REVISION OF THE RECIDIVIST STATUTES AND RELATED MATTERS

REPORT OF THE

VIRGINIA ADVISORY LEGISLATIVE COUNCIL

To

THE GOVERNOR

And

THE GENERAL ASSEMBLY OF VIRGINIA

COMMONWEALTH OF VIRGINIA
Department of Purchases and Supply
Richmond
1967

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RECIDIVIST STATUTES

REPORT OF THE COMMITTEE TO THE VIRGINIA ADVISORY LEGISLATIVE COUNCIL

Richmond, Virginia

To:

HONORABLE MILLS E. GODWIN, JR., *Governor of Virginia*
and
THE GENERAL ASSEMBLY OF VIRGINIA

In 1964, the Virginia Advisory Legislative Council was requested by Governor Albertis S. Harrison, Jr., among other things, to consider "a revision of the Virginia Recidivist Statute." The Council in its report to the Governor and General Assembly in 1966 stated:

"In regard to the recidivist statutes, further study should be made of the system of sentencing in the State and of other relevant matters to determine whether the recidivist statutes should be repealed or further amended. We recommend that a resolution be presented to the 1966 Session of the General Assembly to continue the study of the problems of fixing punishment in criminal cases and of post-conviction proceedings generally, with the thought of possible changes in dealing with habitual criminals. This is a very involved matter and all matters relating to these questions should be included in this study."

As a result, the 1966 General Assembly passed Senate Joint Resolution No. 13, as follows:

SENATE JOINT RESOLUTION NO. 13

Directing the Virginia Advisory Legislative Council to continue its study of the possible revision of the recidivist statutes and related matters.

Whereas, at the request of the Governor, the Virginia Advisory Legislative Council in nineteen hundred sixty-four undertook a study of the establishment of a public defender system for indigent persons charged with felonies and of related matters, among which was the possible revision of the Virginia recidivist statues; and

Whereas, the Council in considering changes in the recidivist statutes found that other questions were involved including the method of fixing punishment in felony cases; and

Whereas, the Council found that such questions were so basic that they were worthy of a separate study; now, therefore, be it

Resolved by the Senate, the House of Delegates concurring, That the Virginia Advisory Legislative Council is directed to continue its study of dealing with recidivists and habitual criminals, the feasibility of placing authority to sentence convicted felons in the hands of judges and removing such authority from the jury, and generally to study all problems of post-conviction proceedings and related matters. All agencies of the State shall assist the Council in its study. The Council shall complete its study and make its report to the Governor and the General Assembly not later than September one, nineteen hundred sixty-seven.

The Council selected Garnett S. Moore, Pulaski, member of the House of Delegates and of the Council, to be Chairman of the Committee to continue this study and report to the Council. Mr. Moore selected the following to serve with him on this Committee: Russell M. Carneal, member of the House of Delegates and a practicing attorney, Williamsburg; Joseph Curtis, Dean, Marshall-Wythe School of Law, College of William and Mary, Williamsburg; Ernest H. Dervishian, a practicing attorney, Richmond; Robert C. Fitzgerald, member of the Senate and a practicing attorney, Fairfax; J. Segar Gravatt, county judge and a practicing attorney, Blackstone; William J. Hassan, Commonwealth's Attorney, Arlington; E. W. Hening, Jr., Judge, Tenth Judicial Circuit, Richmond; Sterling Hutcheson, retired Judge of the United States District Court, Boydton; Ligon L. Jones, Judge, Third Judicial Circuit, Hopewell; Robert C. Nusbaum, a practicing attorney, Norfolk; A. L. Philpott, member of the House of Delegates and a practicing attorney, Bassett; and C. Stuart Wheatley, a practicing attorney, Danville.

At the organizational meeting A. L. Philpott was elected Vice-Chairman. G. M. Lapsley and Frank R. Dunham served as Secretary and Recording Secretary, respectively, to the Committee.

The Committee made a thorough study of the recidivist statute and considered many possible amendments. The most frequently made suggestion was to repeal the present recidivist statute and make sentencing of convicted felons a sole function of the trial judge. This was thoroughly explored, and to gather as much information as possible on the entire subject, public hearings were held in Roanoke, Alexandria and Norfolk. At these meetings, members of the judiciary and of the bar were present and expressed their views.

After a thorough study of the matters referred to it, the Committee filed an unanimous Report with the Council. The Council, after careful consideration of this Report, now presents its findings and makes the following recommendations.

RECOMMENDATIONS

1. That jury sentencing in felony cases tried by juries be retained.

2. That the recidivist statute be amended to provide as follows:

   (a) The judge of the trial court of the latest felony conviction where a penitentiary sentence is imposed (whether that case was tried by the judge or a jury) be authorized to impose an additional sentence (after sentence has been imposed for the latest felony) on a convicted felon who has a past record of felony conviction and confinement.

   (b) Such judge be authorized to impose additional time in the penitentiary, in his discretion, up to 3 years for the second, 5 years for the third, 10 years for the fourth and life for the fifth felony conviction. This additional sentence would be indeterminate in the same manner as other sentences under Recommendation 3.

   (c) A probation officer's report be required before any person is tried on a felony charge. If the person is convicted and receives a penitentiary sentence and if there is a record of past felony conviction and penitentiary confinement, the Commonwealth's Attorney should move the trial court to impose an additional sentence therefor, after adequate notice has been given the defense counsel or the defendant advising that the court will hear the question of additional punishment. The probation officer's report is to be kept on file, be available to counsel and become a part of the trial record.

3. That in sentencing by judges or juries, the indeterminate sentence be adopted whereby the penitentiary sentence imposed will be within the maximum set by statute, with no minimum sentence. Release on parole except in life sentence or a death sentence will be at the discretion of the Probation and Parole Board.

4. That the facilities and personnel of the State Parole Board be expanded to meet the increased need occasioned by the operation of the indeterminate sentence.

