VIRGINIA STATE CRIME COMMISSION

MANDATORY MINIMUM CRIMES IN VIRGINIA EXECUTIVE SUMMARY

Authority for Study

The *Code of Virginia*, § 30-156, authorizes the Virginia State Crime Commission ("Crime Commission") to study, report and make recommendations "on all areas of public safety and protection." Additionally, the Crime Commission is to study "compensation of persons in law enforcement and related fields" and to study "apprehension, trial and punishment of criminal offenders."[1] Section 30-158(3) empowers the Crime Commission to "conduct studies and gather information and data in order to accomplish its purposes as set forth in § 30-156. . .and formulate its recommendations to the Governor and the General Assembly."

Using the statutory authority granted to the Crime Commission, staff conducted a study on the various criminal statutes in Virginia that carry a mandatory minimum sentence.

Background

Under Virginia law, a mandatory minimum sentence is one that must be imposed, and cannot be suspended, by the trial judge if a defendant is found guilty of the offense.[2] There are currently 36 criminal statutes in the *Code of Virginia* that contain some type of mandatory minimum sentence. Altogether, they create roughly 82 offenses for which a mandatory minimum sentence is applicable.[3] Of these 82 offenses, 60 are felonies, and 22 are misdemeanors. The sentences vary in range from a mandatory $250 fine,[4] to life imprisonment.[5] The types of offenses for which mandatory minimum sentences have been specified fall into many different categories: drugs, DUI offenses, firearms, sexual assault, non-DUI related driving offenses, and even trespass.

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[1] VA. CODE ANN. § 30-156 (Michie 2007).
[2] VA. CODE ANN. § 18.2-12.1 (Michie 2007).
[3] Unlike the number of statutes, which can definitively be counted, determining the exact number of offenses actually becomes a matter of interpretation. For instance, Va. Code § 18.2-255(A) creates a five year mandatory minimum sentence for distributing a Schedule I or II controlled substance or one ounce or more of marijuana to a minor by an adult; for less than one ounce of marijuana, the mandatory minimum penalty is two years. Should this be counted as two offenses, or as three (i.e., a Schedule I or II drug; more than one ounce of marijuana; less than one ounce of marijuana)? Or even four, by distinguishing between Schedule I and Schedule II drugs? For purposes of this review, Va. Code § 18.2-255(A) was deemed to create only two mandatory minimum offenses. However, the Virginia Sentencing Commission, in their list of mandatory minimum crimes, counts this as three offenses. Using a more conservative approach in counting the number of offenses is why this review "identified" 82; the Sentencing Commission's approach yields a result of over 100.
[4] A first offense DUI. VA. CODE ANN. § 18.2-270(A) (Michie 2007).
[5] For example, distribution of drugs under the drug king-pin statute. VA. CODE ANN. § 18.2-248(H2) (Michie 2007).

The enactment of mandatory minimum laws is a comparatively recent phenomenon in Virginia. The first was passed in 1968, with the creation of Virginia's habitual offender laws.[6] Three more were enacted in the 1970's: the use of a firearm in the commission of certain felonies;[7] a second offense of that crime;[8] and the escape from a correctional facility by a felon.[9] The vast majority of mandatory minimum offenses have been created in the last twenty years; dozens have been created since 2000 in a trend that does not currently show any signs of abating.

Typically, most of the mandatory minimum crimes enacted in a year deal with a specific category of offense, reflecting a pressing concern at that time. For instance, in 2003, all of the enacted mandatory minimum punishments involved DUI offenses.[10] In 2007, eight out of the ten mandatory minimum crimes enacted dealt with child pornography and the use of computers to solicit children.[11]

A review of the literature published on the topic of mandatory minimum punishments finds very few universal conclusions.[12] This is to be expected; a mandatory minimum statute that requires a fine to be paid for speeding cannot be fairly compared to a statute requiring a mandatory minimum life sentence for dealing drugs. The differences in penalties, and in the types of offenses involved, prevent generalities from being made. However, most peer-reviewed studies have not established any long-term deterrent effects directly resulting from the passage of a mandatory minimum statute.[13] Some studies have found that the enactment of a mandatory minimum penalty led to a decrease in convictions for that offense, due to plea bargaining—defendants opted to plead to a lesser offense, rather than risk a conviction which would mean a lengthier incarceration.[14]

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[6] 1968 Va. Acts ch. 476. That penalty, a mandatory minimum one year for driving after having been declared a habitual offender, is still in effect today. VA. CODE ANN. § 46.2-357 (Michie 2007).

