of incorporating risk/needs information on the offender. Mr. Hodges stressed that DOC is not looking to shorten the PSI or cut back on the information contained in the current report format. Mr. Hodges
proposed that DOC and the Commission form a joint committee to examine the current PSI format and make recommendations; the special committee would include judges, prosecutors, defense attorneys, and DOC officials.

Mr. Wingrove noted that COMPAS information is being provided informally, at the request of judges in certain jurisdictions. One goal might be to revise the PSI format to include this information, so that the process is consistent and standardized, rather than haphazard. Judge Cavedo asked what type of information is provided on the COMPAS report, which Mr. Wingrove then described. Judge Alston asked DOC what the agency’s overall goal is. Mr. Wingrove stated the overall goal was to modernize the PSI report.

A Commission member made a motion to explore changes to the PSI through an ad hoc committee. The motion was seconded. Judge Bach called for the vote. The Commission voted 14-0 in favor.

Judge Bach appointed Judge Trumbo, Ms. Windmueller, Ms. Curtis, and Judge Cavedo to represent the Commission on the ad hoc PSI review committee.

**III. Options for Child Pornography Study**

Before presenting the staff’s proposed methodology for studying possession of child pornography offenses, Ms. Meredith Farrar-Owens, the Commission’s staff director, provided members with pertinent background information. Last year, the Commission had adopted several recommendations to modify the sentencing guidelines for child pornography to bring the guidelines more in sync with sentencing practices for these offenses. Proposed modifications would increase the guidelines recommendations for production of child pornography and, in certain instances, for the reproduction/transmission of child pornography. The proposed changes would also decrease the guidelines recommendations for possession of child pornography, in order to better reflect current judicial sentencing practices. The General Assembly accepted the recommendations related to the production and reproduction of child pornography, but directed the Commission to continue studying possession offenses. House Bill 504 and Senate Bill 433 delayed the proposed changes to the guidelines for possession of child pornography in order to give the Commission time to complete such a study. The Commission must complete its work by December 1, 2015. Any proposed modification to the guidelines for possession of child pornography contained in the Commission's 2015 Annual Report will supersede those presented in the 2013 report.

At the Commission’s April 2014 meeting, Ms. Farrar-Owens presented a methodology for a comprehensive and detailed study of possession-related child pornography offenses. The goal was to gather additional offender and case details, not available in the automated data systems, that may help to explain sentencing outcomes in these cases. This would require staff to manually review case files. Given the potential cost of such a comprehensive study, the Commission requested staff to prepare options for scaling back the study, along with costs estimates, for the Commission to consider at its next meeting.
Ms. Farrar-Owens stated that staff had three options to present to the Commission. Option 1 was the comprehensive study that had been proposed at the April meeting. This option would use the entire data collection instrument (35 questions) and require extensive travel to collect information from case files. Including staff time and travel to circuit court clerks’ and Commonwealth’s Attorneys’ offices to review case files, Option 1 was estimated to cost approximately $42,000.

For Option 2, staff would use a pared-down data collection instrument with only nine questions and limit staff travel to only those localities with more than 10 cases. For the remaining localities, staff would ask Commonwealth’s Attorneys’ offices to complete the pared-down data collection form. Judge Kemler suggested an online form to make the process easier for the Commonwealth’s Attorneys. Delegate Cline asked how many of the Commonwealth’s Attorneys’ would respond. Ms. Farrar-Owens said it would be unlikely that the Commission would receive all of the forms back from the Commonwealth’s Attorneys; thus, staff would not have information on all of the cases in the study. This option was estimated to cost approximately $16,000.

For Option 3, staff would not travel or review case files. Instead, staff would add FY2014 data, when it became available, to the analysis and retest proposed changes presented in the 2013 Annual Report. Ms. Farrar-Owens suggested staff could also add FY2015 data, when it became available the following year, to the analysis. The cost of Option 3 in staff time was estimated to be $2,500.

Judge Alston made a suggestion for the Commission to withdraw the original recommendation with regard to the possession of child pornography and, based on additional study, replace it with a new recommendation. Ms. Windmueller indicated that the Commission should proceed with a study of some kind, since legislation had been passed directing the Commission to further review the proposed guidelines. Ms. Farrar-Owens noted that, per the legislation, any proposed change in the Commission’s 2015 Annual Report would supersede the one proposed in the 2013 report.

Members discussed the merits of Option 3. Judge Alston made a motion to adopt Option 3 for the study. Judge Kemler asked Judge Alston to amend the motion to include not only FY2014 but also FY2015 data in the study. The amended motion was seconded. Judge Bach called for the vote. The Commission voted 14-0 in favor.

IV. Sentencing Guidelines Automation Project Demonstration

Judge Bach introduced the next agenda item, the sentencing guidelines automation project, by saying that staff had begun exploring ways to automate the sentencing guidelines process beginning in 2012. Over the last year, staff have been collaborating with the Supreme Court’s Department of Judicial Information Technology (DJIIT) to develop a prototype application.

Mr. Jody Fridley, Manager of the Training/Data Quality Unit, updated members as to the current status of the Commission’s automation project. He reported that DJIT was making good progress in designing the online sentencing guidelines application, which
would allow guidelines users to prepare, save, and submit guidelines worksheets in an automated fashion. DJIT had created an automated version of the Schedule I/II drug guidelines first. Mr. Fridley displayed several of the application’s data entry screens. He noted that commission staff have been testing each component of the application as it was developed by DJIT. Mr. Fridley showed that many data fields will populate automatically with information from the Supreme Court’s Case Management System (CMS), saving preparers significant time. Judge Alston asked if default protocols could be added. Mr. Fridley confirmed protocols would be added to promote the accurate entry of information into the system.

Mr. Fridley continued by saying that pilot testing had begun the previous month in Norfolk. When the users in Norfolk are satisfied with the automated Schedule I/II drug form, DJIT will proceed with the creation of automated forms for all the offense groups. Mr. Fridley stated that he hoped all the forms would be online by December 2014. He noted that, initially, Commission staff would have to administer certain aspects of the project, such as the creation and management of passwords for guidelines users to access the application. Judge Kemler asked if Norfolk judges are typing their departure reasons into the application. Mr. Fridley responded that, as yet, the judges have not started using the application for that.

V. Probation Violation Guidelines – FY2013 and FY2014 to Date

Mr. Fridley next provided an overview of the Commission’s sentencing revocation report (SRR) and probation violation guidelines. The SRR is a simple form, implemented in 1997, designed to capture the reasons for, and the outcomes of, community supervision violation hearings. The probation officer completes the first part of the form, which includes the offender’s identifying information and checkboxes indicating the reasons why a show cause or revocation hearing has been requested. The checkboxes are based on the list of eleven conditions for community supervision established for every offender, but special supervision conditions imposed by the court can also be recorded. Following the violation hearing, the judge completes the remainder of the form with the revocation decision and any sanction ordered in the case. The completed form is submitted to the Commission, where the information is automated.

Mr. Fridley reported that data for FY2014 are incomplete; however, for the year-to-date, 7,149 SRRs had been submitted to, and automated by, Commission staff. The circuits submitting the largest number of SRRs in FY2014 were Circuit 4 (Norfolk), Circuit 29 (Buchanan area), Circuit 1 (Chesapeake), and Circuit 15 (Fredericksburg area). Circuit 6 (Sussex area), Circuit 11 (Petersburg area) and Circuit 17 (Arlington) submitted the fewest SRRs so far in FY2014.