HISTORY OF THE RECIDIVIST STATUTE

Virginia, as have many other states, has meted out additional punishment to habitual criminals for almost two hundred years. The first habitual criminal statute was enacted in 1796 and read as follows:

> If any person convicted of any crime which now is capital, or a felony of death without benefit of clergy, shall commit any such offense a second time, and be thereof legally convicted, he or she shall be sentenced to undergo an imprisonment in said gaol and penitentiary house, at hard labor, during life, and shall be confined in the said solitary cells at such times and in such manner as the inspectors shall direct....

Throughout the years, various amendments to this statute have been made but the purpose remains to give additional time to criminals who do not seem to profit from or be rehabilitated after one mistake. In 1966, the Virginia General Assembly again amended the recidivist statute and presently this reads as follows:

> § 53-296.—When a person convicted of an offense, and sentenced to confinement therefor in the penitentiary, is received therein, if it shall come to the knowledge of the Director of the Department of Welfare and Institutions that he has been sentenced to a like punishment in the United States prior to the sentence he is then serving, the Director of the Department of Welfare and Institutions shall give information thereof without delay to the Circuit Court of the city of Richmond. Such court shall cause the convict to be brought before it, to be tried upon an information filed, alleging the existence of records of prior convictions and the identity of the prisoner with the person named in each. The prisoner may deny the existence of any such records, or that he is the same person named therein, or both. Either party may, for good cause shown, have a continuance of the case for such reasonable time as may be fixed by the court. The existence of such records, if denied by the prisoner, shall be first determined by the court, and if it be found by the court that such records exist, and the prisoner says that he is not the same person mentioned in such records, or remains silent, his plea, or the fact of his silence, shall be entered of record, and a jury shall be impaneled to inquire whether the convict is the same person mentioned in the several records. If they find that he is not the same person, he shall be remanded to the penitentiary; but if they find that he is the same person, or if he acknowledge in open court after being duly cautioned, that he is the same person, he may be sentenced to be confined in the penitentiary for such additional time as the court trying the case may deem proper. This section, however, shall not apply to successive convictions of petit larceny.
>
> If the Circuit Court of the city of Richmond cannot, on the evidence available, make a determination of the convict's allegation

of illegality of his prior conviction by reason of unrecorded matters of fact relative to his prior conviction, the Circuit Court of the city of Richmond may certify such question for hearing and determination to the court of said conviction which court shall conduct a hearing and make a finding of fact and determination of such unrecorded matters of fact, sending a certified copy of its order to the Circuit Court of the city of Richmond.

The words "recidivist" and "recidivism" are not often used in everyday conversation and to the average layman perhaps have no stereotyped meaning. In Webster's New Collegiate Dictionary (7th edition, 1963) the following definitions appear:

"recidivist"—One who relapses; specif: an habitual criminal.

"recidivism"—A tendency to relapse into a previous condition or mode of behavior.

Adopting the above definition of a recidivist, Virginia has deemed it necessary to give additional penitentiary time to persons who are habitual criminals. The Virginia Supreme Court of Appeals in remarking upon the State's recidivist statute in *Tyson vs. Hening* (1964) 205 Va. 389 said:

"It is not a 'crime to be a multiple offender' nor is it an independent offense, but rather a status under which the penalty is enhanced." ..... Recidivist statutes do not involve 'an accusation of a crime' nor do they 'create a separate offense'," .....

"The purpose of § 53-296 and prior recidivist statutes is to discourage repetition of criminal acts by individuals against the peace and dignity of the Commonwealth. 'It is a stiffened penalty for the latest crime, which is considered to be an aggravated offense because it is a repetitive one.' "

This shows the type of person to be reached by the recidivist statute and the purpose for which it was enacted. The next question that comes to mind is why is it necessary to treat habitual offenders differently from other criminals and how are they treated. To find the answer to these questions a look at the purpose and mechanics of the sentencing process in Virginia is helpful.

A convicted criminal receives a sentence for two reasons: (1) in order to exact a penalty for the act he has committed which has harmed another individual and thus the State. Punishment is for the purpose of making him conscious of his wrongdoing and is an attempt to impress upon him the gravity of the act he has committed against society. Ancillary to this is the effect one person's punishment will have to deter others from such acts and; (2) to rehabilitate and redirect the efforts of convicted felons so as to make them more productive and law-abiding upon release.

Today, a great amount of study is being conducted to ascertain what type of individual commits crimes, i.e., whether he is underintelligent, undereducated, underclothed, underfed, or even underhoused. National attention presently is focused on the ever increasing crime rate and the causes thereof. The federal government, as well as states and localities, have spent many dollars in an attempt to find the reasons so many people resort to lives of crime.

For one person to mete out punishment to another for an act committed on a third person is a heart-rending experience. Yet, this is the function of a jury in a criminal case.

In Virginia, in criminal trials, persons selected for a particular jury not only determine the guilt or innocence of the accused, but prescribe the length of sentence he is to serve. § 19.1-291 of the Code sets forth this duty in the following language:

> § 19.1-291.—The punishment in all criminal cases tried by a jury shall be ascertained by the jury trying the same within the limits prescribed by law.

How does a jury go about determining the length of a sentence? Because jury deliberations are of necessity conducted in utmost secrecy no precise answer can be given. It might be said the jury's heart, conscience and experience ultimately dictate the length of a sentence. Under Virginia law the jury receives no information on the defendant's background. They hear the facts concerning a particular case and, if the defendant chooses to testify, they observe him and hear his side of the case. If the defendant does not testify, they are denied even this observation. The court instructs them concerning the law of the case, and they retire to determine the guilt or innocence of the accused. If they believe him guilty beyond a reasonable doubt, they must also arrive at a maximum number of years he is to serve in the penitentiary. Usually, a jury has no information of where the defendant lives, his age, his family status, his prior conduct, his education or any of the data showing his background.