[7] 1976 Va. Acts ch. 371. The penalty at that time was a mandatory minimum one year; the penalty has since been increased to a mandatory minimum three years. VA. CODE ANN. § 18.2-53.1 (Michie 2007).

[8] 1976 Va. Acts ch. 371. The penalty for a second offense of the use of a firearm in the commission of certain felonies was originally three years. The penalty has since been increased to a mandatory minimum five years. VA. CODE ANN. § 18.2-53.1 (Michie 2007).

[9] 1977 Va. Acts ch. 497. That penalty, a mandatory minimum one year, is still in effect today. VA. CODE ANN. § 53.1-203(1) (Michie 2007).

[10] 2003 Va. Acts chs. 573, 591. This was the year in which mandatory minimum fines were created for all DUI offenses punished under Va. Code § 18.2-270.

[11] 2007 Va. Acts chs. 418, 759, 823.

[12] For an interesting overview of various studies done on the subject of mandatory minimum sentences and their effectiveness, *see* Thomas Gabor & Nicole Crutcher, *Mandatory Minimum Penalties: Their Effects on Crime, Sentencing Disparities, and Justice System Expeditures*, RESEARCH AND STATISTICS DIVISION, DEPARTMENT OF JUSTICE CANADA, January 2002. Many of the studies they summarize are from the United States. For an earlier overview, that covers many of the same studies in more depth, *see* Michael Tonry, *Mandatory Penalties*, 16 CRIME & JUST. 243 (1992).

[13] *See* Dale Parent, Terence Dunworth, Douglas McDonald, & William Rhodes, *Key Legislative Issues in Criminal Justice: Mandatory Sentencing*, RESEARCH IN ACTION, NATIONAL INSTITUTE OF JUSTICE, OFFICE OF JUSTICE PROGRAMS, U.S. DEPT. OF JUSTICE (January 1997); Michael Tonry, *Mandatory Penalties*, 16 CRIME & JUST. 243 (1992).

[14] *See, e.g.*, Nancy Merritt, Terry Fain, & Susan Turner, *Oregon's Get Tough Sentencing Reform: A Lesson in Justice System Adaptation*, 5 CRIMINOLOGY & PUBLIC POLICY 1, 5-36 (2006); *c.f.* Colin Loftin, Milton Heumann & David McDowall, *Mandatory Sentencing and Firearms Violence: Evaluating an Alternative to Gun Control*, 17 LAW & SOCIETY REVIEW 2, 287-318 (1983).

Other studies have found that a decrease in crime rate following the passage of a mandatory minimum sentence was due to other factors than the deterrent impact of the new mandatory minimum punishment. For example, a very detailed study that analyzed the impact of mandatory minimum jail sentences in Arizona for drunk driving found that the decrease in drunk driving arrests following the enactment of the "stiffer penalties," was more closely correlated with a corresponding public awareness campaign about the new laws and the dangers of drunk driving, rather than the specific deterrent effect of the laws themselves.[15]

This is not to say that there may not be other compelling reasons for a mandatory minimum penalty to be enacted. Such statutes do allow a legislature to register its strong disapproval of a crime, and formally declare that criminals who commit such acts will not be allowed to escape unpunished. In this way, a legislature can indirectly express its understanding and sympathy for the victims of those crimes.

The passage of mandatory minimum sentences can also provide a tool for prosecutors to induce guilty pleas, via plea bargaining, thus saving time and financial resources of the state.[16] A similar benefit may be that with the "threat" of a mandatory minimum sentence, a defendant may be persuaded to provide cooperation to the prosecutors, either by testifying against co-defendants, or by providing information about other, unrelated criminal cases.[17]

Conclusion

While mandatory minimum laws may provide useful benefits in some situations, they can also lead to unanticipated or even undesirable effects, such as lower conviction rates, or an unjust sentence in an individual case. Trying to determine in advance whether the passage of a mandatory minimum penalty will have mostly positive or negative consequences, or no real impact at all, is extremely difficult. The following general considerations may provide some guidance as to whether or not a particular proposal for a new mandatory minimum punishment will be good policy or not.

How much jail or prison time are such offenders currently receiving? If most defendants convicted of the crime are already receiving a lengthier incarceration than what is proposed, then the new mandatory minimum probably will not be accomplishing much. In fact, it may lead to lighter sentences if judges are "guided" by the mandatory minimum language to sentence all defendants to exactly that amount of time.

