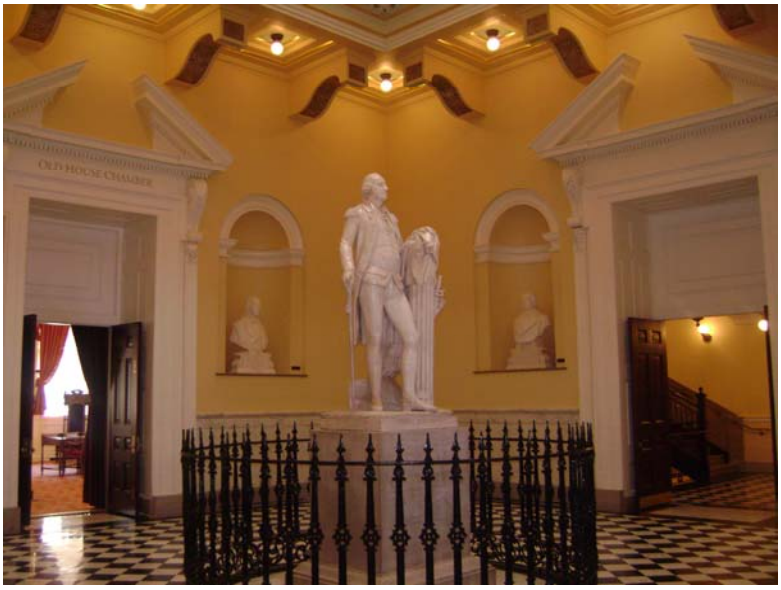

VIRGINIA STATE CRIME COMMISSION

2008 Annual Report

COMMONWEALTH of VIRGINIA

Virginia State Crime Commission

Senator Janet D. Howell, *Co-Chair*
Senator Kenneth W. Stolle, *Co-Chair*
Delegate David B. Albo, *Vice-Chair*

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Director of Legal Affairs
G. Stewart Petoe

June 25, 2009

TO: The Honorable Timothy M. Kaine, Governor of Virginia
Members of the Virginia General Assembly

Pursuant to the provisions of the Code of Virginia §§ 30-156 through 30-164 creating the Virginia State Crime Commission and setting forth its purpose, I have the honor of submitting herewith the Commission's 2008 Annual Report.

Very truly yours,

Janet D Howell

Senator Janet D. Howell, Co-Chair

Very truly yours,

Stolle

Senator Kenneth W. Stolle, Co-Chair

THE VIRGINIA STATE CRIME COMMISSION

2008 Annual Report

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AUTHORITY OF THE COMMISSION

Established in 1966, the Virginia State Crime Commission ("Commission") is a legislative agency authorized by Code of Virginia § 30-156 *et seq.* to study, report, and make recommendations on all areas of public safety and protection. In doing so, the Commission endeavors to ascertain the causes of crime and ways to reduce and prevent it, to explore and recommend methods of rehabilitation for convicted criminals, to study compensation of persons in law enforcement and related fields and examine other related matters including apprehension, trial, and punishment of criminal offenders. The Commission makes such recommendations as it deems appropriate with respect to the foregoing matters, and coordinates the proposals and recommendations of all commissions and agencies as to legislation affecting crimes, crime control and public safety. The Commission cooperates with the executive branch of state government, the Attorney General's office and the judiciary who are in turn encouraged to cooperate with the Commission. The Commission cooperates with governments and governmental agencies of other states and the United States. The Commission is a criminal justice agency as defined in the Code of Virginia § 9.1-101.

The Commission consists of thirteen members that include nine legislative members, three non-legislative citizen members, and one state official as follows: six members of the House of Delegates to be appointed by the Speaker of the House of Delegates in accordance with the principles of proportional representation contained in the Rules of the House of Delegates; three members of the Senate to be appointed by the Senate Committee on Rules; three non-legislative citizen members to be appointed by the Governor; and the Attorney General or his designee.

VIRGINIA
SIC SEMPER TYRANNIS

PERSEVERANCE

2008 SUMMARY OF ACTIVITIES

Throughout 2008, the Crime Commission met four times: April 23, September 9, October 14, and December 9. Commission staff continued completing activities of its ongoing juvenile justice study, mandated by House Joint Resolution 113. Staff completed the analysis of surveys distributed statewide to Juvenile and Domestic Relations court judges and Court Service Unit Directors. The information obtained from the surveys and last year's focus group meetings, as well as consultations with juvenile justice professionals, assisted in formulation of final recommendations and best practices. A thorough review was also conducted of Title 16.1, Chapter 11, of the Code of Virginia to determine if statutes were unnecessary, duplicative, or in need of either a revision or rewrite. At its December meeting, the Crime Commission voted to endorse legislation to amend certain statutes set forth in Title 16.1 and to continue the juvenile justice study an additional year with a specific focus on the certification and transfer of juveniles to circuit court.

In addition to mandated studies, the Commission also conducted studies pertaining to the private sale of firearms at gun shows, the grand larceny threshold amount, capital murder of firefighters, the utilization of Virginia's gang statutes, criminalizing the unintentional cause of a miscarriage, the killing of a newborn baby as it relates to the common law "independent and separate existence" requirement, and the sale of prohibited tinted license plate covers. The Commission reviewed and reported on recent developments in case law pertaining to misdemeanor arrests under § 19.2-74 of the Code of Virginia and the authority of courts to defer the disposition of a sentence. The Commission also inquired into the status and use of petitions of writs of actual innocence.

In addition to the aforementioned studies and reviews, and as part of continued efforts resulting from House Joint Resolution 116 of the 2006 Session of the General Assembly, Commission staff continued to facilitate several meetings of the Animal Control Officer Committee. The Committee discussed animal control officer duties and responsibilities, officer safety concerns, the adequacy and availability of training needs, and the appropriate oversight agency. As a result of these discussions, it was determined that a number of problematic issues exist concerning animal control officers in the Commonwealth. Such issues include, but are not limited to, public safety and officer safety issues that arise due to dangerous situations often encountered by animal control officers and the lack of statewide standardized training and certification.

The Commission approved legislation for the 2009 Session of the General Assembly relating to the presence of State Police at guns shows, the expansion of the availability of writs of actual innocence to non-incarcerated individuals, capital murder of fire marshals with law enforcement powers, the killing of a newborn baby, the oversight of animal control officers, juvenile justice, the composition of the Virginia Forensic Science Board, and notification to convicted persons of the existence of evidence from their old case files that is suitable for DNA testing.

In accordance with § 9.1-1109(A)(7) and § 19.2-163.02, respectively, the Commission's Director also participated as an active member of the Virginia Forensic Science Board and the Virginia Indigent Defense Commission.