On the other hand, if the defendant waives a jury, and under § 19.1-192 the judge hears the evidence and determines his guilt or innocence, this judge may have a presentence report before imposing sentence. This report is prepared by the probation authorities and shows in some detail the background of the person, i. e., his education, marital status, his employment record, whether he has been in trouble before, how many times, and a variety of other information. The authority for such a report appears in § 53-278.1 of the Code and is as follows:

> § 53-278.1.—When a person is tried upon a felony charge for which a sentence of death or confinement for a period of over ten years may be imposed and pleads guilty, or upon a plea of not guilty is tried by the court without a jury as provided by law, and is adjudged guilty of such charge, the court may, or on the motion of the defendant shall, before fixing punishment or imposing sentence direct a probation officer of such court to thoroughly investigate and report upon the history of the accused and any and all other relevant facts, to the end that the court may be fully advised as to the appropriate and just sentence to be imposed. The probation officer shall present his report in open court in the presence of the accused who shall be advised of the contents of the same and be given the right to cross-examine the investigating officer as to any matter contained therein and to present any additional facts bearing upon the matter which he may desire to present. The report of the investigating officer shall be filed as a part of the record in the case.

Thus, a judge who could be called an expert at sentencing because of his education, training and experience may have available to him a complete history of the man he is sentencing and can take it into account in deciding the length of sentence he imposes. This is a picture of the sentencing procedure in Virginia.

A person who has been convicted of a felony prior to the present, whether his present term is prescribed by a jury with little or no information concerning his prior conduct or by a judge with a wealth of information on his prior conduct, he must receive additional time in another hearing prescribed in § 53-296 of the Code.

Under the provisions of this Section and judicial interpretations thereof, the prisoner is brought before the Circuit Court of the city of Richmond, and after a hearing, is given additional penitentiary time. The Supreme Court of Appeals summarizes it by saying such a prisoner has "a status under which the penalty is enhanced". *Tyson vs. Hening* (1964) 205 Va. 389.

It is obvious that crime must be deterred and repeated offenders prevented or at least deterred from continuous lives of crime. Yet the method of providing this deterrence would appear awkward, expensive and in some instances unfair to the prisoner. An example of the awkwardness of the procedure is that judges of the Circuit Court of the city of Richmond must examine former records of crime and attempt to read the mind of the judge or jury to ascertain the seriousness of the crime, the sentence imposed and many other factors. As a result, in many cases, time given recidivists is often suspended. An example of the expense is that presently 36 court days of the Circuit Court of the city of Richmond are consumed with hearings involving convicts, the majority of which are recidivists. The travel cost of transporting criminals from camps outside to Richmond is also involved. An example of the unfairness of the application of the statute is aptly pointed out in *48 Virginia Law Review* 597 at page 620.

> "Another constitutional question stemming from the present treatment of the Virginia recidivist law concerns the equal protection clause of the Fourteenth Amendment. It was the gravamen of a case recently before the Virginia Supreme Court of Appeals that the recidivist law is unconstitutionally applied because only prior Virginia convictions are taken into account. The Virginia Court rejected petitioner's contention, regarding his claim as a charge of laxity on the part of enforcement officers. The Court stated that "mere laxity, no matter how long continued, is not and cannot be held to be a denial of the equal protection of the law. . . . Where discrimination is found, the test seems to be whether it is intentional and according to plan. The decision in *Sims* v. *Cunningham* indicates that the majority of the Virginia Supreme Court of Appeals felt that there was no such plan in the application of the Virginia statute and that the failure to prosecute convicts for prior foreign convictions was the result of laxity of the officials concerned. This in spite of the fact that the Virginia statute has apparently been so administered for well over one hundred years. At the least, such action would appear to be planned laxity."

From the foregoing and from other information received in this study, we believe some alteration in the parole procedure of the State is necessary.

1. We do not believe jury sentencing should be abandoned. Under Virginia law, the defendant has the option of being tried and sentenced by a jury or by a judge. This is a matter of his choice and should not be taken away from him. Actually, between 70% and 80% of all criminal cases are heard by judges alone and apparently persons charged believe they can gain some advantage thereby. But the 20% to 30% who prefer a jury trial have this right guaranteed to them by both the federal and State constitution and elect to exercise it. The jury system has always worked well in Virginia and we are proud of it. It probably bespeaks the momentary pulse of a community better than any other agency of government. Crimes are committed against people and people who can draw on their own experience should not be deprived of imposing punishment on persons who commit crimes.

2. Carrying out the theme that the person or arm of the State closest to the momentary pulse of the community should pronounce sentence, we believe certain amendments in sentencing recidivists should be made. As the judge who presides over the trial of persons convicted of a felony hears all the facts concerning a criminal, we believe that he should impose the extra sentence on the recidivist immediately following the trial at which he received his latest term. The fact of prior convictions should be called to the judge's attention by the Commonwealth's Attorney who handles the latest prosecution. He shall order a probation presentence report from the probation officer of the court in which the felony charge is to be heard in every case. If such a report discloses prior convictions and penitentiary sentence, the Commonwealth's Attorney should call this fact to the judge's attention at the conclusion of the latest felony trial resulting in conviction. After notice to the defendant, this judge should impose additional penitentiary time. Not only will the time and expense of transporting criminals from one place to another and that of the judges of the Circuit Court of the city of Richmond be saved, but the whole matter can be disposed of in the atmosphere and at the trial of the latest conviction. This will be fairer to the defendant and a far more expeditious method of disposing of recidivists. We believe that maximum limits should be placed upon the sentences that can be given recidivists. As a result we propose that a maximum term of three years be imposed for a second conviction; five years for a third; ten years for a fourth; and life for a fifth. It is to be noted that these are merely the maximum and all such sentences even though given by a judge shall be for an indeterminate term. The Parole Board can release a prisoner at any time they believe him to be qualified for parole but the fact that he is a second, third, or fourth offender will cause them to take greater care in ascertaining his complete rehabilitation before they release him.