What will be the fiscal impact on jails or prisons? If the proposed mandatory minimum will lead to much greater periods of incarceration, then the overall impact on

[15] Henry F. Fradella, *Mandatory Minimum Sentences: Arizona's Ineffective Tool for the Social Control of Driving Under the Influence*, 11 CRIMINAL JUSTICE POLICY REVIEW 2, 113-135 (June 2000).
[16] *Mandatory Minimum Sentencing Study*, VCSC ANN. REP. (1996), at 47.
[17] *Id*.

state and local budgets must be considered. The increased costs may need to be considered in Virginia's budget and in future, long-term planning.

Do Commonwealth's Attorneys support the proposal? As the constitutional officers who will make use of the mandatory minimum statute, or ignore it, their input must be sought before the new penalty is enacted. There is little good to be accomplished in passing criminal legislation that is viewed as unnecessary, or worse, a hindrance, by prosecutors.

Is the proposed mandatory minimum sentence consistent with penalties for related crimes? If a mandatory minimum sentence is enacted without keeping a broader view on the penalties for similar crimes, it can lead to illogical sentencing schemes. For example, the mandatory minimum penalty for distributing less than 10 grams of methamphetamine, third offense, is five years. Yet the mandatory minimum penalty for manufacturing that same quantity of methamphetamine is only three years. Distributing any amount of an anabolic steroid, even as an accommodation, carries a mandatory minimum sentence of six months. No mandatory minimum penalty exists for distributing heroin, though, unless the quantity is 100 grams or greater. Discrepancies like these arise when mandatory minimum sentences are enacted in a piece-meal fashion, without considering the existing penalties for similar conduct.

What unforeseen or collateral effects might occur? Will passage of the mandatory minimum make convictions more difficult for prosecutors to obtain? Will it make victims reluctant to testify (a concern for domestic violence and abuse cases)? Will it make defendants more likely to seek a jury trial, as they may feel they have nothing to lose?

While predicting the long-term consequences of a mandatory minimum statute is difficult, these considerations can provide a useful starting point in determining whether, as a policy, the proposed penalty will benefit, or be detrimental to, the Commonwealth.

VIRGINIA STATE CRIME COMMISSION

METHAMPHETAMINES EXECUTIVE SUMMARY

Authority for Study

The *Code of Virginia*, § 30-156, authorizes the Virginia State Crime Commission ("Crime Commission") to study, report and make recommendations "on all areas of public safety and protection." Additionally, the Crime Commission is to study "compensation of persons in law enforcement and related fields" and to study "apprehension, trial and punishment of criminal offenders."[1] Section 30-158(3) empowers the Crime Commission to "conduct studies and gather information and data in order to accomplish its purposes as set forth in § 30-156... and formulate its recommendations to the Governor and the General Assembly."

Using the statutory authority granted to the Crime Commission, staff conducted a study on methamphetamine use and production in Virginia.

Background

Methamphetamine is a highly addictive stimulant drug that can have extremely deleterious effects on a person's physical and mental health.[2] Placed in Schedule II of the federal Controlled Substances Act in 1971, methamphetamine abuse declined throughout that decade, but a resurgence occurred in the 1980's and 90's; today methamphetamine is considered by the U.S. Drug Enforcement Administration to be a "major drug of abuse."[3]

In 2001, the Virginia Criminal Sentencing Commission (VCSC) studied illegal methamphetamine use and distribution in Virginia, and found that "the number of cases involving methamphetamine had been increasing in Virginia since the early 1990's, but remained a small fraction of the drug cases in the state and federal courts."[4] In 2004, they updated their research with an even more extensive study, and found that while methamphetamine arrests were growing at a faster rate than arrests for other drugs, they still accounted for less than two percent of all drug arrests in 2003.[5] The total number of methamphetamine cases in Virginia's circuit courts had increased from the early 1990's (there were 20 cases in 1992, 23 cases in 1993, and 43 cases in 1994), but there were still fewer than 200 cases a year. (There were 122 cases in 2000, 140 cases in 2001, 129

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[1] VA. CODE ANN. § 30-156 (Michie 2007).
[2] *Methamphetamine Use*, THE NSDUH [National Survey on Drug Use and Health] REPORT, January 26, 2007.
[3] U. S. Drug Enforcement Administration, *Methamphetamine*, "Description/Overview" *at* http://www.usdog.gov/dea/concern/meth.html (November 27, 2007).
[4] *Methamphetamine Crime in Virginia*, VCSC ANN. REP. (2004), at 87.
[5] Id. at 95.