VIRGINIA
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PERSEVERANS

MEMBERS OF THE COMMISSION

Chairman

Delegate David B. Albo

Vice-Chairman

Senator Kenneth W. Stolle

Senate Appointments

Senator Janet D. Howell

Senator Henry L. Marsh

House of Delegate Appointments

Delegate Robert B. Bell

Delegate Terry G. Kilgore

Delegate Kenneth R. Melvin

Delegate Brian J. Moran

Delegate Beverly J. Sherwood

Attorney General

The Honorable Robert F. McDonnell

Governor's Appointments

Mr. Glenn R. Croshaw

Colonel W. Gerald Massengill

The Honorable Richard E. Trodden

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PERSEVERANCE

COMMISSION STAFF

James O. Towey, Director

Kristen J. Howard, Deputy Director

G. Stewart Petoe, Director of Legal Affairs

Christina M. Barnes, Senior Methodologist

Holly B. Boyle, Policy Analyst

Thomas E. Cleator, Senior Staff Attorney

Richard S. Fiorella, Policy Analyst

Lauren K. Schultis, Policy Analyst

Steven D. Benjamin, Special Counsel

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ANIMAL CONTROL OFFICERS

Background

House Joint Resolution 116, introduced by Delegate Terry G. Kilgore and passed during the 2006 Virginia General Assembly Session, directed the Virginia State Crime Commission to study the need for regulation, training and funding of animal control officers as well as their duties, responsibilities, and budgets.

The Animal Control Officer Committee was created in 2006 to address the study mandate and to develop recommendations for improving animal control in the Commonwealth. Representatives who serve on the Committee are from the following agencies:

- Crater Criminal Justice Training Academy;
- Virginia Animal Control Association;
- Virginia Association of Chiefs of Police;
- Virginia Association of Counties;
- Virginia Department of Agriculture and Consumer Services, Office of Veterinary Services (State Veterinarian);
- Virginia Department of Criminal Justice Services;
- Virginia Department of Game and Inland Fisheries;
- Virginia Department of Health;
- Virginia Department of Treasury, Office of Risk Management;
- Virginia Farm Bureau;
- Virginia Municipal League; and,
- Virginia Sheriff's Association.

Analysis

Chapter 65, Article 7, of Title 3.2 of the Code of Virginia governs animal control officers. Section 3.2-6555 of the Code of Virginia creates the position of animal control officer and states that the governing body of each county or city shall, or each town may, employ an officer to be known as the animal control officer, who shall have the power to enforce this chapter, all ordinances enacted pursuant to this chapter and all laws for the officers and deputy animal control officers shall have the power to issue a summons or obtain a felony warrant as necessary, providing the execution of such warrant shall be carried out by any law-enforcement officer as defined in § 9.1-101, to any person found in the act of violating any such law or any ordinance enacted pursuant to such law of the locality where the animal control officer or deputy animal control officer is employed. Every locality employing an animal control officer shall submit to the State Veterinarian, on a form provided by him, information concerning the employment and training status of the animal control officers employed by the locality. The State Veterinarian may require that the locality notify him of any change in such information.

Staff conducted a comprehensive analysis of animal control responsibilities and duties, as well as a review of training requirements and curriculum. Currently, the State Veterinarian is charged with the establishment of training criteria, as well as maintaining records of training compliance. Subsection A of the Code of Virginia § 3.2-6556 states that every locality employing animal control officers shall require that every animal control officer and deputy animal control officer complete the following training:

1. Within two years from the date of hire, a basic animal control course that has been approved by the State Veterinarian. The basic animal control course shall include training in recognizing suspected child abuse and neglect and information on how complaints may be filed and shall be approved and implemented; and
2. Every three years, additional training approved by the State Veterinarian, 15 hours of which shall be training in animal control and protection.

The State Veterinarian shall work to ensure the availability of these training courses through regional criminal justice training academies or other entities as approved by him. Based on information provided by authorized training entities, the State Veterinarian shall maintain the training records for all animal control officers for the purpose of documenting and ensuring that they are in compliance with this subsection. Subsection C states that any animal control officer that fails to complete the training required by subsection A shall be removed from office, unless the State Veterinarian has granted additional time as provided in subsection B.

Conclusion

During the past two years, Committee members have identified a number of problematic issues concerning animal control officers as follows:

- The State Veterinarian is not the proper oversight agency for animal control officers because of the increasing law enforcement duties of animal control officers;
- Public safety issues arise due to the dangerous situations animal control officers encounter, such as dog fighting, gangs, and drugs, without the necessary training and proper equipment for protection. This creates serious animal control officer safety issues and a potential liability for the locality, as well as the state;
- There is a two year time frame in which animal control officers must be trained, which allows for an animal control officer to be employed during this time without any minimum standards, requirements, and classroom or field training;
- A need exists for increasing the training standards from 84 to 120 hours, which Crater Regional Academy has done with no negative feedback from the localities;
- There is no statewide certification, licensing, or regulation of animal control officers;
- There are no standardized lesson plans;
- There is no standardized or accredited statewide training examination program that tests the knowledge and skills of animal control officers;
- There is no method in place to determine and ensure whether training standards are in compliance; and,
- There is no method in place to track or verify animal control officers statewide.

The Department of Criminal Justice Services ("DCJS") was identified as an appropriate agency to oversee animal control officers. Prior to 2004, DCJS was tasked with the oversight of animal control officers and is currently responsible for a wide variety of similar oversight and training duties of other professions as mandated in Virginia Code § 9.1-102, such as the establishment of:

- Compulsory minimum training standards;
- Qualifications for certification and recertification;
- Minimum curriculum requirements;
- Training courses;
- Minimum entry-level training standards, employment, and job-entry standards;
- Certification for training instructors; and,
- model policy and protocol guidelines.

Additionally, DCJS has oversight authority for the following similar entities:

- Law enforcement;
- School security officers;
- Campus safety officers;
- Bail bondsmen and bail enforcement agents; and,
- Locksmiths.

Legislation was introduced during the 2009 Session of the General Assembly to move the oversight and governance from the State Veterinarian to the Department of Criminal Justice Services.