For FY2014 to date, 3,551 of the 7,149 SRR cases involved offenders who had committed a new crime; of those, 43% were felonies. When violations involved a new felony, 48.7% of the offenders received a prison term with a median sentence of two years. When violations involved a new misdemeanor, offenders were most likely to receive a jail term with a
median sentence of six months. Technical violators (i.e., offenders who violate the terms of community supervision but are not convicted of a new offense) were also most likely to receive a sentence to jail.

In 3,415 cases, the offender was returned to court for technical violations. The number of technical violators remains lower than the peak experienced during FY2007-FY2008.

Mr. Fridley explained that the Commission’s Probation Violation Guidelines apply to offenders on active probation supervision who commit technical violations only. Examining the 3,415 technical violator cases, however, it was found that 466 had to be excluded from subsequent analyses. Cases were excluded if the guidelines were not applicable (e.g., the offender was not on supervised probation at the time) or if the guidelines were incomplete or prepared on outdated forms.

Examining the remaining 2,949 violation cases revealed that 58.5% of the offenders were cited for using, possessing, or distributing a controlled substance. Over half (53.3%) of the offenders were cited for failing to follow instructions given by the probation officer. Other frequently cited violations included absconding from supervision (28.7%). In more than one-quarter of the violation cases (27.7%), offenders were cited for failing to follow special conditions imposed by the court, such as failing to pay court costs and restitution or failing to comply with court-ordered substance abuse treatment. Mr. Fridley stressed that offenders may be, and typically are, cited for violating more than one condition of their probation.

For FY2014 cases submitted and keyed to date, overall compliance with the Probation Violation Guidelines was approximately 53%. While lower than compliance with the Sentencing Guidelines for felony offenses, compliance with the Probation Violation Guidelines has been higher since FY2008 than in prior years. The Commission revised the Probation Violation Guidelines beginning in FY2008 to better reflect judicial sentencing practices in these cases. When departing from the Probation Violation Guidelines, judges sentenced below the recommended range in 25% of the cases and above the recommended range in 24% of the cases. Mr. Fridley noted that roughly half of the cases sentenced outside of the guidelines did not include a reason for the departure.

Judge Trumbo asked why the number of technical violations has declined overall since FY2007. Mr. Fridley noted that the Department of Corrections (DOC), which oversees community corrections for the vast majority of felony offenders, initiated new policies and procedures beginning about FY2008. The new policies and practices are referred to collectively as evidence-based practice (or EBP). The EBP approach involves the use of offender risk and needs assessment tools, as well as techniques for interacting with offenders that have been shown through evaluation to be effective. EBP includes the delivery of treatment services, matched to offender need, that have been demonstrated empirically to be effective. Ms. Farrar-Owens commented that, in most cases, probation officers will now work with offenders longer in the community before referring an offender back to court for violations.
VI. Two Decades of Truth-in-Sentencing in Virginia

Ms. Farrar-Owens announced that Virginia was nearing the twentieth anniversary of the adoption of truth-in-sentencing. In the fall of 1994, the General Assembly passed legislation to abolish parole for felons committed on or after January 1, 1995, and to implement the truth-in-sentencing system, whereby felons must serve at least 85% of the sentence ordered by the court. To commemorate the anniversary, staff propose new analyses to examine the impact of the truth-in-sentencing system in the Commonwealth. The Commission had conducted some analysis in 2004 for the tenth anniversary and produced a pocket-sized brochure showing the results.

Ms. Farrar-Owens presented the goals of the 1994 sentencing reform, which included: the abolition of parole, implementation of truth-in-sentencing (minimum 85% time served by felons), targeting of violent felons for longer prison terms, redirection of prison-bound low-risk offenders to alternative sanctions, and expansion of alternative punishment options for some nonviolent felons. Virginia’s sentencing guidelines were originally established in the 1980s to reduce unwarranted sentencing disparities, and that has remained a goal under the truth-in-sentencing system.

Ms. Farrar-Owens then discussed several aspects of Virginia’s truth-in-sentencing system that staff could examine as part of a new analysis. These included the percent of sentence served by felons, length of prison time served by felons, nonviolent felons recommended through risk assessment for alternative sanctions, recidivism among violent offenders, growth and changing composition of Virginia’s prison population, reductions in crime rates, and changes in incarceration rates. Ms. Farrar-Owens also displayed results of a 2008 study by the National Center for State Courts that found no substantively significant discrimination in sentences in Virginia.

A Commission member made a motion for the Commission to produce a twentieth anniversary brochure examining the impact of Virginia’s truth-in-sentencing system. The motion was seconded. Judge Trumbo stated that, for comparison purposes, he would like to see many of the same measures as were used in the 2004 brochure. Judge Bach suggested that the results of the National Center for State Courts study be included. Judge Bach called for the vote. The Commission voted 14-0 in favor.

VII. Miscellaneous Items

Ms. Farrar-Owens provided members with a brief overview of her remarks to the circuit court judges at the Judicial Conference held in Williamsburg the previous month. She had encouraged judges to write specific and detailed departure reasons, as their reasons for departing from the guidelines are crucial in directing the Commission’s attention to areas of the guidelines that may need amendment. Ms. Farrar-Owens also emphasized the importance of departure reasons for the report the Commission must file with Virginia’s Child Protection Accountability System. She also encouraged judges to check the plea agreement box on the back of the guidelines cover sheet whenever they accept a plea agreement, as that information is not available from any other source. Ms. Farrar-Owens stated that, after her remarks, a judge expressed concern about the labeling on the plea
agreement checkbox on the guidelines form. Judge Alston described the differences between a formal plea agreement and a plea with a recommendation for sentencing; he noted that the labeling on the current guidelines form does not distinguish between them. Judge Alston proposed adding another checkbox to capture when there was a plea and recommended sentence accepted by the judge. Judge Alston also suggested that the Supreme Court’s Rule number be included in the label. Judge Kemler recommended that the staff send out a letter to all judges about the change.

Ms. Farrar-Owens reminded Commission members about the location and dates for the 2014 conference of the National Association of Sentencing Commissions. The Connecticut Sentencing Commission will host the conference in New Haven on August 3-5, 2014. She asked members to let her know as quickly as possible if any one wished to attend.

Ms. Farrar-Owens concluded by noting the dates for the remaining 2014 Commission meetings. The Commission is scheduled to meet on September 8 and November 5.

With no further business on the agenda, the Commission adjourned at 12:10 p.m.
MEETING OF THE
VIRGINIA CRIMINAL SENTENCING COMMISSION

September 8, 2014, 10:00 a.m.

Richard P. Kern Memorial Conference Room
Virginia Supreme Court Building
Fifth Floor

AGENDA

I. Approval of Minutes from Last Commission Meeting
   Judge F. Bruce Bach, Chairman

II. Two Decades of Truth-in-Sentencing in Virginia - Update
    Meredith Farrar-Owens, Director

     Jody Fridley, Training/Data Quality Manager

IV. Possible Topics for Guidelines Revisions
    Meredith Farrar-Owens, Director

V. Larceny and Fraud Study – Update
    Joanna Laws, Research Manager

VI. Sentencing Guidelines Training – Update
    Kim Storni, Training Associate

VII. Miscellaneous Items
    a. Immediate Sanction Probation Pilot Program
    b. Sentencing Guidelines Automation Project
    c. Technical Assistance
Members Present:
Judge F. Bruce Bach (Chairman), Judge Rossie D. Alston, Jr., Linda L. Bryant, Judge Bradley B. Cavedo, Delegate Benjamin L. Cline, H.F. Haymore, Jr., Judge Lisa Bondareff Kemler, Judge Michael Lee Moore, Judge Charles S. Sharp, Rosemary Trible, Esther J. Windmueller, and Judge James S. Yoffy

Members Absent:
Harvey L. Bryant, Linda D. Curtis, Marsha L. Garst, and Judge Malfourd W. Trumbo (Vice-Chairman)

The meeting commenced at 10:10 a.m.