cases in 2002, and 166 cases in 2003, as computed at the time of publication in 2004).[6] By comparison, in 2003 there were over 2,700 convictions involving cocaine, and 380 cases involving heroin.[7] The federal district courts in Virginia had a similar increase over the same time period in the number of cases involving methamphetamines: there were 19 cases in 1992, eight cases in 1993, and six cases in 1994, compared with 42 cases in 2001 and 64 cases in 2002.[8] However, the number of methamphetamine cases in federal courts in Virginia was significantly fewer than the number of cases involving cocaine—in 2002, there were 352 cases involving crack cocaine and 153 cases involving other forms of cocaine.[9]

More troublesome was the data showing the increase in number of illegal "meth labs" in Virginia. Methamphetamine can be produced using simple over-the-counter cold or allergy medications and other low cost, readily available chemicals. The production methods also create large quantities of environmentally hazardous chemicals—five to six pounds of hazardous waste for every pound of methamphetamine manufactured.[10] The later clean-up of a clandestine methamphetamine manufacturing site can cost a locality or the federal government thousands of dollars.[11] The illegal production of methamphetamine is, therefore, a serious problem.

According to the VCSC 2004 report, there were 30 illegal "meth labs" seized in Virginia by law enforcement in 2003; that number had more than doubled to 63 labs in the first ten months of 2004.[12]

Current Data

Referencing the same sources that the VCSC used in its 2004 study, the relevant figures for illegal methamphetamine use and manufacture were examined to see if there had been any changes in the general trends in the past three to four years.

The arrest rates in Virginia for methamphetamine offenses have remained relatively constant since 2004; there were 470 arrests in 2003, 541 arrests in 2004, 570 arrests in 2005, and 567 arrests in 2006.[13] While higher than the methamphetamine arrest rates in the first part of this decade—203 arrests in 2000, 194 arrests in 2001, and 332 arrests in

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[6] Id. at 101. It should be noted that these figures are only for those cases where the defendant was found guilty of the charge; the numbers were gathered from post-sentence investigation (PSI) reports.

[7] These figures are derived from the chart in Figure 69 on page 107 of the Sentencing Commission's report. The chart reveals that of all convictions for Schedule I or II drug offenses in 2003, methamphetamine cases were 4.8% of the total; cocaine cases were 80.2%, and heroin cases were 11.1%. *Methamphetamine Crime in Virginia*, VCSC ANN. REP. (2004), at 107.

[8] Id. at 104.

[9] Id. at 108. There were also 41 cases involving heroin.

[10] U. S. Drug Enforcement Administration, *Methamphetamine*, "Trafficking Trends" *at* http://www.usdog.gov/dea/concern/meth.html (November 27, 2007).

[11] Id.

[12] *Methamphetamine Crime in Virginia*, VCSC ANN. REP. (2004), at 97.

[13] All figures obtained from the *Crime in Virginia* reports, 2003 through 2006, released by the Virginia State Police.

2002—the figures do seem to indicate that the rate is no longer growing.[14] By comparison, there were over 10 times as many arrests for cocaine and "crack" in these years: 6,551 arrests in 2003; 7,259 arrests in 2004; 8,052 arrests in 2005; and 8,894 arrests in 2006.[15] There were also more arrests for heroin than for methamphetamine in each of these years: 664 arrests in 2003; 692 arrests in 2004; 672 arrests in 2005; and 678 arrests in 2006.[16] Overall, methamphetamine arrests continue to amount to less than two percent of all drug arrests in the Commonwealth.[17] This data suggests that methamphetamine use in Virginia remains fairly small compared to other Schedule I and II illegal drugs.