CAPITAL MURDER OF FIREFIGHTERS

Background

Virginia inherited the death penalty from English common law. In 1612, Virginia's Governor, Sir Thomas Dale, activated the Divine, Moral and Martial Laws that greatly expanded Virginia's death penalty to apply to even minor crimes such as killing dogs or chickens, or stealing grapes. However, Virginia's death penalty was soon softened due to fears that Virginia would not be attractive to future settlers. Daniel Frank became the first person criminally executed in 1622 for the crime of theft. The first major change to the death penalty after the American Revolution came on December 15, 1796, when the Commonwealth of Virginia passed chapter CC. This statute stated that "no crime whatsoever committed by any freeperson against this commonwealth, (except murder in the first degree) shall be punished with death within the same." This in effect, abolished the death penalty for all crimes except first degree murder. First degree murder in this statute was defined as:

"all murder which shall be perpetrated by means of poison, or by lying in wait, or by duress of imprisonment or confinement, or by starving, or by willful, malicious and excessive whipping, beating, or other cruel treatment or torture, or by any other kind of willful, deliberate and premeditated killing, or which shall be committed in the perpetration, or attempted perpetration any arson, rape, robbery, or burglary, fall henceforth be deemed murder in the first degree. And all other kinds of murder, shall be deemed murder of the second degree, and the jury, as heretofore, shall ascertain their verdict, whether it be murder in the first or second degree."

The Virginia General Assembly, in 1975, completely overhauled Virginia's capital murder statute in response to the US Supreme Court decision in Furman v. Georgia. The new legislation set apart offenses defined and punished as capital murder, in contrast with first degree murder. The 1975 capital murder statute in Va. Code § 18.2-31, specified:

a) the willful, deliberate and premeditated killing of any person in the commission of abduction as defined in §18.2-48, when such abduction was committed with the intent to extort money, or pecuniary benefit;

b) the willful, deliberate and premeditated killing of a human being by another for hire; and

c) the willful, deliberate and premeditated killing by an inmate in a penal institution as defined in §18.2-32, or while in the custody of an employee thereof

Since 1976 Virginia's capital murder statute has been amended to include fifteen subsections that qualify as capital eligible if the offense results in a premeditated homicide. They include:

1976: Murder while in the commission of robbery while armed with a deadly weapon, murder in the commission of, or subsequent rape.

1977: Murder of a law-enforcement officer while in the performance of his duties.

1981: Murder of more than one person as part of the same act or transaction.

1982: Murder of any person by a prisoner confined in a state or local correctional facility.

1985: Murder of any child under twelve.

1989: Murder in the commission of attempted robbery or attempted rape.

1990: Murder of any person in the commission or attempted commission of a violation of Va. Code § 18.2-248, involving a Schedule I or II substance.

1991: Murder in the commission of or attempted forcible sodomy.

1995: Murder in the commission of object penetration.

1996: Murder of more than one person within a three year period.

1997: Murder of any law enforcement officer of another state or United States having the power to arrest for a felony.

1997: Murder pursuant to the direction or order of one who is engaged in a continuing criminal enterprise as defined in subsection I of Va. Code § 18.2-248; and, murder of a pregnant woman by one who knows the woman is pregnant to cause a involuntary termination of pregnancy.

1998: Murder of a person under fourteen by a person over the age of twenty one.

2002: Murder as an act of terrorism.

2007: Murder of a judge, when the killing is for the purpose of interfering with his duties; and, murder of a witness in a criminal case after a subpoena has been issued, when the killing is for the purpose of interfering with the person's duties in such case.

Analysis

A number of activities were undertaken to examine this issue. First, Crime Commission staff conducted a 50 state survey to see how many states make it a capital offense to murder a firefighter. Second, firefighter deaths in Virginia in the past five years were reviewed. Finally, Senate Bill 384 was then reviewed for any possible amendments to Va. Code § 18.2-31.

Of the 37 states that have capital punishment, 21 make the killing of a firefighter either a capital crime or an aggravating factor in the consideration of a death sentence. It should be noted that while it is not expressly stated, Nebraska has extremely broad language in its capital murder statute that could theoretically include firefighters. The Nebraska statute includes, "Murder committed knowingly to disrupt or hinder the lawful exercise of any government function or enforcement of the laws."

Every state that makes the premeditated killing of a firefighter a capital eligible crime requires that the offender must know, or should have known that the victim is a firefighter. It is also a requirement that the killing occur while the firefighter is in the performance of his duties, except in Illinois, Indiana, Louisiana, South Carolina and Utah's statutes where the more broadly written statutes include the killing of a firefighter related to the performance of his or her duties. Should an off duty firefighter, or arson investigator be murdered, and if the motivation for the crime is found to be because of a response to a 911 call or an arson investigation, then the perpetuator could be charged with capital murder. South Carolina's and Utah's statutes also include the murder of former firefighters.

If the language of SB 384 were adopted, it would also make the premeditated killing of an emergency medical service worker, emergency medical technician, or rescue worker a capital eligible offense. Of the 37 states that have capital murder, only Tennessee expressly covers EMS, EMT, rescue workers and paramedics. As of August 2008, there were 39,792 career and volunteer firefighters in the Commonwealth of Virginia. Additionally, there were another 34,269 EMS providers in the state. Therefore, approximately 75,000 firefighters and EMS/EMT personnel would potentially be covered in this bill.

Crime Commission staff also reviewed the number of Virginia firefighters who have died in the line of duty, in order to see if any would qualify for capital murder under the provisions of the proposed legislation. Since 2004, there have been seventeen deaths of firefighters in the Commonwealth. However, none of these deaths arose as a direct result of arson or an intentional killing while in the performance of their official duties.

Conclusion

The Commission voted to endorse legislation that would add to Va. Code § 18.2-31 "willful, deliberate, and premeditated killing of a fire marshal appointed pursuant to § 24-30 or assistant fire marshal appointed pursuant to § 27-36, when such fire marshals and assistant fire marshals have police powers as set forth in §§ 27-34.2 and 27-34.2:1."

DEFERRED DISPOSITION

Background

In general, deferred disposition permits a court to withhold imposition of a sentence and place conditions on the defendant that, when met, allow for the charges to be dismissed. Deferred disposition is usually accompanied by the imposition of conditions similar to probation. Upon the satisfactory completion of all conditions, and if no other criminal offenses are committed during the period of deferment, the original charge may be dismissed.

Currently, there are nine sections in the Code of Virginia that expressly permit a court to use deferred disposition:

- § 4.1-305: Underage purchase and possession of alcohol - first offense;
- § 16.1-278.8 & 16.1-278.9: Juvenile delinquency cases, with "due regard for the gravity of the offense and the juvenile's history;"
- § 18.2-57.1: Assault against family member cases;
- § 18.2-61: Marital rape cases - when the spouse is the complaining witness and with consent of the CA;
- § 18.2 67.1 & 18.2-67.2: Forcible sodomy and object penetration - when the spouse, as the complaining witness, consents and with consent of the CA;
- § 18.2-251: First time possession of controlled substances or marijuana; and,
- § 19.2-303.2: First offense misdemeanor property cases - if the individual was "not previously convicted of a felony."