It is to be noted that the provisions permitting the Director of the Department of Welfare and Institutions to bring the fact of prior felony convictions to the attention of the Circuit Court of the city of Richmond still remain. The purpose of this is that the State Central Criminal Records Exchange was created in 1966 and at the present time records of all prior convictions probably have not been completed and are not available. If the Director has such information when the convict enters the penitentiary, he can bring this matter to the attention of the same Circuit Court that has been handling the matter under present law. Further, should the Director of the Department of Welfare and Institutions have information concerning offenses committed outside the State of Virginia, he can bring these to the attention of the Circuit Court. The maximum sentences set forth for the trial judges shall be applicable to the Circuit Court of the city of Richmond.

3. To further update the sentencing procedure in the State, we recommend the adoption of the indeterminate sentence in all felonies including recidivists. The only exception would be in cases where life imprisonment or the death penalty was imposed. In the latter cases, the death penalty would be carried out and the convict executed. In the case of a life sentence, the convict must serve fifteen consecutive years before being eligible for parole and any prisoner sentenced to two or more life sentences shall not become eligible for parole.

In all other cases, it was believed best to leave determination of the time a convict should be confined to the discretion of the Probation and Parole Board. There are two principal reasons for this; first, the present system of parole is not sufficiently deterring recurrent crime and secondly, as stated earlier in this report one of the purposes of imposing punish-

ment is rehabilitation of the prisoner. The Probation and Parole Board is in the best position to observe the prisoner and determine when a prisoner has learned his lesson and is capable of becoming a useful citizen.

Looking at the first of the above stated reasons, the problem of recidivists is becoming more acute. In *Crime in the United States,* by John Edgar Hoover, Director of the Federal Bureau of Investigation, released August 10th, 1967 we find the following:

> "In January, 1963, the FBI initiated a study of criminal careers. At the end of calendar year 1966, 160,310 criminal histories of individual offenders had been incorporated into the program.
>
> Table B illustrates the profiles of known repeaters by type of crime. The table consists of repeaters who were arrested in calendar year 1966. It provides insight concerning the degree to which repeaters contribute to crime counts year in and year out.
>
> These offenders included in Table B have been arrested on at least two occasions and were selected for inclusion in this study by type of crime based on their last charge in 1966. The average age of these offenders ranged from 26 years for the auto thief to 45 years for the gambler. Considering the auto thief who repeated in that offense, his average age was 24 at the time of his first arrest for auto theft while the average age at first arrest for the gambler who repeated was 40 years of age. The extreme ranges of age at first arrest for any offense were the gambler at age 30 and the burglar and rapist at 19 years of age. The average age at first arrest is influenced upward since fingerprint cards are not submitted with any degree of consistency on juvenile offenders.

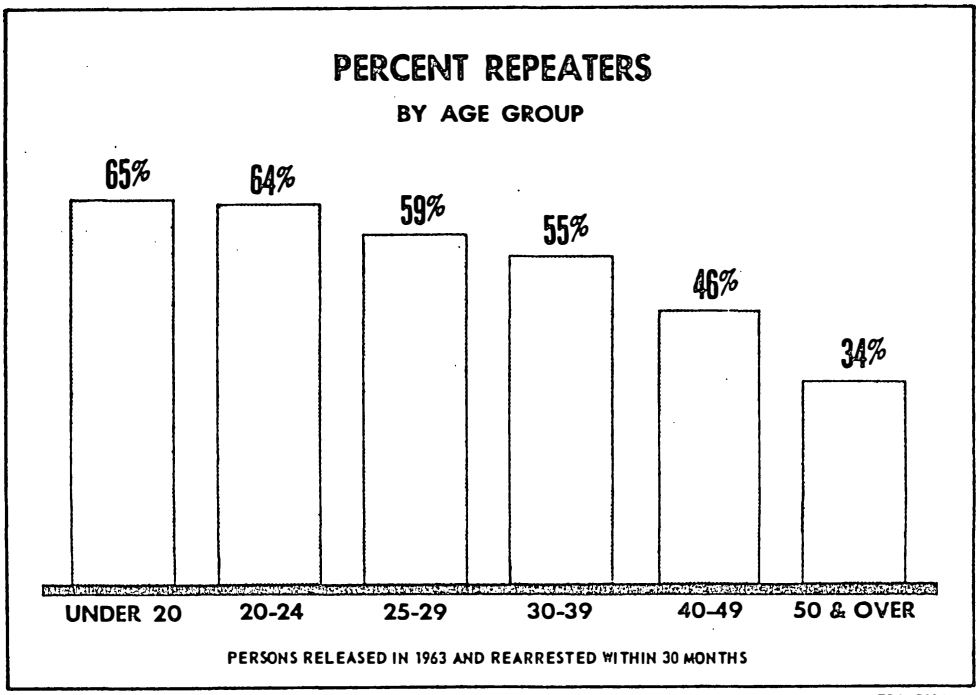
TABLE B.

Profile of Known Repeaters Arrested in 1966 by Type of Crime

	Murder	Felonious assault	Robbery	Burglary	Auto theft	Rape	Sex offenses	Narcotics	Gambling	Bogus checks
Total number of subjects	337	1,500	2,013	3,439	5,264	319	376	3,729	1,234	3,598
Average age 1966	32	31	29	28	26	27	33	31	45	33
Average age first arrest for specific charge	31	29	26	24	24	26	31	27	40	29
Average age at first arrest	22	22	20	19	20	19	23	21	30	23
Average criminal career (yrs.)	10	9	9	9	6	7	10	10	15	10
Average arrests during criminal career	6	7	8	9	6	6	7	8	6	8
Crime Index arrests	3	4	4	5	3	3	2	2	1	2
Frequency of arrest on specific charge (percent):										
One	94	74	62	44	61	81	76	43	42	52
Two	5	17	26	26	22	17	13	21	30	21
Three or more	....	9	12	30	18	3	11	37	37	27
Frequency of leniency action on any charge (percent):										
One	27	29	30	34	28	32	30	28	23	32
Two	7	8	13	17	10	11	13	11	7	14
Three or more	4	6	8	9	7	5	8	9	4	11
Total (%)	38	43	51	60	45	48	51	48	34	57
Leniency on specific charge (percent)	3	7	11	17	25	5	7	25	11	25
Average arrests after first leniency	5	6	7	7	5	5	6	7	6	6
Mobility (percent):										
Arrests in 1 State	35	37	37	30	31	37	35	54	68	32
Two States	40	36	29	32	33	35	34	29	21	26
Three or more States	25	27	34	38	36	28	31	18	11	42

A further examination of persons released in 1963 was made by age group and appears in Chart 19.