This general conclusion is supported by recent information gathered by the U.S. Department of Health and Human Services, Substance Abuse and Mental Health Services Administration, in the NSDUH (National Survey on Drug Use and Health).[18] According to the most recently released data (from the 2005 survey), 0.2% of respondents reported having used methamphetamine in the last month, compared with 1.3% of respondents who reported having used either cocaine or "crack," and 0.1% that used heroin.[19] The NSDUH indicates that methamphetamine use has declined overall throughout the United States between 2002 and 2005, and the combined data from those years indicates persons in the West were more likely (1.2% of respondents) to have used methamphetamine in the past year that persons in the South (0.5% of respondents).[20]

The VCSC was contacted for recent PSI (Pre/Post Sentence Investigation) data concerning methamphetamine convictions in Virginia's circuit courts, in an attempt to see if any trends were discernable. The Sentencing Commission spent much of 2007 re-examining the topic of methamphetamine use in Virginia, updating their 2004 report with an even more exhaustive study.[21] Their most recent review of the PSI data indicates that in fiscal year 2003, there were 146 convictions for offenses involving methamphetamine; in fiscal year 2004, there were 204 convictions; in fiscal year 2005, there were 157

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[14] These arrest figures were also obtained from the *Crime in Virginia* reports, in this case 2000 through 2002, released by the Virginia State Police.
[15] *Crime in Virginia* reports, 2003 through 2006, released by the Virginia State Police.
[16] Id.
[17] Id.
[18] This survey is perhaps better known by its former title, the National Household Survey on Drug Abuse (NHSDA). Started in 1971, it annually conducts interviews with approximately 70,000 individuals on their illegal drug use, both recent (in the past year or month) and in their lifetime.
[19] *Results from the 2005 National Household Survey on Drug Abuse: Volume 1: Summary of National Findings*, U.S. DEPARTMENT OF HEALTH AND HUMAN SERVICES, SUBSTANCE ABUSE AND MENTAL HEALTH SERVICES ADMINISTRATION, OFFICE OF APPLIED STUDIES.
[20] *Methamphetamine Use*, THE NSDUH REPORT, January 26, 2007, p. 1. 0.5% of respondents from the Midwest also reported having used methamphetamine in the past year; at 0.1% of respondents, the Northeast had the lowest reported level of methamphetamine use. Id.
[21] The study, published in their Annual Report, obtained data from many of the same original sources as did the Crime Commission. It is even more detailed, and provides information on quantities of methamphetamine seized and tested, numbers of people who have sought treatment for methamphetamine use, lengths of sentences received, and other information. *See generally*, *Methamphetamine Crime in Virginia*, ANNUAL REPORT, VIRGINIA CRIMINAL SENTENCING COMMISSION, 2007, p. 53.

convictions, and for fiscal year 2006, there were 73 convictions.[22] The number of convictions thus appears relatively stable, and the preliminary results suggest that the rate of methamphetamine convictions in Virginia courts is not increasing. By comparison, there were 2,512 convictions involving cocaine or "crack" in fiscal year 2005, and 249 convictions involving heroin.[23]

In the federal district courts in Virginia, there were 109 convictions involving guideline defendants where the primary offense involved methamphetamine in fiscal year 2003, 87 such convictions in fiscal year 2004, 138 convictions in fiscal year 2005, and 145 such convictions in fiscal year 2006.[24] By comparison, there were 608 such convictions involving cocaine or "crack" in fiscal year 2003; 584 cocaine or "crack" convictions in 2004; 649 convictions in 2005; and 608 convictions in 2006.[25]

As with the arrest data and the information obtained from the NSDUH, the number of convictions involving methamphetamine in Virginia, in both state and federal courts, indicates that illegal methamphetamine use has not grown rapidly in the past few years, and is much less wide-spread than cocaine.

Recent methamphetamine legislation and the possible impact on "meth labs"

With increasing awareness of the dangers posed by the illegal production of methamphetamine, both Governor Mark Warner and the Virginia General Assembly took steps to address this growing concern in both 2005 and 2006.

In 2005, the General Assembly inserted a new subsection into the *Code of Virginia* § 18.2-248, dealing solely with the manufacture of methamphetamine.[26] Anyone who manufactures any amount of methamphetamine is now guilty of a felony punishable by ten to 40 imprisonment; a second conviction is punishable by imprisonment from 10 years to life; a third conviction is punishable by imprisonment from 10 years to life, with a mandatory minimum sentence of three years, provided the prior convictions are alleged and proven at trial.[27]

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[22] Information provided by the Virginia Criminal Sentencing Commission. It should be noted that the data gathered was for fiscal years, rather than calendar years, which may explain the slight differences in numbers from their 2004 report. The numbers for fiscal years 2005 and 2006 should be regarded as preliminary. Staff would like to acknowledge Rick Kern and staff at the VCSC for their assistance in fulfilling data requests in a timely manner.

[23] Information provided by the VCSC.