Additionally, there are two code sections that allow a court to suspend a sentence, after conviction (§ 19.2-303), or a finding of guilt (§ 19.2-298).

Although deferred disposition was an issue in Moreau v. Fuller, the Supreme Court of Virginia failed to articulate clear guidance for future use of deferred disposition by Virginia courts. In Moreau, during a bench trial in a juvenile court, a judge found "sufficient" evidence to find the defendant guilty of contributing to the delinquency of a minor (§ 18.2-371). The judge, on request of the victim's mother, did not enter judgment and took the case under advisement to issue a future disposition. The Commonwealth's Attorney objected to the judge's decision and filed a writ of mandamus with the circuit court. In filing the writ, the Commonwealth's Attorney argued that the judge did not have the discretion to defer the final disposition once she made a finding of guilt. The circuit court ordered the judge to make a decision, holding that once the judge makes a finding of guilt or innocence, there is no further discretion to withhold judgment.

The judge appealed the circuit court's decision to the Virginia Supreme Court, where the Court overruled the circuit court's holding. The Court held that "the act of rendering judgment is within the inherent power of the court and that the very essence of adjudication and entry of judgment by a judge involves discretionary power of the court." Since the act of rendering judgment is "discretionary" and not "ministerial," the court held that writ of mandamus was improperly applied.

This decision, however, did little to define what, if any, authority courts have to apply deferred disposition outside what is already permitted by statute. Justice Koontz noted in his concurrence that the decision "necessarily leaves unresolved a significant issue concerning the inherent authority of the trial courts of this Commonwealth to defer rendering final judgments in criminal cases." Justice Koontz also noted in his opinion that deferred disposition is a "matter of common knowledge and practice of long standing" in the Commonwealth. Likewise, Justice Kinser stated in her separate concurrence:

> *"The record on appeal does not permit us to decide the question whether a trial court has the inherent authority, as opposed to the statutory authority in certain situations...to decline to render judgment in a criminal case and continue the case with or without probationary-type terms with the understanding or promise that the court will ultimately render a particular disposition after a specified period of time."*

While it appears that the Supreme Court of Virginia in Moreau avoided directly deciding whether courts have authority, absent a statute, to use deferred disposition, the Court did overrule a previous decision of the Court of Appeals of Virginia in Gibson v. Commonwealth**.** In Gibson, the Court of Appeals held that, absent statutory authority, a court does not have the authority to use deferred disposition. The Supreme Court of Virginia overruled the Court of Appeals' Gibson decision in footnote No. 5 in Moreau, stating that "to the extent that the decision of the Court of Appeals in Gibson v. Commonwealth, 50 Va.App. 285, 649 S.E.2d 214 (2007), is inconsistent with the holding of this case, it is expressly overruled."

While the Supreme Court of Virginia seems to have been vacating the Court Of Appeals' holding that limited deferred disposition to cases where there is explicit statutory authority authorizing such outcome, the precise significance of this footnote is more uncertain. The holding of Moreau, as previously discussed, dealt with the civil issue of mandamus and whether such writ could be issued against a judge to force her to render a final verdict. The Moreau case did not explicitly deal with the validity of deferred dispositions. The reluctance of the concurrences in Moreau to adopt a broad judicial power allowing a use of use deferred dispositions also creates confusion as to the scope of the holding. Finally, to make matters more confusing, the Supreme Court of Virginia actually upheld the conviction in Gibson, but on completely different grounds.

Conclusion

Overall, the Virginia Supreme Court's decision in Moreau did little to settle the issue of whether courts have the authority, absent explicit statutory permission, to use deferred disposition in criminal cases. As it currently stands, deferred disposition is available only when permitted by statute in some courtrooms across the Commonwealth, while in other courts it is, as stated by Justice Koontz, a "matter of common knowledge and practice of long standing."

GANG STATUTES

Background

Virginia's principal anti-gang statutes, consisting of necessary definitions, the crime of gang participation, and the crime of gang recruitment, were enacted in 2000. Significant amendments aimed at combating gang-related crime were enacted in 2004 and 2005. Additional amendments were made in 2006, 2007, and 2008.

The principle gang statutes are contained in Title 18.2, Chapter 4, Article 2.1 (§ 18.2-46.1 et. seq.) of the Code of Virginia. These statutes, after the aforementioned amendments, include definitions, the crime of gang participation, the crime of gang recruitment, an enhanced punishment for a third or subsequent conviction of the crimes of gang participation or recruitment, forfeiture of property used in furtherance of committing gang participation or recruitment, and enhanced penalties for gang participation and recruitment in or near school zones. In addition to these principal gang statutes, additional gang-related provisions are contained throughout the Code of Virginia.

The definitions set forth in § 18.2-46.1 are significant to the entire statutory sequence. A "criminal street gang" is defined as a group of three or more persons which has as one of its primary objectives or activities the commission of one or more criminal activities, has an identifiable name or identifying sign or symbol, and the members of which individually or collectively have engaged in the commission of, attempt to commit, conspiracy to commit, or solicitation of two or more "predicate criminal acts," at least one of which is an "act of violence." A "predicate criminal act" includes those crimes that consist of an "act of violence," as defined by § 19.2-297.1, as well as additional, specifically enumerated offenses. The definition of "predicate criminal act" has great significance because it serves both as a component of the definition of "criminal street gang" and as the offense that triggers the crime of gang participation in violation of § 18.2-46.2.

The offenses that constitute a "predicate criminal act" by virtue of the definition of "act of violence" include:

- Murder;
- Involuntary manslaughter;
- Mob-related felonies;
- Abduction;
- Malicious felonious assault;
- Malicious wounding;
- Robbery;
- Carjacking;
- Felonious criminal sexual assault;
- Arson; Conspiracy to commit any such offense; and,
- Principle in the second degree or accessory before the fact of any such offense.

The additional, specifically enumerated offenses included in the original definition of "predicate criminal act" when it was enacted into law in 2000, include:

- Malicious wounding;
- Malicious bodily injury to law enforcement officer;
- Malicious bodily injury by means of caustic substance;
- Shooting, stabbing, or wounding in the commission of a felony;
- Bodily injury caused by prisoners, parolees, and probationers;
- Assault and battery;
- Assault and battery on a family or household member;
- Entering property of another for purposes of damaging it;
- Injuries to churches, church property, burial grounds, etc.;
- Trespass upon church or school property;
- Injury to property or monument;
- Damage to public buildings;
- Breaking, injuring, defacing, or preventing operation of any vehicle, aircraft or boat; and,
- Entering or setting in motion a vehicle, aircraft, boat, locomotive, or rolling stock; and, damage or defacement of property in violation of a local ordinance.

