REPORT OF
THE VIRGINIA STATE CRIME COMMISSION

CIVIL COMMITMENT OF VIOLENT SEXUAL OFFENDERS

TO THE GOVERNOR AND
THE GENERAL ASSEMBLY OF VIRGINIA

SENATE DOCUMENT NO. 30

COMMONWEALTH OF VIRGINIA
RICHMOND
1999

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COMMONWEALTH of VIRGINIA

VIRGINIA STATE CRIME COMMISSION

Senator Ken Stolle
Chairman

Rich Savage
Director

December 8, 1998

To: The Honorable James S. Gilmore III, and
Members of the Virginia General Assembly:

Senate Joint Resolution 69, agreed to by the 1998 General Assembly, directed the Virginia State Crime Commission to conduct a study on the feasibility of enactment of a civil commitment procedure for sexual predators in the Commonwealth and to submit its findings and recommendations to the Governor and 1999 session of the General Assembly.

In fulfilling this directive, a study was conducted by the Virginia State Crime Commission in 1998. I have the honor of submitting herewith the study report.

Respectively submitted,

Kenneth W. Stolle
Chairman

KWS:jrp

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Executive Summary

Virginia State Crime Commission

Civil Commitment of Violent Sexual Offenders

January 1999

In 1998, the Virginia General Assembly approved Senate Joint Resolution 69 (SJR 69/Howell) directing the Virginia State Crime Commission to conduct a study on the feasibility of enacting a Virginia statute which allows for certain violent sexual predators to be civilly committed after completing their sentence. The civil commitment of sexual predators was recently held by the U.S. Supreme Court in the *Kansas v. Hendricks* decision to be constitutional.[1]

Background

Largely due to the demographic characteristics of their victims (women and children), sex offenders are today among the most vilified of all offender groups. This sentiment has helped to drive calls for stiffer punishment of sexual predators. "Megan's Law" legislation, community notification when a sex offender is released, was passed in New Jersey when young Megan Kanka was brutally raped and murdered by a twice convicted child molester living in the Kanka's neighborhood. A New Jersey congressman introduced similar federal legislation which required all states to enact legislation which provided public access to information on violent sex offenders. Virginia passed its version of "Megan's Law" during the 1998 General Assembly session (SB369/Howell and HB570/Deeds). The legislation provides for all sexually violent offenders to be posted on an internet web page. Schools and daycare facilities will be automatically notified when a sex offender is released and moves into their area.

In recent years, Virginia has enacted stiffer sentences and created a statewide registry of sex offenders. Offenders convicted the second time of certain violent offenses receive life in prison. With the abolition of parole and the use of sentencing guidelines, sex offenders in Virginia typically receive very lengthy sentences in prison. The Sex Offender Registry has been expanded to include numerous additional sex offenses as well as certain other crimes against children. Offenders convicted of "sexually violent" crimes have to register every 90 days for life.

A growing number of states have enacted what is referred to as "sexual predator" legislation. This legislation provides for certain sex offenders who have

[1] *Kansas v. Hendricks*, 117 S.Ct. 2072, 138 L.Ed..2d 501 (1997).

completed their sentence but who are still considered to be a danger to society to undergo a clinical evaluation to determine if they have a "mental abnormality". If the evaluation indicates a problem, the offender goes through a civil commitment procedure, a procedure which introduces the possibility that the offender will be committed. In July, 1997 the U. S. Supreme Court upheld the constitutionality of "sexual predator" legislation in its *Kansas v. Hendricks* decision (see **Appendix** A). The Virginia State Crime Commission adopted a study proposal in 1998 to examine the feasibility of enacting a "sexual predator" statute in Virginia (SJR 69/Howell). This study proposal was passed by the 1998 General Assembly. Senator Howell chaired the subsequently assembled study group, one comprised of individuals from Corrections, Mental Health, Mental Retardation & Substance Abuse Services, Office of the Attorney General's Office, members of the legal community, and private clinicians. The study group was staffed by the Crime Commission.

Using the *Kansas v. Hendricks* decision as a springboard, the study group examined a number of complex issues related to enacting "sexual predator" legislation, including:

- the criteria for commitment;
- the process for commitment; and
- the expense of commitment.

Using as a foundation other on-point data and information collected, the study group examined also other strategies for addressing the issue of sex offenders, including:

- sentencing enhancements;
- risk assessment, treatment and/or pharmacological controls; and
- community containment models for supervision of sex offenders.

Findings & Recommendations

The resultant body of recommendations from the work group studying civil commitment of sexual predators is directed towards improving public safety in the area of sex offending in the most cost effective manner. The Crime Commission adopted recommendations that enhance sentencing options to address the predatory sex offenders, increase penalties for certain sex offenses, and improve assessment and treatment of sex offenders within the correctional system. These recommendations include:

- Introduce a study resolution requesting that the Virginia Criminal Sentencing Commission, in cooperation with the Department of Corrections, develop a risk assessment instrument for "sexually violent offenses" and report back to the 2000 General Assembly;

- Introduce a memorializing resolution which requests that the Judicial Conference include a section on sex offenses and the high rate of recidivism.

The section should provide information on the necessity of providing adequate post incarceration supervision for sex offenders;

- Include §18.2-67.5:1 convictions on the Registry (third misdemeanor sex offense conviction becomes a Class 6 felony);

- §18.2-370-Indecent liberties with a child: Increase the second conviction to a Class 5 felony;

- Cross reference the crimes in the two strikes statute (§18.2-67.5:3-the second conviction of certain sexually violent crimes carry a life sentence) in §18.2-67.5:2(Second conviction triggers maximum penalty);

- Include aggravated sexual battery in the two strikes statute: §18.2-67.5:3;

- Require a formalized sex offender assessment and treatment, <u>if indicated</u>, of all convicted sex offenders at some time during their incarceration or probation in the Department of Corrections. Assessment should include evaluation for psycho-pharmacological sex offender treatment, such as antiandrogens or SSRI's(specific serotonin reuptake inhibitors)proven to be effective in treating some deviant sexual behaviors;

- Establish intensive prison-based treatment programs with a proven record of success.

Resources Needed: $600.000;

- Provide resources to community corrections for treatment, including polygraphing, of sex offenders under community supervision.

Resources Needed: $655,000;

- Provide resources to Department of Juvenile Justice to establish one additional sex offender treatment unit.

Resources Needed: $125,000; and

- Introduce a study recommendation to direct the Department of Mental Health, Mental Retardation and Substance Abuse Services, in collaboration with the Department of Corrections, the Department of Juvenile Justice, the University of Virginia, and Virginia Commonwealth University to explore the development of a Center for Sex Offender Assessment and Treatment including the professional structure, organizational context, assessment and treatment programming. The study will:

  1. Review the availability of facilities and professional staff, and explore the legal issues pertinent to this type of Center, including informed consent, liability, inmate/patient security requirements;

  2. Include consultation with other states, state agencies, and academic institutions regarding the multi-agency utilization of a Center.

  3. A report will be completed to present to the Governor and the 2000 General Assembly. The

report will include a proposal for a Commonwealth Center for Assessment and Treatment of Sexual Disorders, to include the needed resources to implement the proposal.
Resources for planning: $50,000.

The Crime Commission will continue to examine the issue of civil commitment of sexual predators.

Secondly, the mental health system in Virginia is currently undergoing serious reform. There is an effort to reduce the state mental hospital census and place the majority of the patients in less restrictive, community-based alternatives. This will require a major overhaul of the current system as well as a significant infusion of resources. Crime Commission staff recommended that the Commission defer making a decision on enacting a sexual predator civil commitment procedure which would place a serious burden on a system already under stress.

Notwithstanding the current crisis in the mental health system, mental health advocates argue that sex offenders are not truly clinically impaired and do not belong in the mental health system. Sex offender treatment is not readily available in the mental health system and certainly not a standard treatment protocol within state mental health hospitals. Finally, the mental health system does not have a secure facility to house violent sexual predators. The Crime Commission concurred with the recommendation to defer the decision for further study.

Table of Contents

Introduction

Authority for Study

The 1998 General Assembly approved Senate Joint Resolution 69 (SJR 69/Howell) directing the Virginia State Crime Commission to conduct a study on the feasibility of enacting a Virginia statute which allows for certain violent sexual predators to be civilly committed after completing their sentence. The civil commitment of sexual predators was recently held by the U.S. Supreme Court in the *Kansas v. Hendricks* decision to be constitutional.

Section 9-125 of the Code of Virginia establishes and directs the Virginia State Crime Commission "to study, report, and make recommendations on all areas of public safety and protection." Section 9-127 of the Code of Virginia provides that "the Commission shall have the duty and power to make such studies and gather information in order to accomplish its purpose, as set forth in Section 9-125, and to formulate recommendations to the Governor and the General Assembly." Section 9-134 authorizes the Commission to "conduct private and public hearings." The Virginia State Crime Commission, in fulfilling its legislative mandate, undertook the study of the feasibility of a civil commitment procedure for sexually violent predators at the completion of their sentence. The Commission is directed to examine the current availability of treatment services within the prison system, the availability of an appropriate mental health facility for housing sexual predators committed to its system, and the long range cost of civil commitment of sexual predators within the context of the study. Civil commitment legislation was introduced to the 1998 General Assembly (SB 171/Forbes and HB 128/Griffith) but was carried over until 1999 pending the findings of the study.

Members Appointed to Serve

At the May 19, 1998 meeting of the Crime Commission, Chairman Kenneth W. Stolle selected Senator Thomas K. Norment to serve as Chairman of the Public Safety Subcommittee and Delegate Raymond R. Guest, Jr. to chair the Governmental Affairs Subcommittee. SJR 69 was assigned to the Public Safety Subcommittee. The following members of the Crime Commission were selected to serve on the respective subcommittees:

Public Safety Subcommittee

Senator Thomas K. Norment, Jr., Chair

Sheriff Terry W. Hawkins

Senator Janet D. Howell

The Honorable Robert J. Humphreys

Delegate Clifton A. Woodrum

Senator Kenneth W. Stolle, ex-officio

Governmental Affairs Subcommittee

Delegate Raymond R. Guest, Chair

Delegate R. Creigh Deeds

The Honorable Mark L. Earley

Delegate A. Donald McEachin

The Honorable William C. Petty

Senator Kenneth W. Stolle, ex-officio

Introduction

Report Organization

The remaining sections of this report present the results of the Virginia State Crime Commission's analysis of the civil commitment of violent sexual offenders. Section II provides an overview of the report's study design. Section III presents on-point background information. Study objectives and issues are discussed in Section IV, an in-depth examination of the civil commitment of violent sexual offenders is offered in Section V, the report's findings and recommendations are laid out in Section VI, and acknowledgements are contained in Section VII.

Study Design

A multidisciplinary Crime Commission work group was convened to examine the issues identified in the study resolution. This workgroup consisted of representatives from the Department of Mental Health, Mental Retardation & Substance Abuse Services, Department of Corrections, Department of Health Professions, Office of the Attorney General, members of Virginia's legal community, University of Virginia Institute for Law, Psychiatry and Public Policy, local community services board staff, and private sex offender treatment providers. The Secretaries of Health and Human Resources and Public Safety served as ex-officio members. The work group was chaired by Commission member and study patron, Senator Janet Howell.