Agenda

I. Approval of Minutes

Judge Bach asked the Commission members to approve the minutes from the previous meeting, held on June 9, 2014. The Commission unanimously approved the minutes without amendment.


Mr. Jody Fridley, Manager of the Training/Data Quality Unit, presented the sentencing guidelines compliance statistics and departure patterns for FY2014. This information will be included in the Commission’s Annual Report, due to the General Assembly on December 1.

Mr. Fridley stated that, to date, 23,000 FY2014 guidelines forms had been submitted to the Commission and automated. Overall, judicial concurrence with the guidelines in FY2014 was 78.8%. Departures from the guidelines were nearly evenly split between aggravations (10.3%) and mitigations (10.9%).

Mr. Fridley pointed out the high rate of dispositional compliance (defined as the degree to which judges agree with the type of sanction recommended by the guidelines). For example, when a longer jail sentence or a prison term was recommended by the guidelines, the judges concurred with that type of disposition 87.4% of the time. Durational compliance (defined as the rate at which judges sentence offenders to terms of incarceration that fall within the recommended guidelines range) was also high for the fiscal year, at 80.4%.

Mr. Fridley provided information on the departure reasons most frequently cited by judges. In mitigation cases, judges most often reported the decision to sentence an offender in accordance with a plea agreement as the reason for departing from the guidelines (cited in
36% of the mitigation departures). Plea agreement was also the most common reason reported in aggravation cases (cited in 26% of the aggravations). Mr. Fridley commented that the findings were consistent with those from previous years.

Mr. Fridley then presented compliance rates across the 31 judicial circuits. The highest compliance rate, 86%, was found in Circuit 31 (Prince William). He also noted that Circuit 13 in Richmond had the lowest compliance rate this year, at 69%. Showing compliance by offense group, Larceny and Fraud had the highest rates (83% and 81%, respectively). The Murder offense group recorded the lowest compliance rate in FY2014 (57%) and the highest rate of aggravation of all offense groups (31%). The Robbery offense group recorded the highest rate of mitigation during FY2014 (24%).

Mr. Fridley gave an overview of the Commission’s new nonviolent offender risk assessment instrument, used in conjunction with the guidelines for fraud, larceny and drug offenses. The purpose of this instrument is to identify offenders who are statistically less likely to recidivate so that judges may consider them for alternative sanctions in lieu of prison or jail incarceration. The Commission implemented the risk assessment instrument statewide in 2002. Because it had been a number of years since the risk assessment instrument was last examined, the Commission, in 2010, directed staff to begin a new recidivism study to evaluate the instrument and potentially update it based on more recent felony cases from Virginia’s circuit courts. This complex, multi-stage project was completed in 2012. The Commission recommended that the existing risk assessment instrument be replaced with the instruments developed using the results of the new study of felony recidivism. The General Assembly accepted the recommendation and the new instruments were implemented at the beginning of FY2014. Based on the results of the most recent study, the existing risk assessment instrument was replaced by two instruments, one applicable to larceny and fraud offenders and the other specific to drug offenders. Of the 5,649 cases analyzed for FY2014, nearly 48% of the eligible offenders were recommended for an alternative sanction; of those, 38% received an alternative. Mr. Fridley noted that staff would continue to monitor the use of the new risk assessment tools.

Mr. Fridley then presented compliance results for other modifications to the guidelines that became effective on July 1, 2013. These included: the revision of certain worksheets to better account for mandatory minimum penalties, an increase in the guidelines for burglary with a deadly weapon in certain circumstances, an increase in the guidelines for involuntary vehicular manslaughter, and the addition of larceny offenses defined in § 18.2-108.01 to the guidelines system. Mr. Fridley advised that some of these results should be interpreted cautiously since they were based on a relatively small number of cases received.

Concerning risk assessment, Ms. Bryant asked Mr. Fridley to elaborate on the types of alternative sanctions. Mr. Fridley noted several examples.

Mr. Fridley then presented an overview of the Commission’s sentencing revocation report (SRR) and compliance with the probation violation guidelines. The SRR is a simple form, implemented in 1997, designed to capture the reasons for, and the outcomes of, community supervision violation hearings. Mr. Fridley showed that Circuit 4 (Norfolk), Circuit 29 (Buchanan area), and Circuit 1 (Chesapeake) had submitted the largest number of SRR reports during FY2014. Mr. Fridley advised that SRR data for May and June of 2014 were
likely incomplete. For the cases received, however, 51% of the SRR reports involved an offender committing a new offense and 49% involved other types of violations, such as missing an appointment with the probation officer or testing positive for drug use. Mr. Fridley displayed information showing that offenders with new law violations, particularly those with a new felony, were more likely than offenders who commit other types of violations to receive an incarceration sanction for the violation.

The Commission’s probation violation guidelines apply to offenders found in violation of community supervision for reasons not related to a new crime. These are often called “technical violations.” According to the SRR data, use of controlled substances was the most commonly cited technical violation. For FY2014, overall compliance with the probation violation guidelines was approximately 53%. While lower than compliance with the sentencing guidelines for felony offenses, compliance with the probation violation guidelines has been higher since modifications were implemented in FY2008 than in years prior to that. Mr. Fridley discussed dispositional compliance. When a jail sentence up to 12 months was recommended by the probation violation guidelines, the judges concurred with that type of disposition 67% of the time. When a prison sentence of one year or more was recommended, judges gave that type of disposition in 55% of the cases. With regard to probation violations, there is considerable variation in sanctioning practices across the Commonwealth. In FY2014, compliance with the probation violation guidelines ranged from 70% in Circuit 31 (Prince William) to 38% in Circuit 21 (Martinsville area).

In roughly half of the probation violation cases in which the judge sentenced above or below the recommended guidelines range, a departure reason was not provided. For the mitigation cases in which departure reasons were provided, judges were most likely to cite judicial discretion, an agreement with the Commonwealth’s attorney, or the offender’s health. When a departure reason was provided in aggravation cases, judges were most likely to cite the defendant’s previous probation violations, the offender’s failure to follow instructions, or that the offender had absconded.

Mr. Fridley announced that the 2014 Annual Report would include more detailed analysis.

III. Possible Topics for Sentencing Guidelines Revisions

The Commission closely monitors the sentencing guidelines system and, each year, deliberates upon possible modifications to enhance the usefulness of the guidelines as a tool for judges. Ms. Meredith Farrar-Owens, the Commission’s Director, explained that topics for possible guidelines revisions are suggested by Commission members, prosecutors, defense attorneys, and other guidelines users. Suggestions are often made during training seminars or via the Commission’s hotline phone (maintained by staff to assist users with any questions or concerns regarding the preparation of the guidelines). In addition, staff closely examine compliance with the guidelines and departure patterns in order to pinpoint specific areas where the guidelines may need adjustment to better reflect current judicial thinking. The reasons judges write for departing from the guidelines are very important in guiding the analysis. The Commission’s proposals represent the best fit for the historical sentencing data. Any modifications to the guidelines adopted by the
Commission must be presented in its *Annual Report*, submitted to the General Assembly each December 1.

Ms. Farrar-Owens stated that she would present several proposed topics for sentencing guidelines revisions. Analysis of these topics would proceed if the members approved.