These additional, specifically enumerated offenses included in the definition of "predicate criminal act" were added in 2004:

- Gang recruitment;
- Drug offenses in violation of § 18.2-248(H), (H1), or (H2);
- Transporting drugs into the Commonwealth with the intent to sell or distribute;
- Distributing drugs to any person under 18 years of age who is at least three years his junior;
- Violation of drug free school zones;
- A second or subsequent felony violation with respect to a controlled substance listed in Schedule I or II of Subsection C of § 18.2-248 or of § 18.2-248.1; and,
- A second or subsequent felony violation with respect to distribution of marijuana.

These additional, specifically enumerated offenses included in the definition of "predicate criminal act" were added in 2005:

- Assault by mob;
- Reckless handling of firearms;
- Extortion;
- Shooting from vehicle;
- Carrying a loaded firearm;
- Possession of certain weapons on school property; and,
- Any similar offense under the laws of any state or territory of the United States, the District of Columbia, or the United States.

These additional, specifically enumerated offenses included in the definition of "predicate criminal act" were added in 2006:

- Receiving money for procuring prostitution;
- Threats to bomb or damage buildings; and,
- Brandishing a machete.

One additional, specifically enumerated offense included in the definition of "predicate criminal act" was added in 2007:

- Use or display of a firearm in the commission of a felony.

As mentioned, the definition of "predicate criminal act" is a significant element to the crime of gang participation under § 18.2-46.2. That statute makes it a Class 5 felony for an active participant or member of a criminal street gang to participate in a predicate criminal act for the benefit of, at the direction of, or in association with any criminal street gang. The violation rises to a Class 4 felony if the defendant knows that the gang includes a juvenile member. The crime of gang participation constitutes a separate and distinct offense.

The crime of gang recruitment, pursuant to § 18.2-46.3, makes it a Class 6 felony for an adult to recruit a juvenile into a gang, a Class 1 misdemeanor to recruit another into a gang, regardless of the age of the offender or the victim, and a Class 6 felony to use or threaten force against an individual, or a member of his family or household, in order to encourage that individual to join a gang, remain in a gang, or submit to a demand by a gang to commit a felony.

Statutes creating penalty enhancement for certain criminal gang conduct have recently been enacted as well. Section 18.2-46.3:1, which is aimed at combating gang recidivism, makes a third or subsequent violation of gang participation or gang recruitment a Class 3 felony. Section 18.2-46.3:3 creates enhanced penalties for the crimes of gang participation or gang recruitment committed on school property, within 1,000 feet of school property, or on a school bus. When committed in these areas, the crime of gang participation requires a mandatory minimum term of imprisonment of two years, misdemeanor gang recruitment is enhanced to a Class 6 felony, and Class 6 felony gang recruitment is enhanced to a Class 5 felony.

Analysis

A survey was created and issued to all Commonwealth's Attorneys throughout the state for the purpose of establishing whether or not each office prosecuted violations of gang participation and gang recruitment, the number of charges and convictions for each statute since 2000, the number of forfeitures pursuant to § 18.2-46.3:2 since 2004, the number of gang participation and recruitment enhancements since 2005, the number and types of criminal street gangs each office obtained convictions for

since 2000, the "predicate criminal acts" used to prove that a group met the definition of a "criminal street gang," and the "predicate criminal acts" used as the "trigger" offense for the crime of gang participation under § 18.2-46.2. Forty-one percent (49 of 120) of offices representing 55 localities responded.

The survey revealed that 53 percent (26 of 49) of offices prosecuted at least one violation for either gang participation or gang recruitment. Forty-seven percent (23 of 49) of offices had no prosecutions. The localities that prosecuted at least one such case included the cities of Hampton, Harrisonburg, Manassas, Norfolk, Poquoson, Portsmouth, Richmond, Spotsylvania, Staunton, Suffolk, Williamsburg, Winchester, and Virginia Beach and the counties of Albemarle, Appomattox, Arlington, Chesterfield, Grayson, Henrico, James City, Lancaster, Lynchburg, Middlesex, Prince Edward, Prince William, Rockingham, Shenandoah, Spotsylvania, Stafford, and York.

The survey revealed a marked increase in the number of charges and convictions for the crime of gang participation that coincides with the amendments made to the anti-gang laws beginning in 2004. For instance, in 2007 there were 213 charges and 126 convictions for gang participation as compared to only 19 charges and 13 convictions in 2004. In 2008, most of the charges for gang participation occurred in Rockingham County/City of Harrisonburg, Prince William County, the City of Hampton, the City of Richmond, and Grayson County. The most convictions occurred in Prince William County, the City of Richmond, the City of Norfolk, and Henrico County.

The survey also revealed a marked increase in the number of charges and convictions for the crime of gang recruitment that coincides with the amendments made to the anti-gang laws beginning in 2005. It also uncovered a marked decrease after peaking in 2006. It appears that the decrease in the number of charges and convictions for the crime of gang recruitment coincides with the decrease in available funding of anti-gang efforts. It is likely that the decrease in funding did not similarly impact charges and convictions for gang participation because that crime is connected to a "trigger" offense that must be investigated and prosecuted anyway. Gang recruitment, on the other hand, is a crime unrelated to any "trigger" offense and thus, necessitates its own investigation and prosecution that will not otherwise occur. In 2008, most of the charges for gang recruitment occurred in Grayson County, Rockingham County/City of Harrisonburg, and the City of Hampton. The most convictions occurred in Rockingham County/City of Harrisonburg, Prince William County, and Henrico County.

The survey revealed that, to date, there have been no Class 3 felony convictions obtained under § 18.2-46.3:1 for a third or subsequent felony conviction of gang participation since the statute's enactment in 2004. There have been two Class 3 felony convictions under the statute for a third or subsequent felony conviction of gang recruitment since 2004. The survey also revealed that there have been no forfeitures obtained by Commonwealth's Attorneys pursuant to § 18.2-46.3:2 since 2004. The use of the school zone enhancements has increased significantly since the statute's enactment in 2005. As of October 1, 2008, the enhancement has been used with regard to 21 gang participation charges and 13 gang recruitment charges for 2008 alone.

Commonwealth's Attorneys' offices obtained convictions against more than 40 gangs for violations of gang participation or gang recruitment. The gangs with the highest number of convictions included the Bloods (20 offices), the Crips (13 offices), MS-13 (6 offices), and the Gangster Disciples (4 offices).