Staff first reviewed legislation from other states with sexual predator commitment statutes, as well as the *Kansas v. Hendricks* decision. With this information in hand, supplemental research was conducted on treatment efficacy, commitment costs, and the impact of sexual predator commitment on the mental health system. Particular attention was given to the legal nexus between treatment and civil commitment. Additional issues of sentencing enhancements and other approaches, such as pharmacological treatment protocols, surgical castration, indeterminate sentencing with lifetime parole, were also researched.

Working from this foundation, staff then looked to apply this information to Virginia. First staff - in conjunction with the study group - evaluated the feasibility of enacting a civil commitment statute in the Commonwealth at this time. Concurrently, agencies were asked to develop fiscal and programmatic impact statements on the effect of a civil commitment statute on their respective programs. Also, advocacy agencies were consulted regarding their positions on a sexual predator law.

Secondly, staff worked with both the Department of Corrections and the Department of Mental Health, Mental Retardation & Substance Abuse Services to determine whether any treatment programs for sexual offenders were currently in place, if an appropriate facility for housing civilly committed sexual offenders was currently available, and to get a sense of the capital costs of retrofitting such a facility for this population. The desirability of sentencing enhancements and the other approaches mentioned above were also evaluated, and the study group did seek and receive public comment concerning the civil commitment of sexual predators generally from a wide constituency.

Only after carefully considering the information placed before them did the study group move towards the development of on-point findings and recommendations. After much deliberation, the study group adopted several of these recommendations, presenting them to the members of the Virginia State Crime Commission for consideration by the 1999 General Assembly.

Background

Civil commitment for sexually violent predators was recently upheld by the United States Supreme Court (*Kansas v. Hendricks*). Laws for "special commitment" of sex offenders have existed for some time. The first laws appeared in the 1930s and were aimed at offenders who were believed to be at high risk for recidivism but amenable to treatment. The two-fold goal of these statutes was to benefit sex offenders by "curing" them in a shorter time than if they had served their sentence in the criminal justice system, and to protect society from the premature release of dangerous offenders who had not been cured during their incarceration.[1] These laws provided for the civil or "special" commitment of sex offenders found to be sexual psychopaths as an alternative to incarceration. The sexual psychopath legislation was predicated on the following six assumptions, assumptions which had little clinical support:

1. There is a specific mental disability called sexual psychopathy;

2. Persons suffering from such a disability are more likely to commit serious crimes, especially dangerous sex offenses, than normal criminals;

3. Such persons are easily identified by mental health professionals;

4. Dangerousness can be predicted by mental health professionals;

5. Treatment is available for the condition; and

6. Large numbers of persons afflicted with the designated disability can be cured.[2]

These laws came under fire in the 70's and 80's when various professionals, including the Groups for the Advancement of Psychiatry, the American Bar Association's Committee on Criminal Justice Mental Health Standards, the President's Commission on Mental Health separately called for the repeal of the laws. There was a growing consensus that treatment or, more importantly, a "cure" for sexual psychopathy was not attainable. By 1990, only 13 jurisdictions still had sexual psychopath laws, down from 28 in the 60's.[3]

The 1980's brought sweeping reforms to the criminal justice system. Indeterminate sentencing and parole were being abandoned by states in favor of a fixed sentence system. Virginia adopted a no-parole system in 1994. One problem occurred in the abolition of indeterminate sentencing: sentences were set at average time served under the parole system. This often meant that certain violent sex offenders were getting relatively short sentences

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[1] Zonana, Howard, MD, et al., APA Task Force Report on Sexually Dangerous Offenders, Dec. 1996, p. 5.

[2] LaFond, John Q., Washington's Sexually Violent Predator Law: A Deliberate Misuse of the Therapeutic State for Social Control, 15 U. PUGET SOUND L. REV. 655, 661 (1992).

[3] Gary Gleb, Washington's Sexually Violent Predator Law: The Need to Bar Unreliable Psychiatric Predictions of Dangerous from Civil Commitment Proceedings, 39 UCLA L. Rev. 213, 215 (1991).

based upon the historical time served for certain offenses. Virginia, in enacting a no-parole system, however, increased significantly the determinant sentences for most violent sex offenses. States who used strictly the historical time served were faced with concerns when violent sex offenders served their full sentence and were ready to be released back into the community but still posed a significant public safety threat. This led to the passage in several states of "new" civil commitment for sexual predators' legislation.

The current legislation for civil commitment of sexual predators occurs after a sex offender has completed his or her sentence, is identified as unresponsive to treatment, and continues to be a major threat to the public. The offender is referred for a clinical evaluation to determine if he is a "sexual predator". The procedure follows the process for a civil commitment of an individual who is found to be mentally ill. The Court ruled that the legislation did not implicate the two primary objectives of criminal punishment: retribution or deterrence. The following is a summary of the civil commitment procedures upheld in the *Kansas v. Hendricks* decision:

(1) The confined person has:

- been convicted of a sexually violent offense and is scheduled for release;
- the person has been charged with a sexually violent offense but found incompetent to stand trial;
- the person has been found "not guilty by reason of insanity of a sexually violent offense;
- the person has been found not guilty of a sexually violent offense because of a mental disease or defect. These are the four possible criteria for consideration for civil commitment.

(2) The custodial agency (Department of Corrections) notifies the prosecutor 60 (changed to 90) days prior to anticipated release of a person who meets the above criteria. The prosecutor has 45 days to determine is he/she wants to file a petition in court seeking the person's involuntary commitment. If the petition is filed, the court determines if there is probable cause to support a finding that the person is a sexually violent predator. The commitment proceedings can only be initiated when a person has been convicted or charged with a sexually violent offense and suffers from a mental abnormality or personality disorder which makes him likely to engage in predatory acts of sexual violence.

(3) If the finding is affirmative, the person is then given a clinical evaluation. If this evaluation affirms that the person is a sexually violent predator, a trial is held to determine if the person is a sexually violent predator "beyond a reasonable doubt".

(4) If the trial phase determines that the person is, indeed, a sexually violent predator, the person is transferred to the custody of the Secretary of Social and Rehabilitation Services (our equivalent is the Secretary of Health and Human Resources) for the "control, care, and treatment until such time as the person's mental abnormality or personality disorder has so changed that the person is safe to be at large." The burden of proof rests with the State.

Kansas v. Hendricks requires that several procedural safeguards must be in place:

- The individual must be provided counsel and a mental health examination.
- The individual may present and cross-examine witnesses and review evidence of the State.
- Committing court reviews the commitment status at least annually.
- Secretary can decide at any time if the individual's condition has changed and release is appropriate.
- The individual can file a release petition at any time.

Several states have enacted some form of civil commitment for sexual predators. The statutes vary greatly from state to state (see **Appendix C**). It is difficult to say what - beyond the Kansas statute - will withstand constitutional scrutiny. It is important to remember that the *Kansas v. Hendricks* decision was a 5-4 decision with one justice on the prevailing side specifically stating that civil commitment must not be used as a means to prolong incarceration/punishment of sex offenders who have completed their sentence. Because the Kansas statute was held by the U.S. Supreme Court to be constitutional, this is the statute upon which the study group focused the majority of its attention.

Study Objectives & Issues

The work group examined the following issues in its deliberations on enacting a civil commitment statute for sexual predators.

1. *Legal and Procedural Policies*

- What will be the criteria for identifying offenders to be assessed for commitment?
  - Offenses-"sexually violent offense" convictions?
  - Automatic clinical evaluation of all sex offenders exiting the prison system?
- Who will determine the need for commitment proceedings: Attorney General's Office or local prosecuting attorney?
- Are sex offenders who are sentenced to probation eligible for commitment?
- Are juvenile sex offenders eligible for commitment?
- Does a sexual predator commitment process follow the current civil commitment process or does it require a jury trial?
- What due process protections are required during the civil commitment procedures and post-commitment?
- How does such a statute impact sex offenders sentenced under the "not guilty by reason of insanity" statute and "incompetent to stand trial"?
- How do we address sex offenders who are adjudicated "not guilty" because of a trial error but still clearly represent a danger to society?

2. *Clinical and Operational Policies*

- What will be the statutory definition of "mental abnormality or personality disorder"?
- What treatment requirements are needed during prison confinement or probation?
- What treatment requirements are needed in a civil commitment confinement?
- What type of facility will be needed for civil commitment of sexual predators?
- What staffing needs will be required for civil commitment of sexual predators?

- What impact will a sexual predator civil commitment statute have on Virginia's mental health system?

- What are the cross-training needs of corrections and mental health staff to implement a sexual predator civil commitment statute?

3. *Additional Strategies to Address Violent Sex Offenders*

- Consider imposing stiffer sanctions for certain sex offenses.

- Consider the development of a risk assessment instrument for sex offenders by the Virginia Criminal Sentencing Commission to be used by judges in making sentencing dispositions. Offenders assessed at high risk of reoffense should be given the maximum in the sentencing range.

- Consider establishing a "habitual sexual offender" status with additional penalties. Certain criminal statutes, §18.2-67.5:1 and §18.2-67.5:2, currently provide for enhanced penalties for subsequent convictions of certain sex offenses. Consider stiffer penalties or imposition of sentence and lifetime probation with terms and conditions specified for repeat sex offenders.

- Consider biomedical services for certain sex offenders on probation or parole.

- Review the sentencing ranges of the sex offenses which require registration and increase the ranges for certain lower class felonies in order that multiple convictions will increase the sentence served.

Discussion

States' Responses to Sex Offenders

In 1989, 11-year old Jacob Wetterling was abducted near his St. Joseph, Minnesota home. Jacob was taken by an armed man wearing a stocking mask and has not been seen since. A Houston real estate agent, Pam Lynchner, was brutally attacked in 1990 by a twice-convicted felon. Her life was saved when her husband arrived and interrupted the attack. Megan Kanka, age 7, accepted an invitation to see a new puppy in Hamilton Township, New Jersey. The neighbor who invited Megan was a twice-convicted pedophile who raped and murdered her and dumped her in a nearby park.[4]

These three victims and thousands others like them have led to the enactment of a series of major legislative proposals both at the state and the federal level.