1) Distribution of Schedule IV drugs (§ 18.2-248(E2))

Currently, Virginia’s sentencing guidelines do not cover distribution of Schedule IV drugs, a Class 6 felony defined in § 18.2-248(E2)). Ms. Farrar-Owens stated that staff had recommended analysis of this crime to determine if it was now feasible to add it as a guidelines offense.

2) Strangulation resulting in injury or bodily wounding (§ 18.2-51.6)

Strangulation under § 18.2-51.6 was added to the *Code of Virginia* in 2012. As a relatively new felony, it is not currently covered by the guidelines. In some cases, guidelines users in the field have incorrectly prepared guidelines for strangulation using the Class 6 felony of unlawful wounding. Staff have received numerous requests to add this offense to the guidelines. Judge Sharp commented that he had three strangulation cases in the last two months.

3) Obtaining identifying information with the intent to defraud, 2nd or subsequent conviction (§ 18.2-186.3(D))

Section 18.2-186.3, defining identity fraud offenses, was added to the *Code of Virginia* in 2000. One of the five felony offenses in this Code section is currently covered by the guidelines, having been added in 2006. Staff proposed analyzing cases involving a second or subsequent conviction for obtaining identifying information with the intent to defraud (as defined in paragraph D of § 18.2-186.3). Ms. Farrar-Owens indicated that staff could also examine the three other felonies in the section that were not yet covered by guidelines, if a sufficient number of cases could be identified.

4) Receiving, buying, or selling stolen credit card or credit card number
   (§ 18.2-192 (1,b), (1,c), and (1,d))

Section 18.2-192 was last modified in 1985. One of the four felony offenses in this Code section is currently covered by the guidelines. However, the crimes of receiving, buying, or selling stolen credit card or credit card numbers (§ 18.2-192 (1,b), (1,c), and (1,d)) are not covered. Staff proposed examining the data to determine if there were enough convictions to develop historically-based guidelines. Ms. Farrar-Owens noted that staff could also examine a similar offense defined in § 18.2-194.

5) Reanalyze Burglary Offenses

According to Ms. Farrar-Owens, feedback from guidelines users suggested that elements not taken into account by the current guidelines could be important factors affecting sentencing outcomes in burglary cases. She noted details like the time of day the offense
was committed, whether a victim was present at the time of the offense, and victim injury as examples. Many of the case details of interest are not contained in the state’s automated data systems. Thus, a special study would be required in order to collect additional information for burglary cases.

Ms. Farrar-Owens invited Commission members to submit additional topics for analysis, should they wish to do so.

Judge Bach made a motion to approve of all the topics for analysis. The motion was seconded by Judge Alston. Judge Bach called for the vote. The Commission voted 12-0 in favor.

Judge Alston asked if the staff could study the distinction between abduction and kidnapping in the context of the sentencing guidelines.

IV. Larceny and Fraud Study - Update

At a prior meeting, Commission members had approved a special study of felony larceny and fraud offenses. The purpose of the study is to examine the relationship between the value of money or property stolen in larceny and fraud cases and judges’ sentencing decisions. Based on the results of the analysis, the Commission could recommend adding a factor to the larceny and/or fraud guidelines to account for value.

Ms. Joanna Laws, the Commission’s Deputy Director, provided background information regarding the Commission’s previous work in this area and then discussed the staff’s methodology for the recently-approved larceny and fraud study.

In 1997, the Commission conducted a study of felony embezzlement cases to examine the relationship between the amount embezzled and sentencing outcomes. Ms. Laws stated that the staff examined detailed elements of embezzlement cases, including dollar amount, duration of the embezzlement act, type of victim, and the offender’s relationship with the victim. The study revealed that offenders who embezzled $75,000 or more were more likely to receive a sentence longer than six months. In addition, analysis of cases resulting in prison terms revealed that, in over half of the sentences above the guidelines range, judges cited a large dollar amount as the reason for the lengthier sentence. After carefully reviewing the study findings, the Commission approved modifications to the guidelines for embezzlement to add monetary value as a factor scored on the worksheets.

Ms. Laws then described the Commission’s 1999 study of larceny and fraud cases. The Commission studied a sample of felony larceny and fraud cases sentenced in CY 1998 and CY 1999. The sample excluded embezzlement because it had been examined in the previous study. Staff collected information on factors of interest not contained in the automated data. Through analysis of the data, sentencing models with new factors were tested; however, models in which new factors were statistically significant were found to be only marginally better than the existing guidelines model. The best models involved both dollar amount and a combination of restitution and/or victim type. Adding such
factors would have added a layer of complexity for users when scoring. The Commission took no action.

Ms. Laws turned to the methodology for the current study. Staff drew a sample of 1,500 larceny and fraud cases from FY2011-FY2013 sentencing guidelines data. A large sample was preferred, as some cases will be eliminated in subsequent stages of analysis. The sample was drawn based on a stratified random sampling technique to under-sample grand larceny cases and over-sample other types of larcenies. Ms. Laws noted that this ensures an adequate representation of offenses other than grand larceny in the sample. Similar to the previous study, supplemental data collection will be necessary in order to gather important case details that are not found in the state’s criminal justice databases. Ms. Laws displayed a list suggested by staff, which included the following elements: dollar value of money or property stolen, the type(s) of items, any damage to items, whether or not insurance covered the loss, location of the offense, duration of the offense, number of victims, type of victim(s), the offender’s relationship to victim, whether or not money or items were recovered, and whether or not restitution was paid prior to sentencing.

Data sources will include the Pre-Sentence/Post-Sentence Investigation (PSI) report. However, only 42% of the cases in the sample had a PSI. Ms. Laws stated that staff had been exploring other automated sources of data that might be useful for the study, in hopes of reducing staff travel to Commonwealth’s Attorneys’ Offices, Probation Offices, and Clerks’ Offices to review files. Ms. Laws described the Officer of the Court Remote Access (OCRA) System. OCRA enables remote viewing of scanned court documents. Ms. Laws reported that 73% of the sampled cases had either a PSI or occurred in a jurisdiction using OCRA. She displayed a map of Virginia showing how the remaining 400 cases were distributed across jurisdictions in the Commonwealth.

Ms. Laws concluded by presenting the current work plan. Staff expected to complete the study by September 2015 and the results would be presented to Commission members in the fall of 2015.

Judge Moore asked if the staff could break down the type of business (e.g., business run for profit versus a nonprofit organization). Another member asked if staff could distinguish between situations in which the defendant was convicted of charges in multiple jurisdictions because of a “crime spree” (i.e., a series of offenses close in time) and situations in which the defendant has prior convictions spread out over time (with punishment in between each event). Ms. Laws responded that the staff would do their best to address both members’ concerns.

V. Two Decades of Truth-in-Sentencing in Virginia

Ms. Farrar-Owens reminded Commission members that Virginia was nearing the twentieth anniversary of the adoption of truth-in-sentencing. In the fall of 1994, the General Assembly passed legislation to abolish parole for felonies committed on or after January 1, 1995, and to implement the truth-in-sentencing system, whereby felons must serve at least 85% of the sentence ordered by the court. To commemorate the
Ms. Farrar-Owens presented the goals of the 1994 sentencing reform, which included: the abolition of parole, implementation of truth-in-sentencing (minimum 85% time served by felons), targeting of violent felons for longer prison terms, redirection of prison-bound low-risk offenders to alternative sanctions, and expansion of alternative punishment options for some nonviolent felons. Virginia’s sentencing guidelines were originally established in the 1980s to reduce unwarranted sentencing disparities, and that had remained a goal under the truth-in-sentencing system, as well.