CHART 19.



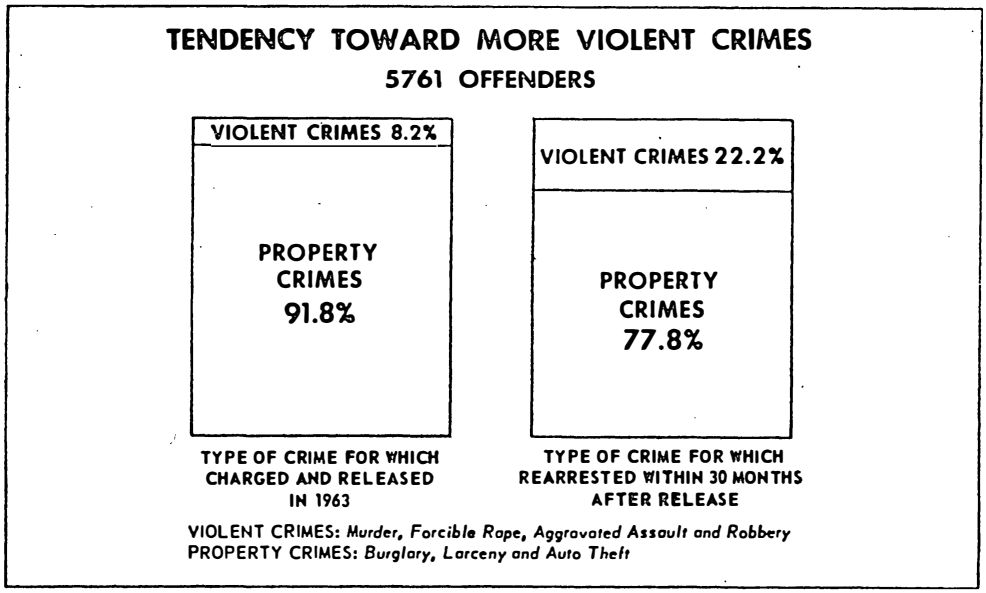
FBI CHART

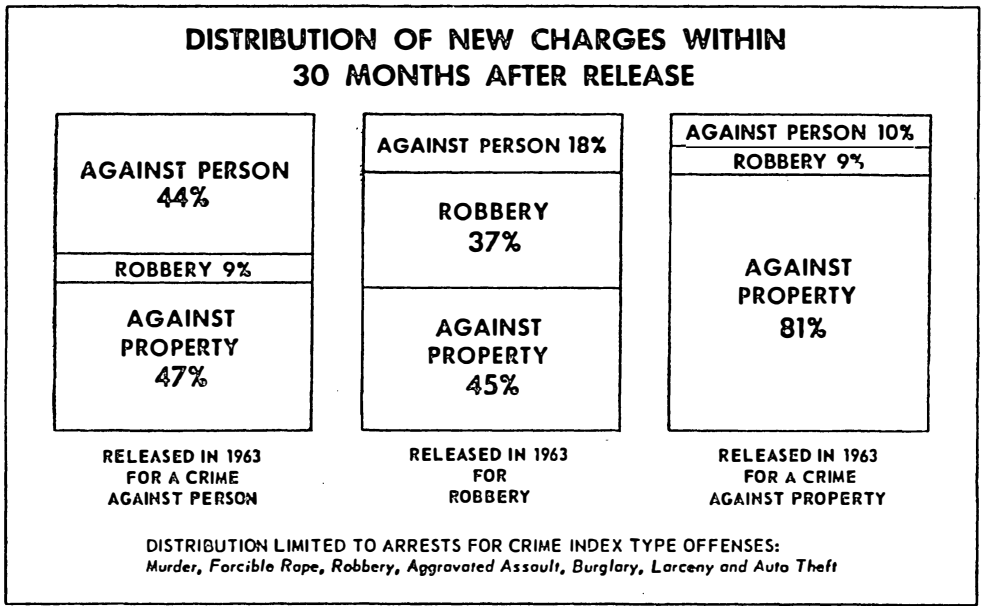
During 1963, 5,761 persons were released for various crimes coming under the general categories of (1) crimes against the person (murder, forcible rape, and aggravated assault), (2) crimes against property (burglary, larceny, and auto theft), and (3) robbery. These persons, during the next 30 months, accumulated 13,180 new charges or an average of over 2 new arrests per person.

The figures were broken down to determine the existence of any trends regarding the type of crime committed by known repeaters. Of those persons released in 1963, 258 were rearrested after a conviction for a crime against the person, 5,291 for committing a crime against property, and 212 for committing robbery offenses. This follow-up, 30 months later, indicates the tendency toward commission of more violent crimes by repeaters. Chart 23 depicts this trend by percentage distribution. Of all new arrests within the 30 months period for Crime Index type offenses, crimes against property amounted to 4,116, while robbery increased to 558 and crimes against the person, to 619.