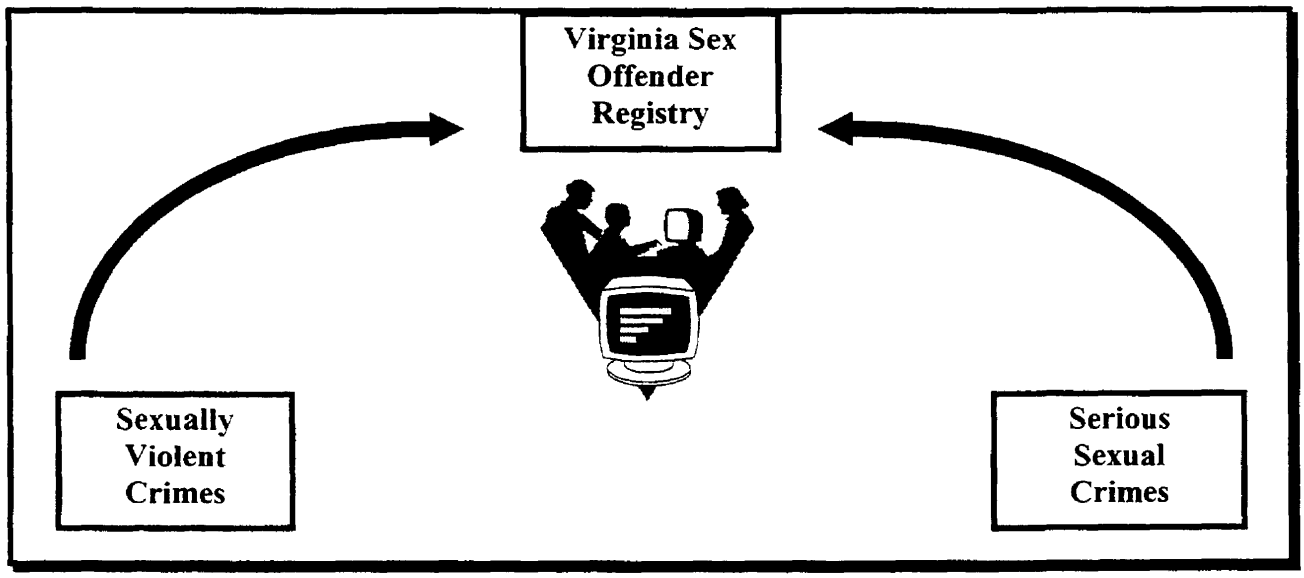
One of the first responses states have taken towards addressing public safety concerns and sex offenders has been to increase the criminal penalties for sex offenses. Virginia has, in recent years, enacted stiffer penalties for certain sex offenses. In 1994 the Virginia General Assembly passed legislation which provided for life imprisonment for the second or subsequent conviction of certain sexually violent crimes (§18.2-67.5:3). The second or subsequent conviction of certain other felony sex offenses were given the maximum sentence allowed by statue (§18.2-67.5:2). During the same time period, legislation was passed which bumped the third conviction of certain misdemeanor sex offenses up to a Class 6 felony (§18.2-67.5:1). Parole was abolished in 1994 as well and the new sentencing guidelines imposed longer sentences for violent crimes. The Sex Offender Registry was established in 1994.

The Jacob Wetterling Crimes Against Children and Sexually Violent Offender Registration Act was included in the Federal Violent Crime Control and Law Enforcement Act of 1994. All states were required to establish registration programs for sex offenders, including a subcategory classified as sexual predators, by September, 1997. The Pam Lychner Sexual Offender Tracking and Identification Act of 1996 established a national computer database to track sex offenders. The FBI is directed to develop the national offender database and to establish and maintain sex offender registration and notification in States unable to meet the "minimal requirements" by October, 1999. Megan Kanka's death led to the passage of the "Megan's Law" amendment which required all states to establish some form of community notification by September, 1997. States were given a two year extension to comply with the "Megan's Law" amendment.

Virginia has developed legislation which will meet the compliance requirements of each of these three federal mandates. As stated previously, the Virginia Sex Offender Registry was initiated in 1994. In 1997 the crimes included on the Registry were substantially

[4] National Conference on Sex Offender Registries-Proceedings, BJS Grant No. 96-BJ-CX-K010, May 1998, pp. vii-xii.

expanded and it was renamed the Virginia Sex Offender and Crimes Against Children Registry. The 1998 Virginia General Assembly adopted legislation providing full public access to sex offender information, effective July, 1998. A summary of the Virginia legislative initiatives to enhance the Registry and provide public access follows:



(1) Legislation created two categories of offenses which will go on the registry: sexually violent crimes and serious sexual crimes.

(2) Offenders who are convicted of the following crimes will be known as "sexually violent offenders":

- §18.2-61 Rape
- §18.2-67.1 Forcible Sodomy
- §18.2-67.2 Object Penetration
- §18.2-67.3A(1) Aggravated sexual battery against a minor
- §18.2-48 (ii) Abduction of a minor with intent to defile

(3) Three additional offenses have been added to the registry:

- §18.2-47(a) Non-parental kidnapping.
- §18.2-48 (iii) Abduction of child under 16 with intent to prostitute.
- §18.2-374.1 B(i) Accosts, entices or solicits a person below 18 to perform in a sexually explicit production.

(4) "Sexually violent offenders" are required to register for life and provide verification of their whereabouts every 90 days.

(5) Offenders convicted of other serious sexual crimes requiring registration must re-register annually and when they relocate. After ten years, without an additional conviction, these offenders may petition the court for expungement.

(6) "Sexually violent offenders" are not eligible for expungement but after three years may petition the court for relief on the every ninety day verification provision. They must undergo an evaluation by a panel of clinical experts in the field of sex offender treatment for determination if they are no longer a "sexually violent offender" as part of the petition for relief.

(7) Sex offenders who fail to register or reregister within ten days of their release, probation, relocation, etc. are guilty of a Class I misdemeanor.

(8) "Sexually violent offenders" who fail to register within ten days of the date required are guilty of a Class 6 felony. Venue for prosecution on this offense is where the offender can be found.

(9) All sex offenders included in the registry must provide fingerprints and a photograph. Following sentencing the offender will be remanded to the custody of local law enforcement for this purpose.

The increase to a Class 6 felony for failure to register applies only to those offenders convicted of a "sexually violent crime". This provision is required by the Jacob Wetterling Act.

Legislation was also passed during the 1997 General Assembly (SB 855/Houck) which allowed persons seeking child-minding or day-care services as defined by §19.2-390.1 (C) to access information on the Sex Offender and Crimes Against Minors Registry. Regulations for implementation of both pieces of legislation were promulgated by the Department of State Police.

The "Megan's Law" amendment to the federal Jacob Wetterling Crimes Against Children Act in 1996 mandated the release of sex offender information for the purpose of enhancing public safety. Virginia was required to enact a broader access law or lose ten percent of its Byrne anticrime monies ($1 million). Furthermore, the public outcry for such legislation was even more compelling. The 1998 General Assembly passed the following legislative package unanimously.

Discussion

Public Access Legislation: the legislation establishes a system of information access wherein information is released upon request. The legislation establishes a progressive system of access to information on the Sex Offender and Crimes Against Minors Registry which includes:

Class I: Creating a web site with a directory of sex offenders convicted of"sexually violent crimes" and the second conviction of other Registry offenses to be available on January 1, 1999.

Class II: Making information on the Sex Offender Registry available upon request to the State Police. Request forms will be developed by the Department of State Police and made available through local law enforcement offices as well as other sites. This became available on July 1, 1998.

Information may be disseminated in the Class II category for the purpose of enhancing public safety. Request should include a name, address, and purpose for the request. There are specific prohibitions against acts of intimidation or harassment.

The legislation also requires that all schools and licensed daycare facilities receive automatic notice when a registered sex offender moves into a community. Other agencies or organizations serving vulnerable populations could register to receive the information automatically.

The legislation which requires that a sex offender convicted of a second or subsequent non "sexually violent offense" will automatically be reclassified as a "sexually violent offender" with the more stringent registration requirements and entered on the web page. The offender can petition the court for relief on this classification after three years without a subsequent offense.

Information on sex offenders who are on the Registry but are not convicted of "sexually violent offenses"* can be obtained through a request to the State Police. Request forms are available through the offices of local law enforcement. The proposal represented a two year study by the Crime Commission in which judges, commonwealth attorneys, a parole board member, adult and juvenile correctional officials and mental health clinicians worked closely with Crime Commission members to craft a proposal to allow the public to find out at any time if there is a sexual predator living in their neighborhood.

A growing number of states have enacted what is referred to as "sexual predator" legislation. As of early 1998 eleven states had sexual predator commitment laws. Several other states were considering similar legislation during their 1998 legislative sessions. The Virginia State Crime Commission adopted a study proposal in 1998 to examine the feasibility of enacting a "sexual predator" statute in Virginia (SJR 69/Howell) which was passed by the

1998 General Assembly. This legislation provides for certain sex offenders who have completed their sentence but who are still considered to a danger to society to undergo a clinical evaluation to determine if they have a "mental abnormality". If the evaluation indicates a problem, the offender goes through a civil commitment procedure to be committed indefinitely to a mental health institution. In July, 1997 the U. S. Supreme Court upheld the constitutionality of "sexual predator" legislation in its *Kansas v. Hendricks* decision. This is part of the major national focus on strategies to incapacitate sex offenders. As stated earlier, several states have had some type of civil commitment for sex offenders in place for a number of years. The civil commitment laws, in many cases, were passed in a package with sex offender registration and community notification. Virginia has a statute, §19.2-300, which allows a circuit court judge, through petition from the defense or prosecuting attorney, to defer sentencing for conviction of any criminal offense if the offense indicates a "sexual abnormality". The judge can order a mental examination to be conducted by a qualified psychiatrist or clinical psychologist. The Code does not, however, address specific judicial options if the mental examination indicates there is a "sexual abnormality". Furthermore, the Code does not define "sexual abnormality".

Legislation to establish a civil commitment process for sexual predators was introduced in the 1998 General Assembly (Forbes/Griffith). The legislation was carried over to the 1999 Session and was included in the Crime Commission's study on civil commitment.

A National Perspective on Civil Commitment

In April, 1998 the National Conference on State Legislatures held a conference on State Issues in Seattle which focused on the issue of sexual predator civil commitment. Washington passed the first sex offender civil commitment law in 1990 and has to defend the legislation in several court challenges. The assistant attorney general responsible for defending the constitutionality of the state's law outlined several important factors to consider in drafting sexually violent predator legislation:

- Distinguish the process as a commitment mechanism for the mentally disordered, not as additional punishment to assure that it does not face *double jeopardy* challenges.

- Build appropriate and adequate treatment as evidence of the legislature's civil intent. Treatment is the issue about which a sex offender civil commitment law may otherwise face endless legal challenges.

- Centralize prosecutorial responsibility for carrying out the law to ensure development of expertise, help insulate the process from local political pressures and provide for uniformity and consistency in filings.

- Develop filing standards in conjunction with experts to guide prosecutors and prevent the law's over-broad or other inappropriate application.

- Consider issues of confidentiality and privilege in drafting civil commitment legislation. This will reduce obstacles prosecutors face in assembling information for case filings. Review existing statutory provisions to make sure the civil commitment statute will not conflict with them.

- Provide for strict procedural safeguards, such as a unanimous jury, proof beyond a reasonable doubt, right to counsel. Also consider whether rules of criminal or civil discovery are applicable; whether the rights of confrontation apply; and if witnesses can be called adversely.

- Place the program under the authority of the social or health services agency, not the department of corrections. If sexual predators who are civilly committed are housed in a correctional facility, they must be fully segregated from the general inmate population and held under the auspices of a health-related agency.

- Provide for immediate release upon showing that the individual is no longer dangerous or mentally impaired. Some states require consideration of less-restrictive options when a sexual predator demonstrates improvement.

- Most important, the civil commitment of sexual predators should be only one of a number of public safety strategies in a state's response to sex offenders. Consideration should be given to other options, such as, enhanced penalties, lifetime supervision, maximum sentences, and "multiple strikes" legislation as means to protect the public from dangerous sex offenders.[5]

Acknowledging their importance, these factors were incorporated into the work plan for the study. Having the benefit of other states' experience provided the study work group with a template for proposing legislation which would withstand legal challenges. Included in Appendix C is information concerning those other states which have enacted civil commitment legislation.

Legal Parameters of Civil Commitment

When the Supreme Court handed down its decision (*Kansas v. Hendricks*) on the civil commitment of sexual predators in July, 1997, it did so with several provisions states must include in such legislation in order to meet the constitutional litmus test. Summarizing, the

[5]NCSL's CJ Letter, News on Criminal Justice Issues, "AG Advises Lawmakers on Crafting Sex Offender Civil Commitment", May, 1998, pp.1-2

civil commitment process occurs at the point an offender has completed his or her sentence cannot appear to be an attempt to further incarcerate the offender which would violate the double jeopardy and *ex post facto* protections of the U. S. Constitution.