[24] All information obtained from the United States Sentencing Commission's *Statistical Information Packets*, fiscal years 2003 through 2006, *available at* http://www.ussc.gov/JUDPACK/2003/va03.pdf (or /2004/va04.pdf, or /2005/va05.pdf, or /2006/va06.pdf).

[25] Id.

[26] 2005 Va. Acts chs. 923, 941.

[27] VA. CODE ANN. § 18.2-248(C1) (Michie 2007). Prior to this subsection, the punishment for manufacturing any amount of methamphetamine under 100 grams was five to 40 imprisonment; a second conviction carried from five years to life; and a third conviction carried from five years to life, with a mandatory minimum three years if the prior convictions were alleged and proven. VA. CODE ANN. § 18.2-248(C) (Michie 2005). It should be noted that subsection C has since been modified. The mandatory minimum penalty for a third conviction under that subsection is now five years, not three.

That same year, the General Assembly also enacted a new subsection into the *Code of Virginia* § 18.2-248 making it a Class 6 felony, punishable by one to five years imprisonment, to possess two or more methamphetamine precursor drugs with the intent to manufacture methamphetamine.[28] And, a new statute was created, making it a felony for any adult to allow a child, over whom he has a custodial relationship, to be present in the same dwelling where methamphetamine is being manufactured.[29] The punishment is 10 to 40 years imprisonment, to be served consecutively with any other sentence.[30]

Later that year, on September 1, 2005, Governor Mark Warner issued Executive Directive 8, mandating that the State Health Commissioner issue an order limiting the quantities of methamphetamine precursor ingredients that may be lawfully purchased.[31] Pursuant to this Directive, the Virginia Department of Health issued an Order that limited the quantities of ephedrine or pseudoephedrine[32] that a person could buy in any one transaction, required retailers to keep any products containing those ingredients "behind the counter," and further required that records be maintained on the identity all customers who purchased such products.[33]

In 2006, the General Assembly enacted legislation, Va. Code § 18.2-248.8, that mandated very similar requirements and restrictions.[34] A violation of this section is a Class 1 misdemeanor. Also in 2006, a heightened penalty was inserted into subsection C of the *Code of Virginia* § 18.2-248, for "anyone who manufactures, sells, gives, distributes or possesses with the intent to manufacture, sell, give, or distribute" certain large quantities of controlled substances—quantities that previously would not have been eligible for the heightened penalties under subsection H of that statute.[35] Under this new legislation, any offense involving 10 grams of methamphetamine is punishable by imprisonment from five years to life, with a mandatory minimum of five years.[36]

These legislative enactments may be having some effect on the presence of illegal "meth labs" in Virginia. Previously, there had been an alarming rise in the presence of such labs in Virginia between 2002 and 2004. According to data maintained by the United States Drug Enforcement Administration El Paso Intelligence Center, law enforcement seized

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VA. CODE ANN. § 18.2-248(C) (Michie 2007).

[28] 2005 Va. Acts chs. 923, 941. *See* VA. CODE ANN. § 18.2-248(J) (Michie 2007).

[29] 2005 Va. Acts chs. 923, 941. *See* VA. CODE ANN. § 18.2-248.02 (Michie 2007).

[30] VA. CODE ANN. § 18.2-248.02 (Michie 2007).

[31] *Curbing Methamphetamine Manufacture and Use*, Executive Directive 8 (2005), Office of the Governor, Commonwealth of Virginia. This Executive Directive went into effect on October 1, 2005, and expired on July 1, 2006.

[32] These two common cold and allergy medication ingredients can be used to manufacture methamphetamine.

[33] *Order Finding Imminent Danger to the Public Health and Requiring Corrective Action* (2005), Virginia Department of Health.

[34] 2006 Va. Acts chs. 865, 893.

[35] 2006 Va. Acts chs. 697, 759.

[36] VA. CODE ANN. § 18.2-248(C) (Michie 2007). The mandatory minimum five years can be avoided if the defendant was not the leader or manager of the offense, has no violence in his criminal record, and cooperates completely with the Commonwealth.