Ms. Farrar-Owens presented a brief overview of the analysis to date. She noted that, indeed, felons are serving at least 85% of the incarceration term ordered by the court and that violent offenders are serving longer terms under truth-in-sentencing than under the parole system. When sentenced to prison, nonviolent offenders are serving about the same amount of time, on average, as they did prior to the abolition of parole.

In a recent Pew study, Virginia ranked tied for third among the 34 states examined for the longest prison stays for violent offenders. Through risk assessment of nonviolent offenders, a significant share of nonviolent felons are being recommended for alternative sanctions in lieu of traditional prison or jail incarceration. As a result, a larger share of Virginia’s prison beds today are occupied by violent felons (as defined in § 17.1-805) compared to 1994.

Ms. Farrar-Owens then described the significant decline in the crime rates in Virginia, noting that Virginia had the fourth lowest violent crime rate and eighth lowest property crime rates in the nation in 2012. Growth in Virginia’s incarceration rate and prison population slowed after 1995, compared to the previous decade. The rate at which Virginia’s prison inmates return to prison following release is now the second lowest in the country.

Ms. Farrar-Owens concluded by saying that analysis would continue and additional information would be provided at the Commission’s November meeting.

Ms. Bryant asked if the numbers of prison beds occupied by violent felons in the 1990s were available. Ms. Farrar-Owens responded that she would ask if the Department of Corrections had those figures.

VII. Sentencing Guidelines Training

Ms. Kimberly Storni, Training Associate, gave Commission members an update on the 2014 training schedule. The Commission’s training staff had planned nine “Introduction to Virginia’s Sentencing Guidelines” seminars, in seven different locations, during October and November. The majority of the participants were expected to be probation officers, followed by Commonwealth’s attorneys. The Introduction seminars provide general background information about guidelines and then progress to detailed instruction for scoring the guidelines worksheets. The seminar is designed for the attorney or
criminal justice professional who is new to Virginia’s sentencing guidelines. The staff also plans to conduct advanced training seminars in the fall for several Probation and Parole Offices. In addition, the staff have been invited back to present at the Judicial Conference in May 2015. Ms. Storni concluded by saying that the Commission’s training seminars are all approved for Continuing Legal Education (CLE) credits for attorneys who attend.

Ms. Windmueller noted that the Commission charges private attorneys who wish to attend a training seminar or receive a sentencing guidelines manual, and she inquired as to the amount of revenue this provided the Commission. She expressed her opinion that individuals who work as court-appointed attorneys should not have to pay for training since Commonwealth’s attorneys, public defenders, and probation officers do not; in addition, court-appointed lawyers should have access to guidelines without paying out-of-pocket expenses. Judge Bach asked staff to examine the revenue from training and manual sales and to report back to the Commission in November. Judge Alston commented that some of the scholarship and grant money available through the Office of the Executive Secretary (OES) goes unused every year. Judge Alston asked staff to check with the OES Education Department to see if it is possible to use some of those funds to assist with guidelines training.

V. Miscellaneous Items

Before concluding the agenda, Judge Bach asked Ms. Farrar-Owens to discuss any miscellaneous items.

Ms. Farrar-Owens presented a brief status report on the Immediate Sanction Probation pilot project. A total of 81 offenders in the four pilot sites were participating in the program at that time. As of September, twelve offenders had completed the program.

Ms. Farrar-Owens provided members with a summary of the staff’s numerous projects over recent months. Ms. Farrar-Owens had assisted the Secretary of Public Safety and Homeland Security with the development of revised offender forecasts. Each year, Commission staff assists the Department of Juvenile Justice with the agency’s recidivism analysis. The Commission provides information on arrests and convictions for juvenile offenders who are now adults. In addition, staff had provided assistance to the Court of Appeals and the Crime Commission. Ms. Farrar-Owens noted that staff had already begun receiving requests for fiscal impact statements on proposed legislation.

Ms. Farrar-Owens presented recognition awards for three employees for their years of service to the Commission and the Commonwealth (Jody Fridley, Training Unit Manager, 25 years of service; Tom Barnes, Research Associate, 20 years of service, and Susan Gholston, Research Associate, 20 years of service).

Ms. Farrar-Owens reminded the members of the date for the remaining Commission meeting for the year. The Commission is scheduled to meet on Wednesday, November 5.

With no further business on the agenda, the Commission adjourned at 12:10 p.m.
MEETING OF THE
VIRGINIA CRIMINAL SENTENCING COMMISSION

November 5, 2014, 10:00 a.m.

Richard P. Kern Memorial Conference Room
Virginia Supreme Court Building
Fifth Floor

AGENDA

I. Approval of Minutes from Last Commission Meeting
   Judge F. Bruce Bach, Chairman

II. Possible Recommendations for Sentencing Guidelines Revisions
    Meredith Farrar-Owens, Director
        Joanna Laws, Deputy Director
        Tom Barnes, Research Associate

III. Sentencing Guidelines Manual Sales and Paid Seminar Attendance
     Jody Fridley, Training/Data Quality Manager

IV. Sentencing Guidelines Automation Project
    Jody Fridley, Training/Data Quality Manager

V. Reporting to the Child Protection Accountability System – Status Update
    Jody Fridley, Training/Data Quality Manager

VI. New Nonviolent Offender Risk Assessment Instruments – Status Update
    Meredith Farrar-Owens, Director

VII. Miscellaneous Items
     Meredith Farrar-Owens, Director
Members Present:
Judge F. Bruce Bach (Chairman), Judge Malfourd W. Trumbo (Vice-Chairman), Harvey L. Bryant, Judge Bradley B. Cavedo, Delegate Benjamin L. Cline, Judge Lisa Bondareff Kemler, Judge Michael Lee Moore, Senator Bryce E. Reeves, Judge Charles S. Sharp, Rosemary Trible, Esther J. Windmueller, and Judge James S. Yoffy

Members Absent:
Judge Rossie D. Alston, Jr., Linda L. Bryant, Linda D. Curtis, Marsha L. Garst, and H.F. Haymore, Jr.

The meeting commenced at 10:05 a.m.

Agenda

I. Approval of Minutes

Judge Bach asked the Commission members to approve the minutes from the previous meeting, held on September 8, 2014. The Commission unanimously approved the minutes without amendment.

II. Possible Recommendations for Sentencing Guidelines Revisions

Meredith Farrar-Owens, the Commission’s Director, first summarized the process by which proposals for revisions to the sentencing guidelines are developed. She explained that topics for possible guidelines revisions are suggested by Commission members, judges, guidelines users (via the hotline or in training seminars), and staff. She emphasized that the proposals reflect the best fit to the historical data. Moreover, the proposals were designed to maximize compliance and balance mitigation and aggravation rates, to the extent possible. Based on detailed analysis of available data, four possible recommendations were developed this year for the members’ consideration.

Proposed Recommendation 1 – Add Distribution of Schedule IV Drugs (§ 18.2-248(E2)) to the Drug/Other Guidelines

Tom Barnes, Research Associate, presented the first two proposals. Mr. Barnes stated that recent reports suggest that the number of offenses involving Schedule IV drugs had increased in the Commonwealth in recent years. Schedule IV drugs generally include tranquilizers and sedatives, such as Valium, Xanax, and Darvocet, and are often used to treat patients suffering from disorders such as seizures, anxiety, and insomnia. In 2005, the General Assembly increased the penalty for the unlawful distribution, sale, or possession with intent to distribute a Schedule IV drug (§ 18.2-248(E2)) from a Class 1 misdemeanor to a Class 6 felony. Currently, however, this offense is not covered by the guidelines when it is the most serious offense at sentencing.
Data from the Circuit Court Case Management System (CMS) for fiscal year (FY) 2010 through FY2014 yielded a total of 131 cases in which distribution, sale, or possession with intent to distribute a Schedule IV drug (§ 18.2-248(E2)) would be the primary, or most serious, offense in the sentencing event. The staff also obtained criminal history reports, or “rap sheets,” on these offenders from the Virginia State Police so that the offender’s prior record could be computed and used in scoring the various factors on the guidelines worksheets.