The procedure is civil, not criminal, in nature and does not involve either objective of criminal punishment: deterrence or retribution. The offender has been found to be unresponsive to treatment and a continuing threat to the community.

The offender undergoes a mental examination to determine if he or she has a "mental abnormality". If the finding is affirmative a civil commitment hearing is held to determine if the offender should be committed to a mental health or psychiatric institution for an indefinite period of time or until he or she no longer represents a threat to himself or to others.

Procedural safeguards include:

- Provision of legal counsel;
- Right to present and cross examine witnesses as well as review the State's evidence;
- Commitment status is reviewed at least annually;
- Offender has the right to petition for release on a regular basis.

Unlike Virginia's administrative commitment hearings, Kansas conducts its commitment hearings as a trial with judge and jury. All states which currently have sexual predator commitment statutes provide for a trial by jury and the standard of proof is "beyond a reasonable doubt".

Kansas' civil commitment also provides for 40 hours of treatment programming for sexual predators committed to the mental health system. Offenders committed to the system in Kansas may petition for release at any time. It is unclear at this time whether such provisions would have to be included in a state's commitment statute in order for it to be upheld.

Legal challenges to other states' civil commitment laws have focused primarily on the constitutionality of the law.[6] Other legal issues include: treatment issues, costs responsibility, dangerousness of offenders in the mental health system. Two cases - *In Re Young* (Wash.) and *State v. Post, State v. Oldakowski* (Wisconsin) - were argued on the constitutional issues of double jeopardy, ex.post facto, and substantive due process. The Court in both states ruled

that such commitment was a civil - not criminal - procedure and, therefore, did not violate the double jeopardy or ex post facto protections provided by the Constitution to criminal defendants. In Washington the justice stated that the civil commitment goals of incapacitation and treatment are distinct from punishment.[7] Both Courts reasoned that the use of "mental abnormality", while not defined within the DSM IV, could still meet the criterion for commitment to a mental health system. The issue of future dangerousness is less well defined but also upheld by both Washington and Wisconsin's highest courts. It is important to note that the U. S. Supreme Court's decision in *Kansas v. Hendricks* was a five to four (5-4) vote. *The primary basis for upholding the constitutionality of the law was a ruling that civil commitment is a civil procedure and not a criminal punishment.*

Treatment: A Civil Commitment Consideration

One of the considerations for civil commitment of a sexual predator is the offender's responsiveness to treatment. An offender's amenability to treatment refers to his or her ability to engage in treatment but does not denote the setting in which that treatment takes place nor a prediction about the effectiveness of treatment. The first step in an offender's readiness for treatment is the acknowledgment that he or she committed a sexual offense and an acceptance of responsibility for his or her behavior.[8] Second, he must consider his sexual offending to be a problem behavior that he wants to stop. Finally, the offender must be willing to fully participate in treatment. An offender's informed consent is essential to maintain clarity and ethics in the treatment setting.[9]

Consideration must be given as to how the offender is presented the opportunity to enter into treatment. If treatment offers the offender an improved environment in which to serve his sentence, he may volunteer for purely self-serving reasons. This can significantly impact the effectiveness of treatment. In a preliminary evaluation of a longitudinal study of sex offenders who received treatment in the California correctional system sex offender treatment program, the researcher Janet Marques indicated that the screening was done through a volunteer process. The treatment participants were removed from a highly secure prison facility and received treatment in a lower custody setting which was a much better facility. There was also an expectation by the participants that treatment participation would positively affect their release date. The results of the treatment program indicated marginal effect on recidivism. According to Dr. Marques, the methodology for selection (treatment facility was a much better environment) may negatively impact on the actual motivation of participants was a critical factor in the outcome. Motivation for treatment is a significant

[7] In re Young, at 998.

[8] McGrath, Robert, "Sex-Offender Risk Assessment and Disposition Planning: A Review of Empirical and Clinical Findings", International Journal of Offender Therapy and Comparative Criminology, 1994, pg. 330.

[9] Ibid., pg. 330.

factor in treatment effectiveness so selection of program participants must be based upon an objective assessment of the participants and treatment should not be viewed as a reward assignment.

Most correctional settings utilize a combination of psycho-educational group therapies and comprehensive cognitive/behavioral programs. Review of several empirical studies shows encouraging results in the reduction of recidivism using these treatment strategies. Of particular success was the treatment of child molesters and exhibitionists. In a California study, a treatment program showed an impressive impact on sex reoffense rates for rapists: 9% as compared to 28% for the untreated control group.[10] This same study also found that the treatment group committed fewer non-sex crimes against persons than did the control group. It is important to note that most of the successful programs have a strong relapse prevention component.

Relapse prevention helps the offender maintain treatment benefits over time, teaches the offender to identify early warning signals, cycles, patterns, distortions, distortions, and lifestyle changes that are necessary. A relapse prevention integrates assessment and treatment in an on-going fashion. The offender learns to identify, avoid, and/or cope with his or her high-risk factors and situations. A successful relapse prevention program involves a collaborative relationship between treatment and supervisory professionals which creates an informed network of contacts and monitors specific offense precursors.

Biomedical treatment of sex offenders is not used in the prison setting but has been used to a limited degree with offenders under community supervision. The offender must give informed consent for the use of biomedical treatment. The University of Virginia's Institute of Law, Psychiatry and Public Policy issued a report on the use of biomedical treatment of sex offenders in 1994. The report focused primarily on the use of Depo-Provera (depo medroxyprogesterone acetate or MPA), a female hormone which reduces testerone levels. The drug does have some serious side effects, such as, fatigue, weight gain, hypertension, hypogonadism, insomnia. The effects of the drug on deviant behavior are also limited to taking the drug; once the drug is stopped the male sex drive returns to normal levels within two to three weeks.[11] Cyproterone acetate or CPA is another antiandrogen used in the treatment of deviant sexual behaviors. This drug has shown significant success in reducing recidivism in certain sex offenders provided that the individuals comply with treatment and has limited side effects.[12] A new pharmacological approach to sex offender treatment has been

[10] Marques, Janice K., Day, David M. et al., "Effects of Cognitive-Behavioral Treatment f Sex Offender Recidivism", Criminal Justice and Behavior, Vol. 21 No. 1, March 1994, pg. 49.

[11] Sex Offender Services in Virginia, Report of the Virginia State Crime Commission, Senate Document No. 20, 1996, pp. 7-9.

[12] Bradford, J.M.W. & Greenberg, D. M., "Pharmacological Treatment of Deviant Sexual Behavior", Annual Review of Sex Research, Vol. VII, 1996, pp.285-291.

used in recent years with the use of specific serotonin reuptake inhibitors (SSRIs) which are essentially antidepressants. One major benefit of this drug group is that it tends to decrease the deviant sexual behaviors while leaving intact normal sexuality. While these biomedical treatments are not viable for all sex offenders, they do hold promise for certain offenders who appear to be distressed by the consequences of their paraphilic behavior.[13] If civil commitment is an option to be considered at the end of an offender's sentence, evaluation of the viability of biomedical treatment should be considered. Sex offenders, within the penal system, can be transferred to a facility for assessment during their sentence to be evaluated for biomedical treatment. If the individual offender is assessed to be a viable candidate for such treatment, post-sentence biomedical treatment and supervision offers both a less restrictive and more cost effective public safety answer.

Virginia's correctional system provides some psycho-educational therapies for sex offenders. The Board of Corrections adopted sex offender treatment as one of its core treatment programs in 1992 and therapy groups are offered at the major institutions. The correctional counselors providing these psycho-educational services are not required to have any specialized training. In 1993 the Virginia General Assembly funded two therapeutic communities for sex offender treatment. Each program was assigned 50 beds in a separate housing unit in a medium security dormitory facility (Bland and Haynesville) and treatment specialists were hired to operate the programs. The therapeutic communities were to use comprehensive cognitive-behavioral treatment strategies which have been proven effective in treatment of sex offenders. Offender participation was voluntary. There was a provision for an evaluation to be conducted on the program as well.[14]

Budget cuts in 1995 forced the two therapeutic communities to close after a year of operation. All of the treatment specialist positions were eliminated and the inmate participants were returned to the prison's general population. Unfortunately, the short time of the existing programs did not provide any evaluative data as to the efficacy of the treatment. A major point of consideration in determining if Virginia should enact a civil commitment statute is the lack of treatment services in the Virginia correctional system. This could potentially lead to challenges to a civil commitment as the offender may not have been given the opportunity for possible rehabilitation. It also inhibits correctional staff's ability to determine the offender's potential for re-offense and amenability to treatment.

Treatment services for post-sentence committed sexual predators present yet another dilemma. The Department of Mental Health, Mental Retardation and Substance Abuse Services has limited treatment for sex offenders available through the community services

[13] Ibid, pp.296-300.

[14] For a more detailed discussion of Virginia Department of Correction sex offender treatment programs prior to the 1995 budget cuts discussed herein, see Substance Abuse and Sex Offender Treatment Services for Parole Eligible Inmates (Joint Legislative Audit and Review Commission, 1992).

board system; such treatment in its state hospitals is virtually nonexistent. The *Kansas v. Hendricks* decision noted that a civil commitment to a mental health facility should require that the facility provide approximately 40 hours of treatment programming each week. Although one criteria for commitment is an offender's lack of response to treatment, it is expected that treatment efforts will continue once the offender has been civilly committed. The work group discussed at length the role of treatment in the post commitment phase. Given the Court's ruling, it was agreed that treatment must be provided both during incarceration and during the civil commitment. The extent of such treatment services was not determined.

There is some case law on the constitutional right to treatment. In *Allen v. Illinois* the Court suggested that the treatment objective of the state could be an important factor in determining if civil commitment is considered regulatory, not criminal in nature.[15] The Court did not, however, rule on the issue of treatment efficacy. The goal of a sexually violent predator statute is not primarily treatment; but to incapacitate a very limited number of dangerous and mentally abnormal persons who are too dangerous to be at large. Treatment efficacy is not necessary to achieve this goal. Treatment must be provided in order to be consistent with the civil commitment procedure. The paradox of the Court's decision is that in order to be eligible for civil commitment a sex offender must be found to be unresponsive to treatment but civil commitment must be done for the purpose of care and treatment. It remains to be seen if the issue of treatability of the offender, once civilly committed, will raise additional constitutional challenges.

If Virginia chooses to pass sexual predator commitment legislation, it appears that the State must first put additional sex offender treatment services in the state penal facilities. This would delay the implementation of such legislation by at least a year to allow for assessment and treatment, if indicated, of sex offenders who are nearing completion of their sentence.

The SJR 69 work group has recommended that intensive prison-based treatment programs with a proven record of success in the Virginia Department of Corrections be funded in the next budget cycle. The work group also recommended an expansion of the sex offender treatment units within the Department of Juvenile Justice correctional facilities.

Assessment and Treatment Protocols

Determining the amenability to treatment for a sex offender is difficult but through recent research efforts, several assessment instruments have been developed which have been validated. One such assessment tool is the ABEL Screen. This is particularly promising because it does not require the use of a plethysmograph; the Screen measures visual time reaction through slides presented on a computer. The screening measures deviant sexual

[15] 478 U. S. 364 (1986).

interest in over ten different areas including pedophilia and voyeurism. The Screen does not contain nudity or pornography and involves no intrusive measuring devices.