10 “meth labs” in 2002, 31 labs in 2003, and 75 labs in 2004.[37] In 2005, the number of seized labs had decreased to 52, and in 2006, the number was 23.[38]

Conclusion

While methamphetamine is a dangerous drug that has been the focus of much attention in the past few years, the data from a variety of sources seems to indicate that the expansion in illicit use and manufacturing in Virginia, first noticed in the early years of this decade, appears to have halted; arrest rates and number of court cases seems to have stabilized. These same sources reveal that cocaine remains much more of a wide-spread problem in Virginia. The worrisome trend of the rapidly growing number of “meth labs” in the Commonwealth, observed in 2004, appears to have dissipated. This is possibly due to the increased penalties enacted in 2005 and 2006 for manufacturing methamphetamine, and the stricter regulation of “pre-cursor” chemicals, making it more difficult for illegal production to take place. Close attention must continue to be paid to illegal methamphetamine use and manufacture in Virginia, but the most recent data is, overall, very encouraging.

[37] *Virginia State Fact Sheet 2007*, UNITED STATES DRUG ENFORCEMENT ADMINISTRATION, *at* http://www.dea.gov/pubs/states/virginia.html (January 12, 2005).
[38] Id.

VIRGINIA STATE CRIME COMMISSION

RESTRICTIONS ON SEX OFFENDERS EXECUTIVE SUMMARY

There were two bills introduced during the 2007 Virginia General Assembly session that created additional restrictions for convicted sex offenders. House Bill 2175 sought to prohibit sex offenders from loitering within 100 ft. of any place he knows or has reason to know is a day-care center, to include publicly operated recreation or community centers.[1] Additionally, HB 2404 would have increased the distance from schools and day care centers where sex offenders would not be permitted to live. While current law restricts sex offenders from residing within 500 feet, this bill proposes an increase to within 1000 feet.[2]

Constitutional Issues

The most significant constitutional issue for any sex offender legislation is whether the restrictions violate the Ex Post Facto Clause.[3] The Ex Post Facto Clause prevents the creation of laws that punish acts that were legal when committed or increases the punishment for acts previously committed.[4] Generally, the U.S. Supreme Court has held that sex offender restrictions do not violate the Ex Post Facto Clause if the legislature's intention was determined to be civil and non-punitive.[5] There is no Ex Post Facto issue with the current restrictions in § 18.2-370.2 (loitering) or § 18.2-370.3 (residence restriction) since the restrictions are part of the initial punishment for committing the criminal act and are not applied retroactively. Therefore, the statutes do not implicate the Ex Post Facto Clause in any way.

House Bill 2175[6] is consistent with the current statutory structure and has no Ex Post Facto issues. House Bill 2404,[7] however, completely changes the statutory scheme for the residency restriction by placing the restriction on the offender post-conviction and is applied retroactively. It is likely that HB 2404 would face an Ex Post Facto challenge. There is also a possibility that any additional, future restrictions could violate the Eighth

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[1] Currently, offenders are prohibited from loitering within 100 ft. of a school or day care center. VA. CODE. ANN. § 18.2-370.2 (Mitchie 2007).

[2] The current restriction of 500 feet is located in VA. CODE. ANN. § 18.2-370.3 (Mitchie 2007).

[3] In Georgia, a residence restriction was invalidated on the basis that it was an unconstitutional taking without adequate compensation. Mann v. Georgia, --- S.E.2d ----, 2007 WL 4142738 (Ga. 2007).

[4] Art. I, § 10 U.S. Cont.

[5] Smith v. Doe, 538 U.S. 84 (2003). Even if the court determines that the legislature had a civil and not penal intention for the restriction, the inquiry does not end. Specifically, the court will determine if the law is "so punitive either in purpose or effect as to negate the state's nonpunitive intent." Id. at 92 (quoting U.S. v. Ward, 448 U.S. 242, 248-249 (1980)). The court examines the following factors: if the restriction (1) "has been regarded in our history and traditions as a punishment;" (2) "imposes an affirmative disability or restraint;" (3) "promotes the traditional aims of punishment;" (4) "has a rational connection to a nonpunitive purpose;" or (5) "is excessive with respect to this purpose." Id. at 97.

[6] This bill adds to the current restrictions in VA. CODE. ANN. § 18.2-370.2 (Mitchie 2007).

[7] Increases the residency restrictions found in VA. CODE. ANN. § 18.2-370.3 (Mitchie 2007).

Amendment prohibition against cruel and unusual punishment if the restrictions forced offenders to move out of the state.[8]

Virginia Law

Under Virginia law, there are no issues for extending the living restrictions for sex offenders, described in HB 2404. There are, however, problems with HB 2175. First, the bill adds "publicly operated recreation center" and "community" center to the list of places registered sex offenders cannot loiter within 100 feet. Neither term is defined by the *Code of Virginia* or by case law. This could cause a great deal of confusion as to what actually constitutes a "recreation" or "community" center, to the point that it could be considered unconstitutionally vague. Additionally, each term is also further modified by the term "serving children" Again, this term is undefined in Virginia law and could lead to confusion. If any future legislation along these lines were to be passed, it should include definitions for "community" and "recreation" center and "serving children."