A main purpose of the survey was to ascertain what offenses included in the definition of "predicate criminal act" pursuant to § 18.2-46.1 are, and are not, being used. Of the specifically enumerated offenses that have existed as part of the definition since 2000, the following have not been used:

- Malicious bodily injury to law enforcement officer;
- Malicious bodily injury by means of caustic substance;
- Shooting, stabbing, or wounding in the commission of a felony;
- Bodily injury caused by prisoners, parolees, and probationers;
- Injuries to churches, church property, burial grounds, etc.;
- Damage to public buildings;

- Entering or setting in motion a vehicle, aircraft, boat, locomotive, or rolling stock; and,
- Damage or defacement of property in violation of a local ordinance.

Data from the Virginia Criminal Sentencing Commission ("VCSC") was also reviewed. Two sources of data were utilized; the Pre-Post Sentence Investigation ("PSI") system and the Court Automated Information System ("CAIS"). Additionally, staff reviewed information provided by the Virginia Department of Corrections ("DOC") for the purpose of determining the total number of offenders under DOC supervision identified by DOC's Security Threat Gang ("STG") database, regardless of the crime of which the individual was convicted, the total number and types of gangs identified by the STG database, regardless of conviction type, and the number of individuals under DOC supervision convicted of gang participation and/or gang recruitment. Detailed analyses of the aforementioned datasets are included in the 2008 Interim Executive Summary of Activities.

Conclusion

The study revealed that the utilization of Virginia's gang statutes has increased significantly since the enactment of the 2004 amendments. Also revealed is the fact that most, but not all, of the specifically enumerated offenses that have been included in the definition of "predicate criminal act" since the creation of the statutory sequence in 2000 have been used by law enforcement and prosecutors. A state-wide review of the data reveals that the jurisdictions which have the highest number of charges filed for violations of gang statutes are not always the jurisdictions with the highest conviction rates for those offenses. Finally, the study has shown that the number of charges and convictions for violations of the gang statutes cannot be used as an accurate indication of the number of gangs and gang members that exist in the Virginia Department of Corrections or, for that matter, throughout Virginia.

GRAND LARCENY

Background

During the 2008 Session of the Virginia General Assembly, Senator W. Roscoe Reynolds introduced Senate Bill 351, which proposed raising Virginia's grand larceny threshold amount from $200 to $500.

This bill was referred to the Senate Courts of Justice Committee and was continued until 2009; a letter was sent to the Crime Commission to review this bill.

Staff reviewed the main larceny statutes of all fifty states, reviewed the Virginia Criminal Sentencing Commission report on grand larceny from 2000, and also consulted the Bureau of Labor Statistics Consumer Price Index Inflation Calculator to determine what the current value in today's dollars would be for $200 in 1980. During the review of the larceny statutes of the fifty states, staff also conducted a cursory examination of specialized larceny statutes (e.g., larceny of a particular object, larceny from a merchant or shopkeeper, etc.).

Virginia Grand Larceny Threshold

Under Virginia law, grand larceny is defined by Va. Code § 18.2-95, which sets a general value of $200 or more as the amount at which a larceny becomes a felony as opposed to a misdemeanor. Grand larceny in Virginia is punishable by imprisonment in a state correctional facility for not less than one nor more than twenty years or, in the discretion of the jury or court trying the case without a jury, be confined in jail for a period not exceeding twelve months or fined not more than $2,500, either or both.

Another relevant larceny statute in the Virginia Code is the section that criminalizes conspiracy to commit grand larceny. The penalty for conspiracy to commit grand larceny is imprisonment in a state correctional facility for not less than 1 year nor more than 20 years. It should be noted that the penalty for conspiracy to commit grand larceny is greater than the penalty for conspiracy to commit any other non-capital felony. Under the general conspiracy statute, the 10 years imprisonment, or a felony punishable by up to one year in jail if the conspired crime had a maximum punishment of less than five years. Therefore, under Virginia law, the potential punishment for conspiracy to commit grand larceny is twice as great as the punishment for conspiracy to commit first degree murder.

The punishment for petit larceny in Virginia is a Class 1 misdemeanor, punishable by up to one year in jail. The punishment for a second conviction of petit larceny is confinement in jail not less than thirty days, up to a maximum of twelve months. For a third, or any subsequent offense of petit larceny, the penalty is a Class 6 felony.

If a person commits separate and distinct acts of embezzlement within a six month period, the prosecution may elect to aggregate the amounts involved in the separate actions, into one charge. In this manner, two separate acts of embezzlement in the amount of $150 each may be prosecuted as either two misdemeanors or one felony.

Inflation Analysis

From 1966 to 1980, the grand larceny threshold amount in Virginia was $100. In 1980, the grand larceny threshold amount was raised to its current level of $200. According to the Bureau of Labor Statistics, $200 in 1980 is equal to $531.76 in 2008. Therefore, if a strict parity is to be maintained, the grand larceny threshold in Virginia should be increased to this amount.

50 State Survey

Staff reviewed the felony threshold amounts of all fifty states. In conducting the review, the most generic larceny statute of each state was used. It was found that 39 out of 50 states have felony larceny thresholds of $500 or greater. The most common threshold amounts are $500 and $1,000, respectively. Specifically, 17 states have a threshold of $500 and another seventeen states have a threshold of $1,000. Another eight states have threshold amounts between $200 and $500. Only one other state, New Jersey, had a threshold equivalent to Virginia's threshold of $200. No state had a threshold amount lower than Virginia's.

Two states have thresholds between $500 and $1,000 and three states have thresholds between $1,000 and $2,500. Twelve states have increased their larceny threshold amounts since the VCSA issued their report on this topic in 2000: Alabama, Arizona, Colorado, Kansas, Maryland, Mississippi, New Mexico, Oklahoma, South Dakota, Vermont, Wisconsin, and Wyoming. Two states, Maine and Missouri, have decreased their larceny threshold amounts since 2000.

Specialized Larceny Provisions

In addition to the review of other states' general larceny statutes, a brief review was also conducted of specialized larceny statutes. Many states create heightened penalties for larcenies involving particular objects or if the larceny occurs in a particular location, such as theft from a retail merchant. Examples include:

- Aqua cultural products from a commercial operation;
- Controlled substances;
- Dogs for the purpose of dog fighting;
- Livestock, domestic fowl, commercially farmed animals;
- Survival equipment;
- Testamentary instrument; and,
- Theft from an employer or theft from a retail merchant.

Virginia currently has a number of specialized larceny statutes in the Code of Virginia as well. Some examples include:

- Bull, cow, dog, horse, mule, pony, or steer;
- Credit card or credit card number;
- Firearms;
- Lottery;
- Milk crates;
- Poultry; and,
- Sheep, lamb, swine, or goat.