The work group studying civil commitment recommended that a formalized sex assessment be administered on all convicted sex offenders at some time during their incarceration or probation in the Department of Corrections. As a part of that effort, it was recommended that Virginia establish a Commonwealth Center for the Assessment and Treatment of Sexual Disorders. The Center's activities would include:

- Comprehensive assessment of individuals using a full battery of evaluation techniques including but not limited to psychological, hormonal, neuropsychological, plethesmography, and polygraph assessment procedures;

- Recommendations concerning the initiation of hormonal and psycho-pharmacological treatments and delineation of on-going relapse prevention and psychotherapeutic/cognitive restructuring needs of each individual;

- Assessment of anticipated level of risk for re-offense;

- Evaluation follow-up of all participants in terms of treatment compliance and types and extent of recidivistic behavior;

- Research on the etiology and treatment of sexual disorders;

- Consultation on issues of public policy concerning the sex offender population;

- Training of community personnel in the on-going assessment and treatment of sexual offenders;

- Consultation to the Department of Corrections, the Department of Juvenile Justice, the Department of Mental Health, Mental Retardation and Substance Abuse Services, and other state agencies regarding assessment, treatment, and supervision issues.

It is recommended that this Center be university-based both in order to attract a high caliber of professional staff and to ensure ongoing access to the most advanced research and innovative ideas bearing on public policy. Funding for the Center could be provided through a combination of resources: state funding, fees for court-ordered evaluations (§19.2-300), and private fees for individuals seeking assessment and treatment. These services would be delivered on both an inpatient and outpatient basis and made available to individuals under court order, on community supervision and those who have not had contact with the court but are voluntarily seeking treatment.

Discussion

The work group recommended that a study proposal be introduced to the 1999 General Assembly to develop the Center proposal. The effort would led by the Department of Mental Health, Mental Retardation, and Substance Abuse Services, in collaboration with the Department of Corrections, the Department of Juvenile Justice, the Department of Criminal Justice Services, representatives from state universities and mental health clinicians specializing in the treatment of sexual disorders.

Facility for Confinement

As previously stated, civil commitment of a sexual predator upon release from incarceration must be in a facility under the auspices of a health or mental health agency. There is also general consensus that a sexual predator confinement facility must be a secured facility. The Virginia Department for Mental Health, Mental Retardation and Substance Abuse Services, the logical agency to operate a facility for mentally impaired, does not currently have a secure facility within its system of state hospitals. Staff discussed the feasibility of designating a correctional facility for the confinement of sexual predators. For this approach to become reality, it would be necessary to put the facility administration under the Department of Mental Health, Mental Retardation and Substance Abuse Services with the Department of Corrections providing security.

Staff worked with the Department of Corrections and the Department of Mental Health, Mental Retardation and Substance Abuse Services to determine the availability of a facility within either of the systems. The Mecklenberg Correctional Center, once a maximum custody prison, is currently being converted into a reception and classification center for offenders entering the Department of Corrections' system. The possibility of utilization of one pod or twelve beds within this facility was assessed by the Department of Mental Health, Mental Retardation and Substance Abuse Services, in collaboration with the Department of Corrections.

The facility does not meet the space requirements for a forensic mental health facility as established by the U. S. Department of Justice. According to officials of the Department of Mental Health, Mental Retardation and Substance Abuse Services, approximately fourteen hundred (1400) square feet of program and living space are required per commitment. It would not be possible to retrofit the Mecklenberg facility to meet those needs. It was determined that no existing correctional facility currently meets the space requirements outlined by the Department of Mental Health, Mental Retardation and Substance Abuse Services. Security issues were also a concern for both Departments. Department of Corrections' security personnel is trained in the use of deadly force when dealing with offenders. By law, civilly committed persons cannot be addressed in the same manner. Inmate due processes and liabilities are also substantially different from those afforded to civilly committed persons.

Discussion

As the above discussion shows, the obstacles to the enactment of a sexual predator civil commitment at this time in Virginia are significant. One major consideration which needs to be addressed prior to making a recommendation is the current problems facing the mental health system in Virginia. Civil commitment legislation creates a new and difficult constituency for the Department of Mental Health, Mental Retardation and Substance Abuse Services; a population of violent offenders who are expected to be committed for a long period of time. The Department is inexperienced in providing services to this population.

The Mental Health System Issues

Advocates for the mentally ill have been vocal opponents of sexual predator civil commitment legislation. Mental health experts argue that this type of legislation distorts the traditional meaning of civil commitment, misallocates psychiatric facilities and resources, and constitutes a serious distortion of true psychiatric conditions. States with sexual predator legislation have coined the term "mental abnormality", a term which does not require a psychiatric diagnosis based upon currently accepted clinical diagnoses. "The danger is the term 'mental abnormality' could be used to reach all kinds of behavior that may have no relation to mental illness" said Michael Allen of the Bazelton Center for Mental Health Law in Washington, D.C., in a June 1997 Chicago Tribune article. "The law would permit commitment of someone who was just maladjusted." The 'mental disorder' definition used in most sexual predator legislation includes personality disorders which are accepted by mental health professionals as insufficient for civil commitment. Individuals with no cognitive disorder, such as someone with antisocial personality disorder, have knowledge of when they do wrong and their behavior is volitional. This runs counter to the commonly accepted professional view of an involuntary commitment where behavior is not recognized as wrong and such behavior is beyond the control of the mentally ill person. The American Psychiatric Association's model guidelines for civil commitment suggest limiting commitment to persons with "severe mental disorders".

The SJR 69 work group attempted to address these issues through proposed eligibility criteria for commitment in Virginia. The proposed criteria would include:

- Person is convicted of a "sexually violent offense", and
- Person did not benefit from treatment, refused treatment, or continues to need treatment after release from the Department of Corrections, and
- Person suffers from a diagnosable mental disorder linked to sexual violence which can be ameliorated through the mental health system, and
- Person's mental disorder still poses a risk for sexual violence.

Discussion

The work group focused on ensuring that the civil commitment process would link to the current criteria for civil commitment; that it would be based upon clinical diagnosis which could be addressed within the mental health system. However, neither the correctional system nor the mental health system have clinical assessment or therapeutic treatment widely or consistently available for sex offenders upon which to make a clinical determination concerning treatment response or need.

Another major concern of the mental health community regarding sexual predator legislation is that treating criminal conduct as an equivalent to a mental disorder will serve to further stigmatize psychiatric disorders and discourage the mentally ill from seeking treatment. The cost of including such a population within the mental health system is substantial. A conservative estimate is that commitment of sexual predators to the mental health system is at least twice as costly as care in the correctional system. Staff solicited information from other states with sexual predator legislation on the costs. Costs ranged from $75,000 to $150,000 per commitment. These are four to eight times Virginia's cost of a prison bed. Opponents believe this legislation could drain much needed resources away from the clinically mentally ill population.

As stated earlier, the Department of Mental Health, Mental Retardation and Substance Abuse Services is experiencing some serious complications within its state mental health hospital system. In recent years, state mental health and mental retardation facilities have come under intense scrutiny from the U. S. Department of Justice. Reports have been released which show deficiencies exist in the quality of care, including interdisciplinary planning and treatment, quality assurance and monitoring, records management and documentation, human resources and training, and coordination between facilities and community programs. These issues must be addressed to ensure that the current mental health population has access to high quality services in the most appropriate setting.

Governor Gilmore has appointed a commission (Hammond Commission) to conduct a comprehensive review of the services systems and recommendations for improving the quality of care. The Commission is examining the system holistically to determine the most effective approach for improving mental health services in the Commonwealth. The study will include examination of the recommendations of the Joint Subcommittee Studying the Future Delivery of Publicly Funded Mental Health, Mental Retardation, and Substance Abuse Services, the recommendations of the Community and Facility Master Plan, and other relevant public and private studies. This will most likely require a significant infusion of state dollars. Once the problems are resolved within the mental health system, Virginia will be in a better posture to consider a new program which attempts both to incarcerate and treat violent sex offenders.

Proposed Findings & Recommendations

Building on the background, study objectives, and discussion offered above, resulting findings and recommendations follow.

Finding I: ***With the abolition of parole and the introduction of sentencing guidelines, many of the sentences for violent sex offenses were increased. The Crime Commission examined additional measures to address the high recidivist rates of certain sex offenders. The recommendations are intended to identify predatory behaviors and enhance sentences accordingly.***

I. Risk Assessment and Sentencing Options

- Introduce a study resolution requesting that the Virginia Criminal Sentencing Commission, in cooperation with the Department of Corrections, develop a risk assessment instrument for "sexually violent offenses" and report back to the 2000 General Assembly.

- Introduce a resolution which requests that the Judicial Conference include a section on sex offenses and the high rate of recidivism. The section should provide information on the necessity of providing adequate post incarceration supervision for sex offenders.

II. Sentencing Enhancement Proposals

Amend the sexual assault statutes

- Include §18.2-67.5:1 convictions on the Registry (third misdemeanor sex offense conviction becomes a Class 6 felony).

- §18.2-370-Indecent liberties with a child: Increase the second conviction to a Class 5 felony.

- Cross reference the crimes in the two strikes statute in §18.2-67.5:2 (Three strikes triggers maximum penalty).

- Include aggravated sexual battery in the two strikes statute: §18.2-67.5:3.

Proposed Findings & Recommendations

Finding II: The U. S. Supreme Court decision - Kansas v. Hendricks - indicated that the underlying criteria for determination of eligibility for commitment is the offender's responsiveness to treatment. Virginia's correctional system currently has no therapeutic sex offender treatment available in the prisons. Treatment services should be put into place prior to instituting a sexual predator commitment process.

I. Sex Offender Assessment and Treatment

- Require a formalized sex offender assessment and treatment, if indicated, of all convicted sex offenders at some time during their incarceration or probation in the Department of Corrections. Assessment should include evaluation for psycho-pharmacological sex offender treatment, such as antiandrogens or SSRI's(specific serotonin reuptake inhibitors)proven to be effective in treating some deviant sexual behaviors.

- Establish intensive prison-based treatment programs with a proven record of success. *Resources Needed: $600.000.*

- Provide resources to community corrections for treatment, including polygraphing, of sex offenders under community supervision. *Resources Needed: $655,000.*

- Provide resources to Department of Juvenile Justice to establish one additional sex offender treatment unit. *Resources Needed: $125,000.*

- Introduce a study recommendation to direct the Department of Mental Health, Mental Retardation and Substance Abuse Services, in collaboration with the Department of Corrections, the Department of Juvenile Justice, the University of Virginia, and the Virginia Commonwealth University to explore the development of a Center for Sex Offender Assessment and Treatment including the professional structure, organizational context, assessment and treatment programming. The study will:

  - Review of the availability of facilities and professional staff. Explore the legal issues pertinent to this type of Center, including informed consent, liability, inmate/patient security requirements.

- Include consultation with other states, state agencies, and academic institutions regarding the multi-agency utilization of a Center.