Practical issues

There are some serious practical issues with increasing residency restrictions that are becoming apparent. In Florida, 16 convicted sex offenders are living under a highway bridge, with state approval, because there is no other place for them to live.[9] In California, sex offenders are avoiding the 2000 foot restrictions by declaring themselves homeless.[10] Since the California law took effect in November of 2006, there has been a 27% increase in offenders reporting that they have no permanent address.[11] While there are some news reports of these practical problems resulting from increased residency restrictions, there have been no comprehensive studies by any state on these issues.

Romeo and Juliet laws

Under existing Virginia law, an individual convicted of certain sexual crimes must register as a sex offender.[12] Some of the crimes on the registry include carnal knowledge,[13] sodomy,[14] indecent liberties,[15] and production and distribution of child pornography.[16] Under Virginia law, therefore, it is possible for an 18 year-old to be convicted of consensual sex with a 14 year-old or for an 18 year-old to be convicted of consensual sodomy with a 17 year-old. Both convictions require registration as a sex offender for a period of ten years. Currently, it is also possible for a 17 year-old to take a

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[8] The Virginia Supreme Court has stated, in dicta, that punishment which forces individuals to leave the state would amount to banishment. Loving v. Commonwealth, 206 Va. 924, 147 S.E.2d 78 (1966).
[9] Fox News, October 31, 2007, *located at* http://www.foxnews.com.printer_friendly_story/0,3566,30708000.html.
[10] Id.
[11] Id.
[12] VA. CODE. ANN. § 9.1-902 (Mitchie 2007).
[13] VA. CODE. ANN. § 18.2-63 (Mitchie 2007).
[14] VA. CODE. ANN. § 18.2-361 (Mitchie 2007).
[15] VA. CODE. ANN. § 18.2-370 (Mitchie 2007).
[16] VA. CODE. ANN. § 18.2-374.1:1 (Mitchie 2007).

nude picture of their girl/boy friend and be convicted as an adult of production of child pornography, which carries a designation of "violent sexual offender" and a lifetime registration requirement.

Some states have taken steps to remove the sex offender registration requirement for individuals convicted of consensual sex crimes within specified age categories. Florida,[17] Georgia,[18] and Kansas[19] all have passed measures recently to remove minors from sex offender registry requirements. Two methods have been implemented: 1) provide a mechanism for relief from registration requirements upon a showing of specified criteria and under specified circumstances (Florida); or, 2) more broadly eliminate from the outset, as a registerable offense, crimes involving consensual sex between persons of specified ages (Georgia).

Georgia removed teenage consensual sexual conduct with regard to sodomy and statutory rape[20] from among the offenses requiring registration. If the victim is (1) at least 13 (14 for sodomy) but less than 16 years of age, and (2) the perpetrator is 18 years of age or younger and is no more than four years older than the victim, then the defendant does not have to register as a sex offender. Florida allows those convicted of very narrowly defined sexual criminal acts to be removed from the Florida sex offender registry if: the victim was between the ages of 14 and 17; and the perpetrator has had no more than 4 years older than the victim; the perpetrator must have no other subsequent, criminal sexual convictions.

Recommendation

If a "Romeo and Juliet" law in Virginia is desired, the Florida scheme is preferable to the Georgia scheme. The Georgia method is significantly broader than the Florida scheme and it is automatic; the Florida method is case-specific and would require an individual to petition the court, allowing more flexibility in each case if there are important facts that need to be considered.

[17] FLA. STAT. ANN. § 943.04354 (West 2007). There is a possibility under the Florida scheme where a person convicted of a non-consensual sexual battery is eligible to petition a court to have the registry requirements ended.
[18] GA. CODE. ANN. § 16-6-2(d) (2007) and GA. CODE. ANN. § 16-6-3(c) (2007).
[19] KAN. CRIM. PROC. CODE ANN. § 22-4902(c) (2006).
[20] Statutory Rape is specifically excluded from registry by operation of GA. CODE. ANN. § 42-1-12(a)(10)(A)(vii) (2007). Sodomy is excluded, via § 42-1-12(a)(10)(B).