Based on thorough analysis of the available data, staff developed a proposal to integrate distribution, etc., of a Schedule IV drug into the Drug/Other guidelines. Mr. Barnes presented the proposed guidelines for this offense. On Section A (the prison in/out recommendation), offenders whose most serious offense is distribution, etc., of a Schedule IV drug will receive six points on the Primary Offense factor if convicted of one count or eight points if convicted of two or more counts. The remaining factors on Section A will be scored as they appear on the current Section A worksheet. Offenders whose primary offense is distribution, etc., of a Schedule IV drug who are referred to Section B (to determine a recommendation for probation or jail up to six months) will receive six points on the Primary Offense factor if convicted of one count and nine points if convicted of two or more counts. When scoring Section B factors for Prior Incarcerations/Commitments and Legally Restrained, offenders convicted of this Schedule IV drug offense will be scored in the same manner as Schedule III drugs. Other factors on the Section B worksheet will be scored as they currently appear on the worksheet.

An offender who scores 11 points or more on Section A of the Drug/Other guidelines is referred to Section C, which determines the sentence length recommendation for a term of imprisonment. On Section C, an offender convicted of one count of distribution, etc., of a Schedule IV drug will receive two points for the Primary Offense factor if his prior record is classified as Other (no violent prior record), four points if he has a Category II prior record (less serious violent prior record), or eight points if he has a Category I prior record (more serious violent prior record). No other modifications to the Section C worksheets are necessary.

When developing sentencing guidelines, the Commission’s goal is to match as closely as possible the historical incarceration rate for the specific offense as well as the median sentence received by offenders. Information presented by Mr. Barnes demonstrated that the proposed guidelines result in sentencing recommendations that are closely aligned with historical sentencing practices for this offense.

Judge Moore made a motion to adopt this recommendation, which was seconded. With no further discussion, the Commission voted 11-0 in favor.

**Proposed Recommendation 2 – Add Certain Identity Fraud Offenses (§ 18.2-186.3) to the Fraud Guidelines**

Mr. Barnes stated that § 18.2-186.3, which defines several identity fraud offenses, was added to the Code of Virginia in 2000. While five felony identity fraud offenses are specified in § 18.2-186.3(D), only identity fraud resulting in financial loss greater than $200 is currently covered by the sentencing guidelines. The staff examined available
data to determine if sufficient cases exist to add the other identity theft offenses defined in § 18.2-186.3(D) to the sentencing guidelines. However, only obtaining identifying information to defraud, second or subsequent offense, provided a sufficient number of cases to move forward with a proposal. Circuit Court Case Management System (CMS) data for fiscal year (FY) 2010 through FY2014 provided 156 cases in which obtaining identifying information with intent to defraud, second or subsequent offense, was the most serious offense at sentencing.

Staff conducted a thorough analysis of the available data, including each offender’s criminal history, and developed a proposal to integrate this offense into the Fraud guidelines. Mr. Barnes described the proposed guidelines. On Section A, offenders whose most serious offense is obtaining identifying information to defraud, second or subsequent offense, will receive one point on the Primary Offense factor. Mr. Barnes noted these offenders often have extensive nonviolent criminal histories and tend to score high on the prior record factors found on Section A of the Fraud guidelines. Under the proposal, the Section A factors for Prior Convictions/Adjudications and Prior Misdemeanor Convictions/Adjudications would be split so that offenders convicted of this identity fraud offense are scored differently than other offenders. This modification was supported by analysis of the data. When referred to Section B of the Fraud guidelines, these offenders will receive six points on the Primary Offense factor. Based on the data, staff recommended adding a new factor to Section B, which would be scored only if the primary offense is obtaining identifying information with the intent to defraud, second or subsequent offense. This new factor will be scored based on the offender’s prior misdemeanor convictions and adjudications. If an offender scores 11 points or more on Section A of the Fraud guidelines, Section C is scored to determine the sentence length recommendation for a term of imprisonment. On Section C, offenders whose primary offense is obtaining identifying information with the intent to defraud, second or subsequent offense, will receive four points for the Primary Offense factor if the offender’s prior record is classified as Other, eight points if he has a Category II prior record, or 16 points if he has a Category I prior record.

Ms. Windmueller asked how the enhancements for Category I and Category II prior record are calculated. Ms. Farrar-Owens stated that the General Assembly, as part of 1994 sentencing reform legislation, specified enhancements to be built into the guidelines to increase the sentence recommendations for offenders convicted of violent crimes, as well as those who have prior convictions for violent felonies. If the current offense is nonviolent, such as the one in this proposal, the base score (labeled “Other” prior record) is increased by 100% for a Category II prior record (less serious violent prior record) and by 300% for a Category I prior record (more serious violent prior record). These enhancements are required by statute.

Information displayed by Mr. Barnes showed that the proposed guidelines are closely aligned with historical sentencing practices for this offense.

Judge Sharp made a motion to adopt the recommendation. The motion was seconded. With no further discussion, the Commission voted 11-0 in favor.
Proposed Recommendation 3 – Add Certain Credit Card Offenses (§§ 18.2-192 and 18.2-194) to the Fraud Guidelines

Joanna Laws, Deputy Director, presented the remaining proposals. She first reviewed §§ 18.2-192 and 18.2-194 of the Code of Virginia, which define several credit card offenses. She noted that the guidelines currently cover one of the four felonies defined in § 18.2-192 and do not cover the offense defined in § 18.2-194. Data from the Circuit Court Case Management System (CMS) for FY2010 through FY2014 were obtained. Staff determined that only one other felony in these two statutes had a sufficient number of cases to proceed further in the analysis. There were a total of 77 cases in which receiving a stolen credit card or credit card number with the intent to use or sell (§ 18.2-192(1,b)) was the most serious offense in the sentencing event.

Judge Trumbo asked about the criteria of adding new offenses to the guidelines. Ms. Laws responded that the general rule is at least 60 cases are needed before the staff conducts an analysis.

Based on thorough analysis of the available data, staff developed a proposal to incorporate the offense of receiving a stolen credit card or credit card number with the intent to use or sell (§ 18.2-192(1,b)) into the Fraud guidelines. On Section A, offenders for whom this is their most serious offense will receive three points on the Primary Offense factor if convicted of one count of the primary offense and ten points if convicted of two or more counts. These offenders will be scored on the remaining Section A factors as they are shown on the present worksheet. Offenders referred to Section B will receive seven points on the Primary Offense factor. Other Section B factors will be scored as they appear on the current worksheet. An offender who scores 11 points or more on Section A of the Fraud guidelines is scored on Section C, which determines the sentence length recommendation for a term of imprisonment. On Section C, offenders whose primary offense is the specified credit card offense will receive six points for the Primary Offense factor if the offender’s prior record is classified as Other, 12 points if he has a Category II prior record, or 24 points if he has a Category I prior record. No other modifications to Section C are necessary.

As shown by Ms. Laws, the proposed guidelines are closely aligned with historical sentencing practices for this offense.

Judge Trumbo stated that the number of cases for this offense may be too low to develop historically-based guidelines. After a brief discussion about the number of cases, Judge Bach noted that the Commission had the option of deferring action on this proposal.