- A report will be completed to present to the Governor and the 2000 General Assembly. The report will include a proposal for a Commonwealth Center for Assessment and Treatment of Sexual Disorders, to include the needed resources to implement the proposal. *Resources for planning: $50,000.*

Finding III: It is difficult to determine the impact of Virginia's existing sex offender initiatives on the reduction of sex offenses at this time. Many of the states adopting sexual predator commitment statutes did not have the same sentencing structures, multiple convictions penalties, a sex offender registry, etc. that Virginia has in place. Given these shortcomings, along with the fact that Virginia cannot adopt a sexual predator civil commitment procedure until treatment services are in place, and that - to date - problems within the mental health system have not been adequately resolved, the study group finds that the Crime Commission ought to be provided with a continuing opportunity to further evaluate the effect of the numerous efforts made to reduce the incidence of sex offending in the Commonwealth. Given the expense associated with the civil commitment of sex offenders, it is critical to find the most cost-effective strategy without sacrificing public safety.

I. Civil Commitment of Sexual Predators

- Introduce a continuing study resolution directing the Virginia State Crime Commission to continue its study for a two-year period to determine the feasibility of enacting a sexual predator civil commitment statute in Virginia. The study will focus on:

  - the impact of enhanced penalties, intensive supervision models, and the assessment and treatment of sex offenders on the reduction sex offending recidivism.

The Commission will collaborate with the Joint Subcommittee Studying the Future Delivery of Publicly Funded Mental Health, Mental Retardation, and Substance Abuse Services and the Hammond Commission in determining the best approach for addressing the care and commitment of violent sex offenders who have completed their sentence but continue to pose a serious public safety threat.

Proposed Findings & Recommendations

The Crime Commission will report to the Governor and Virginia General Assembly in 2001 with a recommendation as to whether Virginia should go forward with a sexual predator civil commitment statute or if more cost effective and less restrictive strategies achieve the public safety goals of the Commonwealth.

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Appendix A

Department of Corrections' Data on Incarcerated Sex Offenders

COMMONWEALTH of VIRGINIA

Department of Corrections

RON ANGELONE
DIRECTOR

P. O. BOX 26963
RICHMOND, VIRGINIA 23261
(804) 674-3000

September 1, 1998

MEMORANDUM

TO: Judy R. Philpott

FROM: Paula A. Harpster Paula A Harpster

SUBJECT: Sex Offender Information Request

Enclosed please find the information you requested on currently confined and released offenders with any predatory sex offense. The same NCIC sex offenses were used to define sex offenders selected for this data request as used before:

1003 - KIDNAP MINOR TO SEXUALLY ASSAULT
1100 - SEX ASSAULT, RAPE[1]
1119 - AGGRAVATED SEXUAL BATTERY AGAINST A MINOR[2]
1120 - PENETRATE WITH INANIMATE OBJECT
1121 - FORCIBLE SODOMY

As per our phone conversation on July 7, 1998, there were some mutually agreed upon changes made to the information you requested. The following table describes the information enclosed with this information request:

[1] This category includes codes 1100 - 1103

[2] For this level of specificity, the data were merged with the Pre-Sentencing Investigation (PSI) database using the Virginia Crime Code #RAP1121F9.

Also, please note the following as it pertains to the data analysis and enclosed tables:

Currently Confined
Offenders with death sentences are excluded from the currently confined tables and analysis. Offenders categorized as **parole eligible** were either sentenced prior to January 1, 1995 or have combination of parole eligible and ineligible sentences. Offenders that categorized as **not parole eligible** are those sentenced on or after January 1, 1995.

FY98 Releases
Only offenders released on either discretionary or mandatory parole or no parole discharge are included in the FY98 release analysis. Offenders with death sentences are excluded from the release tables and analysis. Parole violators are included in this analysis (n=19), however, the current mean sentence was similar to the entire population of releases.

If you have any questions, please contact me at (804) 674-3267.

Attachments

Cc: Ron Angelone
John Britton
Scott Richeson
Robin Hulbert

Offenders Currently Co ed in DOC Facilites*
With Any Sex Offense,
July 1998

Table 1. Confined Sex Offenders: Average Sentence by Sex Offense	Parole Eligible**		Not Parole Eligible		Total	
	Average Sentence in Years	n	Average Sentence in Years	n	Average Sentence in Years	n
1003 - Kidnap minor to sexually assault	75.0	3	0.0	0	75.0	3
1100 - Sex assault, rape	49.0	1,727	23.7	154	46.9	1,881
1119 - Aggravated sexual battery against minor	20.6	66	7.7	10	18.9	76
1120 - Penetrate with inanimate object	34.6	51	14.2	37	26.0	88
1121 - Forcible sodomy	32.4	313	20.3	65	30.3	378
Total	**45.4**	**2,160**	**20.9**	**266**	**42.7**	**2,426**

Table 2. Confined Sex Offenders: Most Serious Offense Group	Parole Eligible** n	Not Parole Eligible n	Total n
Capital Murder	33	3	36
Homicide, 1st	63	0	63
Manslaughter	4	0	4
Abduction	419	27	446
Rape/Sex Assault	1,593	236	1,829
Robbery	3	0	3
Assault	23	0	23
Homicide, 2nd	12	0	12
Burglary/B&E	4	0	4
Larceny/Fraud	2	0	2
Sex Offense	2	0	2
Other Non-violent	2	0	2
Total	**2,160**	**266**	**2,426**

* Death sentences are excluded from this analysis; life sentences are calculated as 68.57 years.

** Includes offenders with combination sentences.

Offenders Currently Confined in DOC Facilities*
With Any Sex Offense,
July 1998

Table 3. Confined Sex Offenders	Total Confined		Parole Eligible		Not Parole Eligible	
Sentence Group	n	%	n	%	n	%
Less than or equal to 2 years	11	0.5%	7	0.3%	4	1.5%
> 2 years up to 3 years	7	0.3%	2	0.1%	5	1.9%
> 3 years up to 4 years	10	0.4%	6	0.3%	4	1.5%
> 4 years up to 5 years	51	2.1%	16	0.7%	35	13.2%
> 5 years up to 6 years	37	1.5%	21	1.0%	16	6.0%
> 6 years up to 8 years	92	3.8%	59	2.7%	33	12.4%
> 8 years up to 10 years	117	4.8%	81	3.8%	36	13.5%
> 10 years up to 15 years	215	8.9%	174	8.1%	41	15.4%
> 15 years up to 20 years	244	10.1%	222	10.3%	22	8.3%
> 20 years	1,174	48.4%	1,127	52.2%	47	17.7%
Life Sentence	468	19.3%	445	20.6%	23	8.6%
Total	**2,426**		**2,160**		**266**	

Table 4. Confined Sex Offenders	Total Confined		Parole Eligible		Not Parole Eligible	
Gender	n	%	n	%	n	%
Male	2,416	99.6%	2,151	99.6%	265	99.6%
Female	10	0.4%	9	0.4%	1	0.4%
Total	**2,426**		**2,160**		**266**	

* Death se s are excluded from this analysis.

Offenders Currently Confined in DOC Facilities*
With Any Sex Offense,
July 1998

Table 5. Confined Sex Offenders	Total Confined		Parole Eligible		Not Parole Eligible	
Age Group at DOC Commitment	n	%	n	%	n	%
Less than 18 years old	73	3.0%	70	3.2%	3	1.1%
18 - 24 years old	744	30.7%	686	31.8%	58	21.8%
25 - 29 years old	519	21.4%	469	21.7%	50	18.8%
30 - 34 years old	401	16.5%	351	16.3%	50	18.8%
35 - 39 years old	301	12.4%	257	11.9%	44	16.5%
40 - 44 years old	175	7.2%	148	6.9%	27	10.2%
45 - 49 years old	89	3.7%	74	3.4%	15	5.6%
50 - 54 years old	67	2.8%	54	2.5%	13	4.9%
55 - 59 years old	26	1.1%	23	1.1%	3	1.1%
60 - 64 years old	19	0.8%	17	0.8%	2	0.8%
65+ years old	12	0.5%	11	0.5%	1	0.4%
Total	**2,426**		**2,160**		**266**	

Table 6. Confined Sex Offenders	Total Confined Mean (in years) (n = 2,426)	Parole Eligible Mean (in years) (n = 2,160)	Not Parole Eligible Mean (in years) (n = 266)
Average Age at DOC Commitment	30.7	30.4	33.2

* Death sentences are excluded from this analysis.

FY 1998 Releases*
With Any Sex Offense,
July 1998

Table 9. FY98 Releases Sentence Group	Total Released		Parole Eligible		Not Parole Eligible	
	n	%	n	%	n	%
Less than or equal to 2 years	16	9.8%	5	3.4%	11	73.3%
> 2 years up to 3 years	8	4.9%	4	2.7%	4	26.7%
> 3 years up to 4 years	7	4.3%	7	4.7%	0	0.0%
> 4 years up to 5 years	22	13.5%	22	14.9%	0	0.0%
> 5 years up to 6 years	6	3.7%	6	4.1%	0	0.0%
> 6 years up to 8 years	7	4.3%	7	4.7%	0	0.0%
> 8 years up to 10 years	19	11.7%	19	12.8%	0	0.0%
> 10 years up to 15 years	30	18.4%	30	20.3%	0	0.0%
> 15 years up to 20 years	19	11.7%	19	12.8%	0	0.0%
> 20 years	25	15.3%	25	16.9%	0	0.0%
Life Sentence	4	2.5%	4	2.7%	0	0.0%
Total	**163**		**148**		**15**	

Table 10. FY98 Releases Gender	Total Released		Parole Eligible		Not Parole Eligible	
	n	%	n	%	n	%
Male	161	98.8%	146	98.6%	15	100.0%
Female	2	1.2%	2	1.4%	0	0.0%
Total	**163**		**148**		**15**	

* Only offe... released on discretionary or mandatory parole or no parole discharge are incl... in this analysis; death sen... are excluded.

FY 1998 Releases*
With Any Sex Offense,
July 1998

Table 11. FY98 Releases	Total Released		Parole Eligible		Not Parole Eligible	
Age Group at Release	n	%	n	%	n	%
Less than 18 years old	0	0.0%	0	0.0%	0	0.0%
18 - 24 years old	15	9.2%	12	8.1%	3	20.0%
25 - 29 years old	20	12.3%	18	12.2%	2	13.3%
30 - 34 years old	32	19.6%	31	20.9%	1	6.7%
35 - 39 years old	32	19.6%	29	19.6%	3	20.0%
40 - 44 years old	19	11.7%	19	12.8%	0	0.0%
45 - 49 years old	21	12.9%	17	11.5%	4	26.7%
50 - 54 years old	10	6.1%	8	5.4%	2	13.3%
55 - 59 years old	7	4.3%	7	4.7%	0	0.0%
60 - 64 years old	2	1.2%	2	1.4%	0	0.0%
65+ years old	5	3.1%	5	3.4%	0	0.0%
Total	**163**		**148**		**15**	

Table 12. FY98 Releases	Total Released Mean (in years) (n = 163)	Parole Eligible Mean (in years) (n = 148)	Not Parole Eligible Mean (in years) (n = 15)
Average Age at Release	38.9	39.1	37.0

* Only offenders released on discretionary or mandatory parole or no parole discharge are included in this analysis; death sentences are excluded.