Legislation to Combat Organized Shoplifting

One of the main concerns with passing Senate Bill 351, and increasing the larceny felony threshold amount in Virginia from $200 to $500, is that such a change might lead to an increase in the dollar amounts of merchandise that shoplifters would attempt to steal.

One solution to this problem could be to increase the felony threshold amount, but at the same time increase the penalty for stealing where the value of the larceny is $200 or more, but less than $500, which would be the new threshold for grand larceny. Criminals who commit larcenies in this intermediate range would be guilty of an Aggravated Class 1 misdemeanor, a new misdemeanor class that would carry up to 24 months in jail, double the current penalty for a Class 1 misdemeanor. Additionally, the statute creating this new crime of Aggravated Petit Larceny could specify that the defendant "shall be sentenced to a term of confinement and in no case shall the entire term imposed be suspended," which is the current language used to mandate some period of incarceration when a defendant is convicted of violating the terms of a protective order.

To combat criminal gangs who repeatedly engage in petit larcenies from retail establishments in an organized, methodical way, a new crime, conspiracy to commit petit larceny, could be created. This statute would complement the existing statute of conspiracy to commit grand larceny, which provides that the amounts stolen or subject to the conspiracy can be aggregated to reach a sum in excess of $200. This new statute could be used in those rare circumstances where the evidence is insufficient to demonstrate that the conspirators intended to steal $200 or more of goods. To this same end, a second offense of petit larceny could be elevated to an Aggravated Class 1 misdemeanor. To assist in the prosecution of these organized gangs, which travel throughout the state, multi-jurisdictional grand juries could be given the authority to investigate allegations of grand larceny, or conspiracy to commit larceny. (They already have the authority to investigate allegations of embezzlement). Finally, larceny could be included as a predicate crime for which criminal street gangs can be prosecuted under Virginia's criminal street gang statute.

Legislation Incorporating the Proposed New Class of Misdemeanor

If a new class of misdemeanor, the Aggravated Class 1 misdemeanor, were created, this would allow the General Assembly more flexibility in deciding appropriate punishments for misdemeanor crimes. Those crimes that are viewed as particularly egregious could have their punishments increased, without resorting to either mandatory minimum sentences or raising the crime to a felony. Of all of the misdemeanor crimes presently in the Virginia Code, those that logically could be considered for an increase would be those that involve either an act of violence or a hate crime or involve a repeat offense, and have a mandatory minimum sentence, proof that the legislature has already deemed those offenses to be more serious than other misdemeanors.

In addition, the following three misdemeanor offenses might also be considered for elevation to the new level of an Aggravated Class 1 misdemeanor, as they involve repeat offenses and violence or the threat of violence, or, in the instance of criminal street gang recruitment, the strong potential for future acts of violence:

- Va. Code § 18.2-46.3; recruitment of an adult into a criminal street gang;
- Va. Code § 18.2-57.2; domestic assault, if it is a second offense; and,
- Va. Code § 18.2-60.3; stalking, if it is a second offense.

Finally, if the felony threshold for larceny is increased to $500, a number of fraud, embezzlement and larceny statutes should be similarly modified for the sake of consistency. These statutes can also be rewritten to incorporate the new intermediate category of aggravated petty larceny, involving amounts that are between $200 and $500.

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Conclusion

At its October 14, 2008, meeting, the Crime Commission discussed the idea of raising the felony larceny threshold from $200 to $500, and creating a new class of misdemeanor, the Aggravated Class 1 misdemeanor, to punish larceny when the amount stolen is from $200 to $500. Staff was requested to draft a bill implementing these ideas, and the other proposals listed in this report. A draft bill was prepared, but was not taken up nor discussed at either the December 9, 2008, or January 13, 2009, Crime Commission meetings

GUN SHOW LOOPHOLE

Background

During the 2008 session of the Virginia General Assembly, Senator Henry L. Marsh, III, introduced Senate Bill 109, which would have required that a criminal background check be performed prior to the completion of any firearms sale conducted at a gun show. This bill was referred to the Senate Courts of Justice Committee. The Committee referred the general subject matter of the bill to the Crime Commission for study. The bill was then put to a vote, and failed to report by a vote of 6 Yeas to 9 Nays.

A formal Mission Statement was adopted by the Crime Commission to govern the parameters of the study:

Commission staff is directed to conduct a legal analysis of federal and state law relating to the private sales of firearms at gun shows (the gun show "loophole") and to review any applicable studies and data. The purpose of this study is limited to promoting a better understanding of the complicated legal issues and statistical limitations involved so that the legislators will be better equipped as they consider and devise policy.

In accordance with this Mission Statement, staff conducted a review of applicable federal and Virginia law, briefly examined the law in the other forty-nine states as pertains to the sale of firearms at gun shows by private citizens who are not federally licensed firearms dealers, and reviewed recent studies on the topic of illegal sales of firearms at gun shows.

Federal Law

The Federal Gun Control Act prohibits any person from engaging in "the business of. . . dealing in firearms" unless they have a federal firearms license ("FFL"). The term "engaged in the business of" is further defined as:

a person who devotes time, attention, and labor to dealing in firearms as a regular course of trade or business with the principal objective of purchase and resale of firearms, but such term shall not include a person who makes occasional sales, exchanges, or purchases of firearms for the enhancement of a personal collection or for a hobby, or who sells all or part of his personal collection of firearms.

The phrase "with the principal objective of livelihood and profit" is defined, in turn, as:

that the intent underlying the sale or disposition of firearms is predominantly one of obtaining livelihood and pecuniary gain, as opposed to other intents, such as improving or liquidating a personal firearms collection: Provided, that proof of profit shall not be required as to a person who engages in the regular and repetitive purchase and disposition of firearms for criminal purposes or terrorism.

In short, it is illegal for a person to regularly sell firearms for profit, or as a means of livelihood, unless they have applied for and received an FFL.

Once a person has received an FFL, one of the requirements of their licensure is that they request a criminal background check on potential purchasers prior to selling them a firearm. This is to ensure that the transfer of the firearm to the buyer will not violate a federal or state law, such as the prohibition on felons from possessing firearms.

However, this requirement for a background check only applies to licensed dealers who possess an FFL. If a person who is not a licensed dealer sells a firearm, there is no requirement under federal law that a criminal background check be performed. As long as the seller is not "engaged in the business of selling firearms," which would require that he be licensed, no federal law is violated.

State Laws

Individual states are free to pass their own laws governing firearms sales. Some states currently require background checks on all firearms sales, including private sales, i.e., those made by a person who is not a licensed dealer. Seventeen states require background checks on at least some private sales (such as sales of handguns by a person who does not have an FFL),

while thirty-three states do not have any requirements at all for background checks when private sales are involved. Of the seventeen states that do have at least some requirements for background checks, two states, Oregon and Colorado, have requirements for background checks of private sales only when the sale occurs at a gun show.