Judge Cavedo made a motion to adopt this recommendation, which was seconded. The Commission voted 7-4 in favor.

Proposed Recommendation 4 – Add Strangulation Resulting in Injury or Bodily Wounding (§ 18.2-51.6) to the Assault Guidelines.

Ms. Laws reviewed the crime of strangulation resulting in injury or bodily injury, as defined in § 18.2-51.6 of the Code of Virginia. She noted that this offense was added to the Code in 2012. As a relatively new felony, it is not yet covered by the sentencing
guidelines. Ms. Laws reported that, in some cases, guidelines users in the field have incorrectly prepared guidelines for strangulation using the Class 6 felony of unlawful wounding. Staff have received numerous requests to add this offense to the guidelines.

According to FY2013 and FY2014 data from the Circuit Court Case Management System (CMS), there were 94 cases in which strangulation (§ 18.2-51.6) was the most serious offense at the time of sentencing. Using these data, as well as each offender’s criminal history, staff developed a proposal to incorporate this offense into the Assault guidelines.

Ms. Laws presented the proposed guidelines. On Section A, offenders whose most serious offense is strangulation will receive two points on the Primary Offense factor (one point for an attempted or conspired act). Additionally, staff recommend expanding an existing Section A factor that currently is only scored if the most serious offense is assault and battery against a family member. Offenders convicted of strangulation would receive points for Prior Felony Person Convictions/Adjudications in the same manner as offenders convicted of assault and battery against a family member. On Section B, staff recommends splitting the current factor for Additional Offenses such that offenders convicted of strangulation as the most serious offense will receive higher points for any additional offense convictions. Furthermore, staff recommends splitting the Prior Convictions/Adjudications factor on Section B and increasing the points scored for offenders convicted of strangulation. Finally, the staff recommends expanding two factors on Section B, currently only scored if the most serious offense is assault and battery against a family member, to include strangulation cases. These factors score Prior Incarcerations/Commitments and Prior Misdemeanor Convictions/Adjudications. These changes were developed based on the data available for strangulation cases. On Section C, offenders whose primary offense is strangulation will receive seven points for the Primary Offense factor if the offender’s prior record is classified as Other, 14 points if he has a Category II prior record, or 28 points if he has a Category I prior record.

Ms. Laws noted that only two years of data were available for analysis of this offense. She stated that sentencing in these cases could still be in flux, as judges become more accustomed to hearing strangulation cases. If sentencing patterns are still evolving, the proposed guidelines may not accurately reflect what sentencing patterns will eventually look like for this offense. Judge Kemler commented that some of the strangulation cases in Alexandria have been tried by a jury. Judge Moore stated that he has never had a strangulation case where there wasn’t an accompanying felony charge. After a brief discussion, Judge Kemler recommended deferring action on this proposal.

Judge Trumbo made a motion to defer action on this proposal to allow for further study. The motion was seconded. The Commission voted 11-0 in favor.

Other Analysis

Ms. Farrar-Owens reviewed other analysis performed by staff that did not result in specific proposals. She noted, however, the Commission could choose to act on the basis of the analysis if it chose to do so.

Based on a request received by staff, the guidelines for indecent liberties (§§ 18.2-370 and 18.2-370.1(A)) were examined. Compliance with the current guidelines for these offenses
is well below the overall compliance rate and, when judges depart, they are much more likely to sentence above the guidelines range than below it. In particular, Ms. Farrar-Owens noted that the rate at which the current guidelines recommend a prison sentence in these cases could be more closely aligned with the actual rate at which judges are sentencing offenders to prison. Staff explored the feasibility of adjusting the Section A Primary Offense scores and other factors to assign higher points for indecent liberties offenses, with the goal of improving compliance and producing more balanced mitigation and aggravation rates. While some scenarios appeared promising, Ms. Farrar-Owens suggested that changes in sentencing practices in indecent liberties cases may be ongoing. Thus, adjustments to the guidelines made based on the current data may not accurately reflect what sentencing patterns will eventually look like for these offenses.

Judge Trumbo asked if the staff would do a full analysis of the indecent liberties offenses during the coming year. Ms. Windmueller commented that she would like to see the same analysis the next year. Judge Bach directed staff to continue examining data on indecent liberties offenses and report back to the Commission in 2015.

III. Sentencing Guidelines Manual Sales and Paid Seminar Attendance

At its previous meeting (September 8, 2014) the Commission discussed the desirability and the feasibility of providing guidelines manuals and training to court-appointed attorneys free of charge. Currently, the Commission provides free manuals and training only to government employees, such as Commonwealth’s attorneys, probation officers and public defenders. The Commission charges private attorneys, including court-appointed attorneys, for manuals and training seminars. The Commission had asked staff to provide additional information at the April 2015 meeting.

Jody Fridley, Manager of the Training/Data Quality Unit, presented information regarding the amount of revenue generated by manual sales and training fees. He stated that prices are set in order to cover most, if not all, of the Commission’s cost to train users and print manuals annually.

Ms. Windmueller noted that the Commission has an outstanding training staff and curriculum and that the members of Virginia’s criminal defense bar find the educational programs offered by the Commission to be of great assistance. Ms. Windmueller pointed out that many private criminal defense attorneys take on court-appointed defense work and that some, especially young lawyers, struggle to earn a living. While the fees charged by the Commission to private defense attorneys are nominal and attendance at the classes qualifies for mandatory continuing legal education (MCLE) credit hours, she nonetheless felt that the Commission should strongly consider waiving the manual and training fees for members of the private bar that do court-appointed work. She mentioned that there is some recent precedent for the Supreme Court to waive fees for training seminars for defense attorneys. Specifically, she mentioned a full-day criminal defense attorney training seminar (Indigent Criminal Defense: Advanced Skills for the Experienced Practitioner) held in Richmond (with a remote video site), sponsored by the Virginia State Bar in conjunction with the Virginia Supreme Court, wherein attendance fees were waived. Ms. Windmueller closed by saying that the Commission should continue to charge private defense attorneys who do not take court-appointed work.
Mr. Fridley noted that one option for the Commission might be scholarship or grant money. At the previous meeting, Judge Alston had informed the Commission that some of the scholarship and grant money available through the Office of the Executive Secretary (OES) goes unused every year and the Commission should inquire about those funds. Ms. Farrar-Owens informed members that she had inquired about those funds and was informed by the OES Director of Training that those funds were available only for judges and court employees, and were available for private defense attorneys to attend the Commission’s guidelines training.

Judge Bach stated that the Commission operates on a tight budget and staff does a considerable amount of work to assist other agencies. Ms. Windmueller inquired if the Commission could bill other agencies for work the Commission performs. Judge Trumbo wondered if the staff could estimate the cost of assistance that we provide to other agencies. Judge Bach suggested that the Commission find a grant to cover the cost of the court-appointed attorneys training and manuals. Judge Yoffy asked if the staff had information regarding how much court-appointed attorneys make annually. Ms. Farrar-Owens responded that she did not have that information but she would request it from the OES. Judge Bach indicated that attorneys could apply for scholarships based on their annual salary. At the conclusion of the discussion, Judge Bach asked the staff to explore options for grants and scholarships and report back to the Commission at the April 2015 meeting.

IV. Sentencing Guidelines Automation Project

Mr. Fridley updated members as to the current status of the Commission’s automation project. He reported that the Supreme Court’s Department of Judicial Information Technology (DJIT) was making good progress in designing the online sentencing guidelines application, which would allow guidelines users to prepare, save, and submit guidelines worksheets in an automated fashion. Commission staff have been testing each component of the application as it is developed by DJIT. Mr. Fridley described the feature that would allow many data fields to be populated automatically with information from the Supreme Court’s Case Management System (CMS), saving preparers significant time. Mr. Fridley concluded by saying that pilot testing is ongoing in Norfolk. While the pilot phase continues, additional components of the application are being designed. Statewide implementation could begin in 2015. He reminded members that the application will have to be updated every year. There would be an ongoing maintenance cost for the automation project.