FY 1998 Releases*
With Any Sex Offense,
July 1998

Table 7. FY98 Releases Average Sentence by Sex Offense**	Parole Eligible			Not Parole Eligible			Total		
	Average Sentence in Years	Average Time Served	n	Mean Sentence in years	Average Time Served	n	Mean Sentence in years	Average Time Served	n
1003 - Kidnap minor to sexually assault	0.0	0.0	0	0.0	0.0	0	0.0	0.0	0
1100 - Sex assault, rape	16.9	9.1	109	1.3	1.1	6	16.1	8.7	115
1119 - Aggravated sexual battery against minor	4.9	2.8	8	2.3	2.0	7	3.7	2.4	15
1120 - Penetrate with inanimate object	8.8	4.9	4	1.0	0.8	1	7.2	4.1	5
1121 - Forcible sodomy	10.1	5.5	27	2.5	2.3	1	9.9	5.4	28
Total	**14.8**	**8.0**	**148**	**1.8**	**1.6**	**15**	**13.6**	**7.4**	**163**

Table 8. FY98 Releases Most Serious Offense Group	Parole Eligible n	Not Parole Eligible n	Total n
Abduction	9	0	9
Rape/Sex Assault	138	15	153
Burglary/B&E	1	0	1
Total	**148**	**15**	**163**

*Includes offenders released on discretionary or mandatory parole or no parole discharge; death sentences are excluded.
**Parole vir (n=19) & current sentence are included in this analysis.

Appendix B

National Data on Other States' Sexual Predator Commitment Laws

EXECUTIVE SUMMARY

Twelve states have statutes that authorize the confinement and treatment of highly dangerous sex offenders following completion of their criminal sentence: Arizona, California, Florida, Illinois, Iowa, Kansas, Minnesota, New Jersey, North Dakota, South Carolina, Washington, and Wisconsin. These laws are commonly referred to as "sexual predator" laws. This report describes sexual predator laws and compares several of their key provisions.

As of the summer of 1998, more than 520 sexual predators have been committed in these 12 states.

Sexual predator laws conform in many aspects. Key similarities include the following:

- Commitment follows a criminal sentence.
- The laws target repeat sex offenders.
- Evidence regarding the individual's likelihood of future violence is central to decision-making.

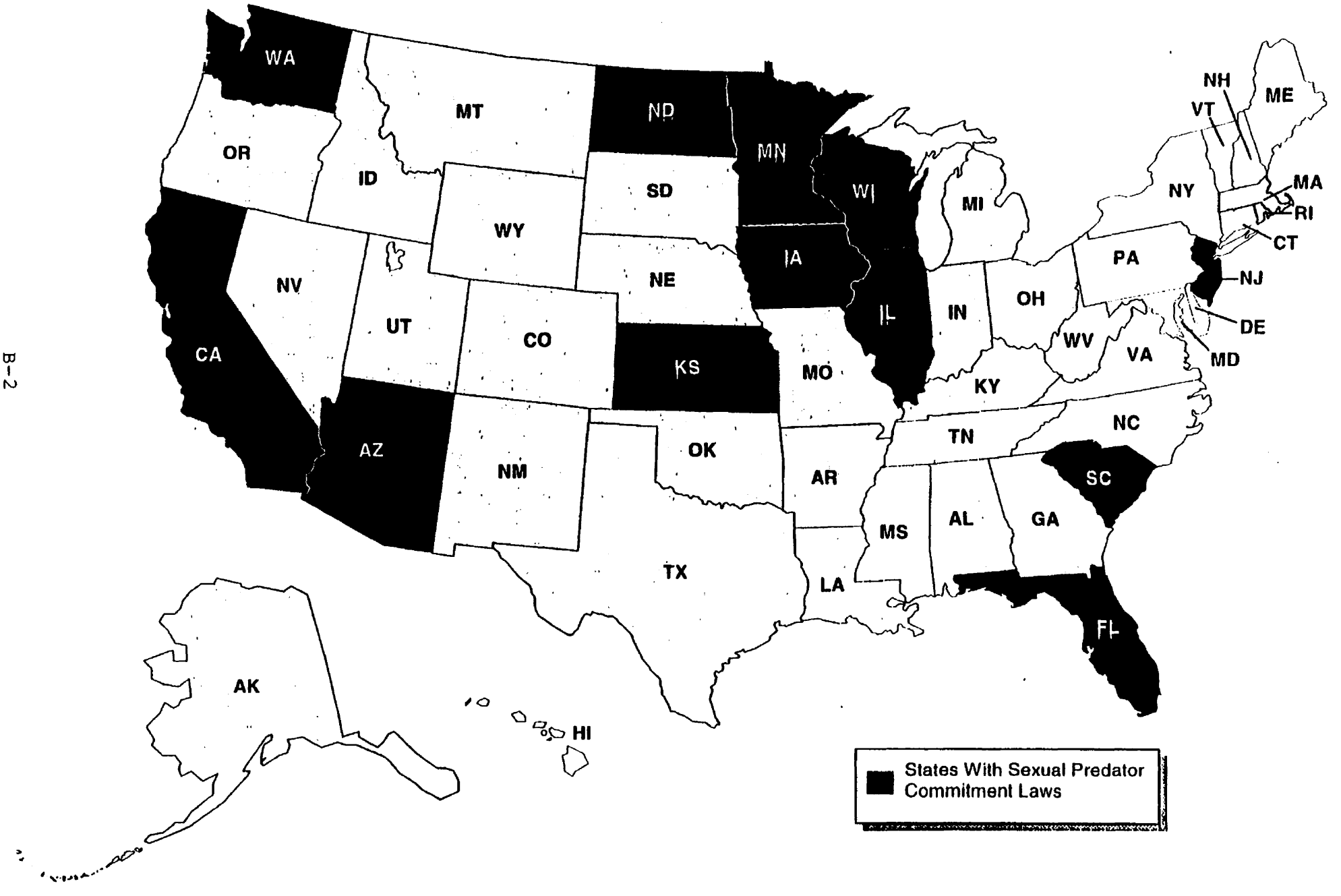
In comparing state statutes, some differences emerge:

- Most states require the "beyond a reasonable doubt" standard used in criminal proceedings as the burden of proof for commitment; others use the lower standard of "clear and convincing evidence."
- A few states specifically provide that juveniles are eligible for commitment, while others stipulate that petitions can only be filed on persons who are 18 years of age or older.
- California's law calls for a time-limited confinement of two years, while the remaining eleven states authorize indeterminate periods of commitment.

The earliest statutes, in Washington and Kansas, were quite similar, although each law has been slightly modified since its passage. With the U.S. Supreme Court decision in 1997 upholding the constitutionality of Kansas' law, the next wave of statutes is likely to show more individuality.

In 1998, legislative proposals for post-release confinement of sexual predators were introduced in at least 21 states.

TWELVE STATES HAVE SEXUAL PREDATOR COMMITMENT LAWS



WSIPP, ember 1998

REFERRALS, FILINGS, AND COMMITMENTS

During the summer of 1998, we contacted states and inquired about the number of commitments as well as cases evaluated for commitment. The responses are displayed in Table 1. Since states rely on a variety of procedures to identify sexual predators, some explanation of terms is required.

- Referred cases are those that have been reviewed and a judgment made by an individual or committee; the person meets the statutory criteria, including an assessment of mental state or dangerousness as well as history.

- Filed cases are those a prosecutor acted on through a petition.

- Committed represents the number found by the court/jury to meet the statutory criteria. In some states, individuals have chosen to undergo an evaluation at the facility and did not immediately contest the filing; these persons are not included in this category.

Since most states enacted their statutes in the last three years, the overall commitment pattern is still unstable.

TABLE 1: NUMBER OF SEXUAL PREDATORS COMMITTED (SUMMER 1998)

STATE	YEAR ENACTED	NUMBER REFERRED	NUMBER FILED	NUMBER COMMITTED
Arizona	1996	41	36	5
California	1996	1,374	465	119
Florida	1998	0	0	0
Illinois	1997	27	n/a*	3
Iowa	1998	0	0	0
Kansas	1994	n/a*	150	17
Minnesota	1939	220	n/a*	130
New Jersey	1994	n/a*	n/a*	101
North Dakota	1997	1	0	0
South Carolina	1998	0	0	0
Washington	1990	196	71	41
Wisconsin	1994	n/a*	260	107
	Total			523

**Not applicable or not available.*

COSTS

Table 2 presents cost estimates for sexual predator laws.[14] These estimates cover housing and treatment costs and where indicated, legal expenses. These estimates are not comprehensive. The process of identifying and evaluating potential candidates for commitment often requires assistance from state and local government staff; few, if any, of the estimates incorporate these resources.

TABLE 2: ANNUAL ESTIMATED COSTS OF COMMITMENT

STATE	HOUSING	TREATMENT	LEGAL
Arizona	Unknown	$45,000 per offender	Unknown
California	$103,000 per offender, combined		Unknown
Florida	$97,000 per offender, combined		Unknown
Illinois	Unknown	Unknown	Unknown
Iowa	$1,177,481 total in 1st year of operation, $2,783,855 in 2nd year (Based on 6 to 11 commitments per year)		$269,000 total in 1st year, $425,000 in 2nd year (Based on estimated 6 to 11 commitments per year)
Kansas	$80,000 per offender, combined		Unknown
Minnesota	$110,000 per offender, combined		Unknown
New Jersey 1994	$85,000 per offender, combined		Unknown
New Jersey 1998	$20 million was appropriated to construct and operate a new 150-bed facility (expansion to 300 possible)		Unknown
North Dakota	$100,000 per offender, combined		Unknown
South Carolina	Unknown	$940,000 total (24-bed facility)	Unknown
Washington	$70,000 per offender, combined		$60,000 per offender
Wisconsin	$82,125 per offender, combined		Unknown

RELEASE FROM COMMITMENT FACILITIES

Given the recency of most state statutes, few people have been released from the facilities. In Washington State's eight-year history with its law, two individuals have been released to a less restrictive alternative.

[14] Figures based upon telephone conversations with facility directors between April and July 1998. Some figures were not available because decision-making occurs at the local level, and a central data source is not available.

In 1994, Minnesota implemented a new sex offender treatment program for individuals committed with sexual psychopathic personalities or as sexually dangerous persons. As of July 1998, one offender completed this program and is about to be released.

Wisconsin's statute was passed in 1994. Two individuals have been discharged from Wisconsin's facility and seven are on supervised release.

CONCLUSION

Over 520 persons have been identified across the country as sexual predators. Twelve states have enacted sexual predator laws, and many more are considering similar legislation.

As these laws evolve, states will take individual approaches in deciding how to assess the relative dangerousness of sex offenders. Additionally, the treatment programs will vary in their approach, intensity, and degree of offender cooperation. As more individuals labeled as predators are released from confinement, decisions will follow about their level of supervision and conditions.

Whatever opinion one holds about sexual predator laws, the implementation experience of states offers a rich source of information on sexual offender policy. A systematic analysis of these state experiences could benefit policymakers across the country.