Chart 23 illustrates the distribution of new Crime Index charges for those persons released in 1963 and rearrested. These charts indicate that the large proportion of criminal repeating is in the property crimes of burglary, larceny, and auto theft. However, 19 percent of the rearrests for the property crime offenders were for the more serious crimes of violence. Primarily the result of this escalation, violent crime offenses were more than double on rearrest than in 1963.

Chart 23





FBI CHART

A comparable breakdown on cases in Virginia is not presently available. But the conclusion of Mr. Hoover's report presents a good general overall picture of recidivists:

The Careers in Crime data documents the existence of the persistent or hard-core offender and the substantial extent to which he contributes to the crime problem. The tendency of this offender to repeat in crimes of more serious nature, coupled with a high degree of mobility, further complicates the problem. It is apparent that rehabilitation methods

have not been very successful with this type of criminal behavior. It is obvious that the criminal justice system needs to re-examine its methods if criminal careers are to be aborted.

Police arrest supported by the submission of a fingerprint card was used as the basis of recidivism in this analysis. Conviction and imprisonment data will be used in future studies. The delay between police formal charge and final court disposition prohibited the use of conviction data in this analysis.

The accompanying tables provide added insight into the problems of repeaters. The figures are based upon a 30 month follow-up after the offenders were released in 1963.

TABLE F.

30 Month Follow-up by Age and by Specific Charge on Which Released in 1963

OFFENSE	Under 20	20-24	25-29	30-39	40-49	50 and over	Total all ages
Assault:							
With a subsequent charge	18	30	21	25	10	4	108
With no subsequent charge	8	11	11	15	7	5	57
Total	26	41	32	40	17	9	165
Percent with a subsequent charge	69.2	73.2	65.6	62.5	58.8	.....	65.5
Burglary:							
With a subsequent charge	67	63	49	39	15	6	239
With no subsequent charge	30	23	16	21	12	4	106
Total	97	86	65	60	27	10	345
Percent with a subsequent charge	69.1	73.3	75.4	65.0	55.6	.....	69.3
Larceny:							
With a subsequent charge	122	303	175	275	111	40	1,026
With no subsequent charge	103	215	143	233	161	56	911
Total	225	518	318	508	272	96	1,937
Percent with a subsequent charge	54.2	58.5	55.0	54.1	40.8	41.7	53.0
Auto Theft:							
With a subsequent charge	673	1,004	408	426	233	61	2,805
With no subsequent charge	260	307	137	138	64	21	927
Total	933	1,311	545	564	297	82	3,732
Percent with a subsequent charge	72.1	76.6	74.9	75.5	78.5	74.4	75.2
Robbery:							
With a subsequent charge	24	42	27	58	21	8	180
With no subsequent charge	12	27	18	52	25	22	156
Total	36	69	45	110	46	30	336
Percent with a subsequent charge	66.7	60.9	60.0	52.7	45.7	26.7	53.6
Narcotics:							
With a subsequent charge	21	130	182	316	86	28	763
With no subsequent charge	6	47	74	211	124	69	531
Total	27	177	256	527	210	97	1,294
Percent with a subsequent charge	77.8	73.4	71.1	60.0	41.0	28.9	59.0
Gambling:							
With a subsequent charge	.....	6	4	28	29	25	92
With no subsequent charge	1	4	12	38	72	80	207
Total	1	10	16	66	101	105	299
Percent with a subsequent charge	.....	.....	.....	42.4	28.7	23.8	30.8
Forgery:							
With a subsequent charge	38	215	227	354	184	59	1,077
With no subsequent charge	30	142	124	213	140	59	708
Total	68	357	351	567	324	118	1,785
Percent with a subsequent charge	55.9	60.2	64.7	62.4	56.8	50.0	60.3
Liquor Law Violations:							
With a subsequent charge	36	101	138	251	184	140	850
With no subsequent charge	67	169	179	354	328	336	1,433
Total	103	270	317	605	512	476	2,283
Percent with a subsequent charge	35.0	37.4	43.5	41.5	35.9	29.4	37.2
Fraud:							
With a subsequent charge	3	25	37	87	59	12	223
With no subsequent charge	1	22	54	131	98	68	374
Total	4	47	91	218	157	80	597
Percent with a subsequent charge	.....	53.2	40.7	39.9	37.6	15.0	37.4

Thus, we come to the second reason for suggesting adoption of the indeterminate sentence which is that a prisoner should be released only when he has become rehabilitated both mentally to a point of realizing the gravity of his offense and physically to a point where he can return to society and obtain sufficient income to support himself and family. These points are illustrated in the following statements presented by Mr. W. K. Cunningham, Jr., Director, Corrections Division of the Department of Welfare and Institutions and by Mr. Charles P. Chew, Director of the Probation and Parole Board.

Mr. Cunningham stated:

> "It is difficult to teach prisoners respect for law when they compare sentences with each other and find widely different sentences being imposed for very similar offenses. In this connection consideration might be given to recommending the establishment of indeterminate sentencing in Virginia. Such a law, if written so as to provide maximum flexibility and participation of prison authorities on the decision as to when a prisoner is ready for release, and if it provided for post release supervision, could be of help in motivating prisoners to rehabilitate themselves."

Mr. Chew said:

> "I believe there have been some other studies that favored indeterminate sentencing. Such a plan is no panacea. The concept of indeterminate sentencing is favored if the minimum sentence is short enough to allow considerable flexibility between minimum and maximum. Unless this is done the indeterminate sentencing may be more inflexible than the present fixed sentence with ¼ parole eligibility. Considerable sentiment is developing toward a procedure that fixed a maximum sentence and imposes no minimum. This affords the greatest opportunity to accomplish supervised release at the optimum point in terms of community protection and the individual's improvement and readiness for community living."

We agree that a close check should be kept on all prisoners both during the time that they are in the penitentiary and during their parole. The Probation and Parole Board is the agency with the most facilities and proficiency in this field. Thus, we believe the adoption of the indeterminate sentence with no minimum is a step in the right direction. The prisoner must demonstrate his readiness for release to those who know him best. If he shows determination, he will be released sooner, no matter how long a term he receives. This we hope will be a step in the right direction not only for prisoners but for prison officials.