V. Reporting to the Child Protection Accountability System – Status Update

Mr. Fridley provided members with an update on the Commission’s reporting to Virginia’s Child Protection Accountability System. The Commission is required to submit information to the System for cases involving certain crimes, such as child abuse and neglect, kidnapping, and numerous sexually-related offenses. The Commission must report detailed information pertaining to each case including, but not limited to, the name of the sentencing judge, the sentence given, whether the sentence was within the
guidelines range or an upward or downward departure from the guidelines, and the
reasons given for the departure, if any.

Mr. Fridley presented a sample of the Commission’s most recent report based on FY2014
data. The FY2014 report will be completed and submitted to the Department of Social
Services (DSS) in December 2014. As a result of the legislation, for FY2014 cases, staff
began typing the exact wording of the judge’s departure reason(s). Thus, the FY2014
report will reflect the exact wording of the departure reason (instead of the general
category of the departure reason, as in years past). In addition, when a judge does not
provide a complete or legible departure reason, the staff will return the guidelines form to
the judge with a letter explaining the requirements of the legislation, thus providing an
opportunity for the judge to submit a complete departure reason for each case.

Mr. Fridley advised that each judge will receive a copy of his or her FY2014 report for
review before it is submitted to DSS. Judge Moore asked how a judge could correct an
error if he or she finds one in the report. Mr. Fridley said that a judge may call, email or
fax to submit the correct information and staff will update the report accordingly.

Judge Moore made a motion to approve sending the report to Circuit Court judges. The
motion was seconded. With no further discussion, the Commission voted 11-0 in favor.

VI. New Nonviolent Offender Risk Assessment Instruments – Status Update

Ms. Farrar-Owens provided an overview of the Commission’s risk assessment instrument
for nonviolent offenders. In 1994, as part of the reform legislation that abolished parole
and instituted truth-in-sentencing, the General Assembly directed the newly-created
Sentencing Commission to develop an empirically-based risk assessment instrument
predictive of a felon’s relative risk to public safety to determine appropriate candidates
for alternative sanctions, apply the instrument to non-violent felons recommended for
prison, and implement the instrument with a goal of placing 25% of these prison bound
felons in alternative sanctions. After the instrument was developed, pilot-tested, and
refined, the Commission recommended, and the General Assembly approved, statewide
implementation for July 1, 2002. In 2003, the General Assembly directed the
Commission to determine, with due regard for public safety, the feasibility of adjusting
the assessment instrument to recommend additional low-risk nonviolent offenders for
alternative punishment. The Commission recommended moving the threshold to 38
points, which would not result in a significant increase in the recidivism rate and would
recommend an additional 500 offenders per year for alternative punishment in lieu of
traditional incarceration. That recommendation was approved by the legislature and the
change became effective July 1, 2004.

Ms. Farrar-Owens then described the use of the risk assessment tool and how risk
assessment is integrated in the guidelines. The risk assessment worksheet is completed
for larceny, fraud 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
(defined in §17.1-803) are ineligible for risk assessment. When the risk assessment
instrument is completed, offenders scoring at or below the selected threshold are
recommended for sanctions other than traditional incarceration in prison or jail. If the judge complies with either the traditional incarceration recommendation of the guidelines or with the risk assessment recommendation for alternative punishment, he or she is considered in compliance with the guidelines. For offenders scoring over the selected threshold, the original recommendation for incarceration remains unchanged.

Because it had been a number of years since the nonviolent offender risk assessment instrument was last examined, the Commission, in 2010, directed staff to begin a new recidivism study to evaluate the current instrument and potentially update the instrument based on more recent felony cases. Following the completion of the study, the Commission approved the revised risk assessment tools (one for fraud/larceny offenders and one for drug offenders). Ms. Farrar-Owens explained that the 2012 Annual Report included a recommendation to implement the revised risk instruments, which was accepted by the General Assembly. The new instruments became effective on July 1, 2013.

Ms. Farrar-Owens summarized the Commission’s most recent study. As with previous studies, recidivism was measured as a new arrest within three years of release that ultimately resulted in conviction. The results indicated that, overall, 27.1% of offenders in the study sample recidivated during the follow-up period, with larceny offenders recidivating at the highest rates. When developing the new risk assessment tools, Commission staff attempted to address concerns expressed by users in the field. Guidelines users reported that information for two factors on the previous risk assessment instrument (employment history and marital status) was not always available. It has always been the Commission’s policy that the guidelines preparer err on behalf of the defendant if a particular piece of information is unknown. As a result, some offenders recommended for an alternative sanction would not have been recommended had unemployment and marital status been known and scored accurately. Ms. Farrar-Owens displayed the new risk assessment tools, which exclude employment and marital factors. The Commission’s study revealed that predictive accuracy was slightly improved using the two newly-developed instruments.

Ms. Farrar-Owens stated that staff had been monitoring the new instruments since they became effective on July 1, 2013. Preliminary data for FY2014 suggest that the new instruments are recommending a slightly lower percentage of nonviolent offenders for alternative sanctions than the previous instrument (48% recommended for an alternative in FY2014 compared to 53% recommended for an alternative in FY2013). This could be explained by more accurate scoring of the risk assessment instruments (because employment and marital status are no longer included on the instrument). In addition, comparison of data from before and after implementation of the new risk tools revealed that certain characteristics in the felon population appeared to have shifted. For example, the percentage of fraud offenders who were legally restrained at the time of the new offense had increased over time, while prior record offenses among certain drug offenders were resulting in higher scores on the risk assessment tool. Ms. Farrar-Owens explained that these shifts in the population appear to be affecting risk assessment outcomes, such that a lower percentage of offenders were being recommended for alternatives. Ms. Farrar-Owens concluded by saying that the staff would continue to monitor the risk assessment instruments throughout FY2015.
VII. Miscellaneous Items

Before concluding the agenda, Judge Bach asked Ms. Farrar-Owens to discuss any miscellaneous items.

Ms. Farrar-Owens announced that a northern Virginia law firm had submitted a Freedom of Information Act (FOIA) request for guidelines compliance and departure rates for all judges in Fairfax and Arlington. Per FOIA requirements, staff had prepared the information. A letter was sent to the Fairfax and Arlington judges making them aware of the request. The letter also provided each judge with information regarding his or her individual compliance and departure rates by guidelines offense group.

Ms. Farrar-Owens reminded members that the Commission’s Annual Report was due to the General Assembly on December 1, 2014. Staff had already begun preparing a draft of the report. Ms. Farrar-Owens advised that the report draft would be sent to all members for their review and comment prior to its submission to the General Assembly.

Ms. Farrar-Owens announced the tentative dates for the Commission’s 2015 meetings. After some discussion, meetings were set for April 13, June 8, September 14, and November 4. (Note: The September 14 meeting date was subsequently changed to September 15).

Judge Bach recognized Mr. Harvey Bryant and Ms. Trible and noted that this meeting would be their last with the Commission. Judge Bach thanked both of them for their commitment and service to the Commission. He also acknowledged the service of Ms. Garst, who was not able to attend the meeting. Judge Bach informed members that Chief Justice Kinser had re-appointed Judge Trumbo and Judge Sharp for another term on the Commission.

With no further business on the agenda, the Commission adjourned at 12:00.