TABLE 3
COMPARISON OF KEY ELEMENTS

State	Eligible Offenders/Offenses Likelihood Standards	Responsible Agency	Setting	Standard of Proof	Jury Trial	Duration of Confinement	Release Authority
Arizona	Individuals at least 18 years old. *Standard:* likely to engage in sexual violence.	Health Services	Hospital	Beyond a reasonable doubt	Yes	Indeterminate	Court
California	Individuals at least 18 years old with two or more victims. *Standard:* the person is a danger to the health and safety of others in that he or she will engage in sexually violent criminal behavior.	Mental Health	Hospital	Beyond a reasonable doubt	Yes; unanimous	2 years; can be extended by court with additional petition and trial	Court
Florida	Individuals at least 18 years old. *Standard:* likely to engage in acts of sexual violence.	Children and Family Services	Hospital	Clear and convincing evidence	Yes; unanimous	Indeterminate	Court
Illinois	Can include juveniles. *Standard:* substantially probable that the person will engage in acts of sexual violence.	Human Services	Secure facility	Beyond a reasonable doubt	Yes	Indeterminate	Court
Iowa	*Standard:* likely to engage in predatory acts constituting sexually violent offenses.	Human Services	Forensic Mental Health Unit within Corrections	Beyond a reasonable doubt	Yes; unanimous	Indeterminate	Court
Kansas	*Standard:* likely to engage in predatory acts of sexual violence.	Social and Rehabilitative Services	Correctional Mental Health facility	Beyond a reasonable doubt	Yes; unanimous	Indeterminate	Court
Minnesota	*Standard:* likely to engage in acts of harmful sexual conduct.	Human Services	Hospital	Clear and convincing evidence	No	Indeterminate	Commissioner
New Jersey 1994	Relies on mental health commitment law, with specific direction that mental illness is not limited to those with psychosis. *Standard:* likely to engage in acts of sexual violence.	Mental Health	Hospital	Clear and convincing evidence	No	Indeterminate	Court

TABLE 3 (CONTINUED)

State	Eligible Offenders/Offenses: Key Distinctions	Responsible Agency	Setting	Standard of Proof	Jury Trial	Duration of Confinement	Release Authority
New Jersey 1998	Individuals at least 18 years old. *Standard:* has a mental disorder that makes the person likely to engage in sexual violence.	Human Services	Secure facility operated by the Department of Corrections and separate offenders	Clear and convincing evidence	No	Indeterminate	Parole Board
North Dakota	*Standard:* likely to engage in further acts of sexually predatory conduct.	Human Services	Hospital	Clear and convincing evidence	No	Indeterminate	Court
South Carolina	*Standard:* likely to engage in acts of sexual violence.	Mental Health	Secure facility	Beyond a reasonable doubt	Yes; unanimous	Indeterminate	Court
Washington	Individuals must meet definition of "predatory." Predatory defined as "acts directed toward strangers or individuals with whom a relationship has been established or promoted for the primary purpose of victimization." For individuals living in the community, a recent overt act is required. *Standard:* likely to engage in predatory acts of sexual violence.	Social and Health Services	Mental Health facility within the Department of Corrections	Beyond a reasonable doubt	Yes; unanimous	Indeterminate	Court
Wisconsin	Can include juveniles. *Standard:* substantially probable that the person will engage in acts of sexual violence.	Social Services	Hospital	Beyond a reasonable doubt	Yes	Indeterminate	Court

WSIPP 1998

Appendix C

Kansas v. Hendricks
Summary of the U.S. Supreme Court Decision

Kansas v. Hendricks - as summarized by Cornell Law School's Legal Information Institute.[16]

SUPREME COURT OF THE UNITED STATES
KANSAS v. HENDRICKS

certiorari to the supreme court of Kansas

No. 95-1649. Argued December 10, 1996 -- Decided June 23, 1997

[n.*]

Kansas' Sexually Violent Predator Act establishes procedures for the civil commitment of persons who, due to a "mental abnormality" or a "personality disorder," are likely to engage in "predatory acts of sexual violence." Kansas filed a petition under the Act in state court to commit respondent (and cross petitioner) Hendricks, who had a long history of sexually molesting children and was scheduled for release from prison. The court reserved ruling on Hendricks' challenge to the Act's constitutionality, but granted his request for a jury trial. After Hendricks testified that he agreed with the state physician's diagnosis that he suffers from pedophilia and is not cured and that he continues to harbor sexual desires for children that he cannot control when he gets "stressed out," the jury determined that he was a sexually violent predator. Finding that pedophilia qualifies as a mental abnormality under the Act, the court ordered him committed. On appeal, the State Supreme Court invalidated the Act on the ground that the precommitment condition of a "mental abnormality" did not satisfy what it perceived to be the "substantive" due process requirement that involuntary civil commitment must be predicated on a "mental illness" finding. It did not address Hendricks' ex post-facto and double jeopardy claims.

Held:

1. The Act's definition of "mental abnormality" satisfies "substantive" due process requirements. An individual's constitutionally protected liberty interest in avoiding physical restraint may be overridden even in the civil context. *Jacobson v. Massachusetts*, 197 U.S. 11, 26. This Court has consistently upheld involuntary commitment statutes that detain people who are unable to control their behavior and thereby pose a danger to the public health and safety, provided the confinement takes place pursuant to proper procedures and evidentiary standards. *Foucha v. Louisiana*, 504 U.S. 71, 80. The Act unambiguously requires a

[16] Established with a $250,000 multi-year startup grant from the National Center for Automated Information Research, the Legal Information Institute aims to connect the full resources of Cornell's Law School with the legal profession, with other law schools, and with the world; to carry out applied research on the use of digital information technology in the distribution of legal information, the delivery of legal education, and the practice of law; and to carry out these activities in partnership with but not under the control or direction of such other key actors as law firms, bar associations, public law making and applying bodies, commercial publishers, and other academic institutions.

precommitment finding of dangerousness either to one's self or to others, and links that finding to a determination that the person suffers from a "mental abnormality" or "personality disorder." Generally, this Court has sustained a commitment statute if it couples proof of dangerousness with proof of some additional factor, such as a "mental illness" or "mental abnormality," see, e.g., *Heller v. Doe*, 509 U.S. 312, 314-315, for these additional requirements serve to limit confinement to those who suffer from a volitional impairment rendering them dangerous beyond their control. The Act sets forth comparable criteria with its precommitment requirement of "mental abnormality" or "personality disorder." Contrary to Hendricks' argument, this Court has never required States to adopt any particular nomenclature in drafting civil commitment statutes and leaves to the States the task of defining terms of a medical nature that have legal significance. Cf. *Jones v. United States*, 463 U.S. 354, 365, n. 13. The legislature is therefore not required to use the specific term "mental illness" and is free to adopt any similar term. Pp. 8-13.

2. The Act does not violate the Constitution's double jeopardy prohibition or its ban on ex post-facto lawmaking. Pp. 13-24.

(a) The Act does not establish criminal proceedings, and involuntary confinement under it is not punishment. The categorization of a particular proceeding as civil or criminal is a question of statutory construction. *Allen v. Illinois*, 478 U.S. 364, 368. Nothing on the face of the Act suggests that the Kansas Legislature sought to create anything other than a civil commitment scheme. That manifest intent will be rejected only if Hendricks provides the clearest proof that the scheme is so punitive in purpose or effect as to negate Kansas' intention to deem it civil. *United States v. Ward*, 448 U.S. 242, 248-249. He has failed to satisfy this heavy burden. Commitment under the Act does not implicate either of the two primary objectives of criminal punishment: retribution or deterrence. Its purpose is not retributive: It does not affix culpability for prior criminal conduct, but uses such conduct solely for evidentiary purposes; it does not make criminal conviction a prerequisite for commitment; and it lacks a scienter requirement, an important element in distinguishing criminal and civil statutes. Nor can the Act be said to act as a deterrent, since persons with a mental abnormality or personality disorder are unlikely to be deterred by the threat of confinement. The conditions surrounding confinement–essentially the same as conditions for any civilly committed patient–do not suggest a punitive purpose. Although the commitment scheme here involves an affirmative restraint, such restraint of the dangerously mentally ill has been historically regarded as a legitimate nonpunitive objective. Cf. *United States v. Salerno*, 481 U.S. 739, 747. The confinement's potentially indefinite duration is linked, not to any punitive objective, but to the purpose of holding a person until his mental abnormality no longer causes him to be a threat to others. He is thus permitted immediate release upon a showing that he is no longer dangerous, and the longest he can be detained pursuant to a single judicial proceeding is one year. The State's use of procedural safeguards applicable in criminal trials does not itself turn the proceedings into criminal prosecutions. *Allen*, supra, at 372. Finally, the Act is not necessarily punitive if it fails to offer treatment where treatment for a condition is not possible, or if treatment, though possible, is merely an ancillary, rather than an overriding,

state concern. The conclusion that the Act is nonpunitive removes an essential prerequisite for both Hendricks' double jeopardy and ex post-facto claims. Pp. 13-21.

(b) Hendricks' confinement does not amount to a second prosecution and punishment for the offense for which he was convicted. Because the Act is civil in nature, its commitment proceedings do not constitute a second prosecution. Cf. *Jones*, supra. As this commitment is not tantamount to punishment, the detention does not violate the Double Jeopardy Clause, even though it follows a prison term. Baxstrom v. Herold, 383 U.S. 107. Hendricks' argument that, even if the Act survives the "multiple punishments" test, it fails the "same elements" test of *Blockburger v. United States*, 284 U.S. 299, is rejected, since that test does not apply outside of the successive prosecution context. Pp. 22-23.

(c) Hendricks' ex post-facto claim is similarly flawed. The Ex Post-Facto Clause pertains exclusively to penal statutes. *California Dept. of Corrections v. Morales*, 514 U.S. 499, 505. Since the Act is not punishment, its application does not raise ex post-facto concerns. Moreover, the Act clearly does not have retroactive effect. It does not criminalize conduct legal before its enactment or deprive Hendricks of any defense that was available to him at the time of his crimes. Pp. 23-24.

259 Kan. 246, 912 P. 2d 129, reversed.

Thomas, J., delivered the opinion of the Court, in which Rehnquist, C. J., and O'Connor, Scalia, and Kennedy, JJ., joined. Kennedy, J., filed a concurring opinion. Breyer, J., filed a dissenting opinion, in which Stevens and Souter, JJ., joined, and in which Ginsburg, J., joined as to Parts II and III.

Appendix D

SJR 69
Civil Commitment of Violent Sexual Offenders

SENATE JOINT RESOLUTION NO. 69

Directing the Virginia State Crime Commission to study the civil commitment of violent sexual predators.

Agreed to by the Senate, February 13, 1998
Agreed to by the House of Delegates, March 12, 1998

WHEREAS, the United States Supreme Court in *Kansas v. Hendricks* recently upheld the constitutionality of civil commitment of violent sex offenders who have completed their criminal sentence; and

WHEREAS, the Virginia State Crime Commission examined the issue of civil commitment of sex offenders as a component of its "Megan's Law" study; and

WHEREAS, the Commission found that there were a number of critical issues in Virginia which needed to be addressed in order to implement a sex offender civil commitment statute, including (i) the availability of sex offender treatment within the prison system, (ii) the availability of a facility within the mental health system for the civil commitment procedure, and (iii) the long-range cost of civil commitment of sex offenders; and

WHEREAS, the Commission determined that the issues needed more thorough examination prior to the introduction of this legislation; and

WHEREAS, it is critical that the Commonwealth proceed with caution on this issue and thoroughly address each of the mandates established by the Supreme Court decision in order to pass constitutional muster; now, therefore, be it

RESOLVED by the Senate, the House of Delegates concurring, That the Virginia State Crime Commission be directed to conduct a study on the civil commitment of violent sexual predators who have completed their sentence and are subject to release back into the community.

All agencies of the Commonwealth shall provide assistance to the Commission, upon request.

The Commission shall complete its work in time to submit its findings and recommendations to the Governor and the 1999 Session of the General Assembly as provided in the procedures of the Division of Legislative Automated Systems for the processing of legislative documents.

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