In passing, it has been pointed out that judges seldom make use of §§ 19.1-299 and 53-272 which provide that in certain instances sentences given prisoners can be suspended in whole or in part by the judge even after a jury has rendered them and the prisoner put on probation. Judges have said that they are reluctant to interfere with a jury's verdict. However, these sections were enacted to accomplish this purpose. If for any reason a judge in good conscience believes a prisoner's sentence should be suspended, we think he should interpose his judgment and make use of the statute. Since the Commonwealth's Attorney will have a presentence report in each case he prosecutes, we urge him to bring the contents of such report to the judge's attention so that if probation is feasible or the sentence too long or harsh, the matter can be aired immediately. We believe juries do an excellent job, but in some instances, because of the

nature of the crime committed or of other factors, juries are sometimes too harsh and injustice results. Such a case is where two persons commit a felony, are tried separately and receive different sentence. The trial judge if he believes justice demands, can immediately right this wrong. It is the function of judges to administer justice and we believe the ends of justice will be better served if more use were made of §§ 19.1-299 and 53-272.

4. To carry out these additional duties the Probation and Parole Board will need extra personnel and extra funds.

Mr. Charles P. Chew, Director, Probation and Parole Board, submitted the following figures as an estimate of the additional cost of administering such a system of sentencing:

> There seem little doubt but that members of the Probation and Parole Board would be more involved "time-wise" than under a statutory minimum. This might eventually entail the need to increase the number of Board members. An alternative to this might be the employment of one or more "hearing officers" to whom could be delegated some of the relatively routine parole interviews with inmates. In the absence of a statutory minimum for first parole consideration some general policy would need to be established. It is suggested that such a policy might be as follows:
>
> 1. No first parole consideration date would be longer than the minimum now set by statute. This would mean that the minimum parole consideration date as now set would become the *latest* date for first parole consideration.
> 2. Permit earlier parole consideration than the minimum by unanimous consent of the Board.
> 3. Permit upward revision by majority action of the Board. Such would occur in cases of new offenses, escapes, serious institutional infractions, etc.
>
> It is our view that the minimum anticipated need to put this into effect would be the employment of a case analyst at a starting salary range of $8,040 and two assistants at beginning salary range of $7,680. Two additional clerk-stenographer B positions at beginning salaries of $3,936 would also be required. This, then, would suggest beginning salaries for the first year totaling some $31,272—exclusive of merit increases. Obviously there would be costs in addition involving travel, communication, equipment, supplies, etc.

We therefore, recommend an additional appropriation of $31,272 for the purpose outlined by Mr. Chew.

CONCLUSION

We trust that the adoption of the foregoing recommendations will lead to improvement in the State's handling of recidivists and, in fact, of all prisoners. We realize that this is a mere beginning and changes may be necessary in the future, but we trust our deliberations and recommendations will improve the method of sentencing in Virginia.

We wish to thank the members of the Committee for the effort and time they gave to this Study. The complete Report given by them was a major contribution to the recommendations made. We also wish to express appreciation to the many members of the judiciary and bar who took

the time to attend the public hearings of the Committee and express their views. Their personal knowledge and recommendations concerning this matter were of a great help.

Bills to effectuate the recommendations made herein are attached.

Respectfully submitted,

Tom Frost, *Chairman*

Charles F. Fenwick, *Vice-Chairman*

C. W. Cleaton

John Warren Cooke

John H. Daniel

J. D. Hagood

Charles K. Hutchens

J. C. Hutcheson

Garnett S. Moore

Lewis A. McMurran, Jr.

Sam E. Pope

Arthur H. Richardson

William F. Stone

Edward E. Willey

A BILL to amend and reenact §§ 19.1-291 and 19.1-292 of the Code of Virginia, relating to the ascertainment of punishment by juries and of punishment in felony cases, respectively.

Be it enacted by the General Assembly of Virginia:

1. That §§ 19.1-291 and 19.1-292 of the Code of Virginia be amended and reenacted as follows:

§ 19.1-291. Ascertainment of punishment in criminal cases generally when tried by jury.—The punishment in all criminal cases tried by a jury shall be ascertained by the jury trying the same within the limits prescribed by law *and according to the provisions of § 19.1-292.*

§ 19.1-292. Ascertainment of punishment in felony cases.—The term of confinement in the penitentiary or in jail of a person convicted of *a* felony, if that punishment is prescribed, and the amount of the fine, if the felony be punishable by fine, shall be ascertained by the jury, if there be one, or by the court trying the case without a jury, so far as the term of confinement and the amount of the fine are not fixed by law. *In prescribing the term of confinement in the penitentiary or jail of a person convicted of a felony, except where life imprisonment or the death sentence is imposed, the jury or the court trying the case without a jury shall impose a term of imprisonment for an indeterminate period, but shall set a maximum term which shall not exceed the maximum term of imprisonment prescribed by law for the offense. Notwithstanding any other provision of law, no minimum term of confinement shall be set by the jury or court.*

A BILL to amend and reenact §§ 53-251 and 53-252, as amended, of the Code of Virginia, relating to eligibility for parole and review by Probation and Parole Board to determine same.

Be it enacted by the General Assembly of Virginia:

1. That §§ 53-251 and 53-252, as amended, of the Code of Virginia be amended and reenacted as follows:

§ 53-251. Eligibility for parole.—(1) Except as herein otherwise provided, every person convicted of a felony, and sentenced and committed under the laws of this Commonwealth to the State penitentiary, the State penitentiary farm, the State Industrial Farm for Women, or the Southampton Penitentiary Farm, or any of the State convict road camps, and any subsidiary institution, if a part of the major penal system, shall be eligible for parole * *at any time the Probation and Parole Board so determines.* In case of terms of imprisonment to be served consecutively * *or* concurrently * *no restriction shall be placed upon the time at which parole may be considered, but the Board may take into account the length of sentence and the number of sentences imposed in determining when to release on parole a person convicted of a felony and sentenced to imprisonment.*

(2) Persons sentenced to die shall not be eligible for parole.

(3) Persons sentenced to *one term of* life imprisonment shall be eligible for parole after serving fifteen consecutive years, *but persons sentenced to two or more terms of life imprisonment shall not become eligible for parole.*

§ 53-252. Times at which Probation and Parole Board to review cases.—The Probation and Parole Board shall review the case of each prisoner * *within one year after he has been committed to any one of the institutions set forth in § 53-251* and at least annually thereafter until he is released on parole or otherwise. The Board may in addition thereto review the case of any prisoner * at any other time when it is of the opinion that such should be done.

A BILL to amend and reenact § 53-295, as amended, of the Code of Virginia, relating to jurisdiction for trial of certain convicts; to amend the Code of Virginia by adding a section numbered 53-296.1, relating to additional confinement for certain convicts sentenced more than once, jurisdiction and procedures therefor; and to repeal § 53-296, as amended, of the Code of Virginia, relating to the same subjects.

Be it enacted by the General Assembly of Virginia:

1. That § 53-295, as amended, of the Code of Virginia be amended and reenacted and that the Code of Virginia be amended by adding a section numbered 53-296.1, as follows:

§ 53-295. Jurisdiction for trial of convicts.—All criminal proceedings against convicts in the penitentiary *arising under §§ 53-291, 53-292, or 53-294* shall be in the Circuit Court of the city of Richmond; but when convicts are employed upon any work of public or private improvement in any county in the State * *such* criminal proceedings against them may be in the circuit court of the county in which the convict is so employed or in the Circuit Court of the city of Richmond; provided that as to convicts held in the State penal institutions in the counties of Goochland and Powhatan, *such* criminal proceedings against them may be held in the circuit court of the respective county or in the Circuit Court of the city of Richmond.

In any *such* proceedings instituted in the Circuit Court of the city of Richmond or the circuit courts of the counties of Goochland and Powhatan under the provisions of this section the court may be convened and such proceedings conducted at such place or places within the limits of the city of Richmond or the counties of Goochland or Powhatan respectively, as the judge of such court may deem proper.

§ 53-296.1 Convicts previously sentenced to like punishment; additional confinement.—(a) When a person is convicted of a felony and sentenced to confinement therefor in the penitentiary, the Commonwealth's Attorney prosecuting such person shall, whenever he has knowledge that such person has been sentenced previously to a like punishment for a felony in the United States, without delay, file an information against such convict in the court wherein such convict has been prosecuted. Such court shall cause the convict to be tried upon the information filed, alleging the existence of records of such prior felony convictions and the identity of the prisoner with the person named in each. The prisoner may deny the existence of any such records, or that he is the same person named therein, or both. Either party may, for good cause shown, have a continuance of the case for such reasonable time as may be fixed by the court. The existence of such records, if denied by the prisoner, shall be first determined by the court, and if it be found by the court that such records exist, and the prisoner says that he is not the same person mentioned in such records, or remains silent, his plea, or the fact of his silence, shall be entered of record, and a jury may, at the request of such convict be impaneled to inquire whether the convict is the same person

mentioned in the several records. If the court or jury find that he is not the same person, he shall be confined in accordance with the terms of the sentence which has been imposed in such court; but if court or jury find that he is the same person, or if he acknowledge in open court after being duly cautioned, that he is the same person, he may be sentenced to be confined in the penitentiary for a maximum number of years as follows: a maximum of three years for a second conviction; a maximum of five years for a third conviction; a maximum of ten years for a fourth conviction; and a maximum of life for a fifth conviction. These terms shall be for an indeterminate period of time as provided in § 19.1-292.

If the circuit court cannot, on the evidence available, make a determination of the person's allegation of illegality of his prior conviction by reason of unrecorded matters of fact relative to his prior conviction, the court may certify such question for hearing and determination to the court of said conviction which court shall conduct a hearing and make a finding of fact and determination of such unrecorded matters of fact, sending a certified copy of its order to the circuit court which certified such question.

(b) When a person convicted of an offense, and sentenced to confinement therefor in the penitentiary, is received into the State penal system, if it shall come to the knowledge of the Director of the Department of Welfare and Institutions that he has been sentenced to a like punishment in the United States prior to the sentence he is then serving and has not received an additional sentence therefor by the trial court where he was last convicted of a felony, the Director of the Department of Welfare and Institutions shall give information thereof without delay to the Circuit Court of the city of Richmond. Such court shall cause the convict to be brought before it to be tried upon an information filed and in accordance with the provisions of the preceding subsection with the exception that if the convict is found by the court or jury not to be the same person as mentioned in the records of prior convictions, the convict shall be remanded to the institution in which confined. The maximum terms set forth in subsection (a) above shall be applicable to this proceeding.

2. § 53-296, as amended, of the Code of Virginia is repealed.

A BILL to amend § 53-278.1, as amended, of the Code of Virginia, requiring Commonwealth Attorneys to obtain presentence reports from investigations by probation officers in certain cases.

Be it enacted by the General Assembly of Virginia:

1. That § 53-278.1, as amended, of the Code of Virginia, be amended and reenacted as follows:

§ 53-278.1 Investigations by probation officers in certain cases.— **Before any* person is tried upon a felony charge * *the Commonwealth's Attorney prosecuting such person shall obtain a presentence report from the* probation officer of such court * *which shall show all prior felony convictions reflected in the records of the State Central Criminal Records Exchange,* report * the history of the accused and any and all other relevant facts. * *The accused or his attorney shall be given a copy of such report at the time such report is delivered to the Commonwealth's Attorney requesting it.* The report of the investigating officer shall be filed as a part of the record in the case.