Virginia is one of thirty-three states that do not require any criminal background checks to be performed on private sales. Therefore, as long as no federal or state laws are being violated, such as knowingly selling a firearm to a convicted felon, private sales of firearms may lawfully take place in any private or public location, including at an organized firearms show, without any background check.

Published Studies

The main question that confronts policy makers is, how often do convicted felons purchase guns at firearms shows from private sellers? Unfortunately, this is an extremely difficult question to answer, as private sellers are not required to keep records of their sales. A number of studies have been published in recent years that examine this topic. None of the studies are able to provide a conclusive answer, due to inherent problems of trying to calculate or estimate a definitive number in a situation where precise data are not recorded for such sales. The studies reviewed by staff all had inherent methodological issues, limiting the usefulness of the findings. Often the sample size was small, there were potential biases in the data, or the study was limited by a focus on a specific geographic region, with results not necessarily generalizable to Virginia.

While there can be no doubt that some felons obtain firearms from private sales conducted at firearms shows, it is not known what percentage of felons obtain their guns in this manner, as opposed to private sales outside of firearms shows, the use of straw purchasers, sales from corrupt licensed dealers, or theft.

Preemptive Federal Legislation

In 2007, two bills were introduced in Congress that would mandate criminal background checks be performed for every firearms sale conducted at a gun show. Senate Bill 2237, the "Crime Control and Prevention Act of 2007," introduced by Senator Joseph Biden, was referred to the Senate Judiciary Committee, where no further action was taken. House Resolution 96, the "Gun Show Loophole Closing Act of 2007," introduced by Congressman Michael Castle, was referred to the House Judiciary Committee's Subcommittee on Crime, Terrorism and Homeland Security, where no further action was taken. While neither of these bills were acted upon nor taken up for a vote, they are a reminder that Congress could potentially act to require background checks at gun shows, thus preempting state law. If such a federal law were upheld as constitutional by the courts, Virginia might accommodate such a requirement by enacting legislation similar to that passed by Colorado and Oregon.

District of Columbia v. Heller

Recently, the United States Supreme Court brought a constitutional dimension to this issue. In the case of District of Columbia v. Heller, the United States Supreme Court struck down a D.C. law that imposed very strict limitations on the ownership of firearms—essentially banning all handguns, and requiring rifles and shotguns to be disassembled or have a trigger lock installed at all times, even inside a private residence. In its opinion, the Court expressly stated that the Second Amendment creates not just a collective right to gun ownership, dependant on membership in a militia, but creates an individual right. While the Court did state that some limitations on firearms are acceptable, such as "prohibitions on the possession of firearms by felons and the mentally ill, or laws forbidding the carrying of firearms in sensitive places such as schools and government buildings, or laws imposing conditions and qualifications on the commercial sale of arms," it is at this time uncertain which restrictions will be allowed by the federal courts, and which will not.

The United States Supreme Court did note, though, that the level of scrutiny that will be applied in the future to gun restriction laws will

not be the deferential standard of "rational basis," i.e., as long as some rational reason can be articulated for the law in question, it will be upheld by the courts. This means that any future gun restriction legislation passed by Virginia, or Congress, will have to survive the more difficult hurdles of either intermediate scrutiny or strict scrutiny.

The full ramifications of the Heller opinion likely will be litigated in federal courts over the next few years, and may prove to have a determinative bearing on this issue.

Conclusion

At the January 13, 2009, meeting, the Crime Commission deliberated on what policy changes, if any, it would recommend in regards to private sales of firearms at firearms shows. One proposal was to require background checks be performed for all sales at firearms shows. This proposal was voted upon, and, due to a tie vote of 6 to 6, failed to pass. The Commission then considered a proposal to require that the organizer of a firearms show ensure that agents of the Virginia State Police be present while the show is taking place. The organizer would be responsible for reimbursing the Commonwealth of Virginia the cost for the State Police's presence. This proposal was voted upon and was unanimously approved. It was agreed that a bill requiring State Police presence at firearms shows would be introduced during the 2009 General Assembly Regular Session.

JUVENILE JUSTICE

Executive Summary

During the 2006 Session of the Virginia General Assembly, Delegate Brian Moran introduced House Joint Resolution 136 (HJR 136), which directed the Virginia State Crime Commission to study the Virginia juvenile justice system over a two-year period. Specifically, the Commission was to examine recidivism, disproportionate minority contact within the juvenile justice system, quality of and access to legal counsel, accountability in the courts, and diversion. The Commission was also tasked with analyzing Title 16.1 of the Code of Virginia to determine the adequacy and effectiveness of current statutes and procedures relating to juvenile delinquency.

Because of the detailed information that was produced during the first two years of the study, an additional year was needed to fully examine the newly-identified issues in conjunction with the current matters cited in the initial resolution. The goals for the continuation of the study through 2008 included: ascertaining juvenile justice related training opportunities for Commonwealth's Attorneys and their assistants; examining the role of Commonwealth's Attorneys offices in the Juvenile and Domestic Relations (JDR) courts; determining the training provided for intake officers; reviewing juvenile law training provided for circuit court judges; discovering truancy patterns and exploring Department of Education programs directed toward truancy issues; determining the number of juveniles identified as having mental health and/or substance abuse needs in detention centers and DJJ correctional facilities; monitoring juvenile justice legislation; re-entry back into the community; and creating a list of proven practices for Court Service Units. During the 2008 Session of the Virginia General Assembly, the Commission was directed to continue its study of Virginia's juvenile justice system for a third year under House Joint Resolution 113 (HJR 113) as introduced by Delegate Brian Moran. Under this new resolution, the Commission was directed to continue to examine the issues outlined in HJR 136, as well as some additional concerns identified throughout the first part of the study. HJR113 also incorporated House Joint Resolution 160 (HJR 160), introduced by Delegate Clarence Phillips, which provided for a two-year study of the juvenile justice system to: (i) review the severity of offenses committed by juveniles in the Commonwealth; (ii) evaluate the effects on the learning environment and educational process when juvenile offenders are returned to the public school classroom; (iii) identify and examine more effective methods of rehabilitating juveniles, particularly juveniles who commit serious offenses; and, (iv) recommend such changes as the Commission may deem necessary to provide a more effective juvenile justice system. The Crime Commission utilized several research methodologies to address the directives of the mandates regarding the juvenile justice system in the Commonwealth, including: (i) completing a literature review; (ii) attending local, regional and national professional juvenile justice meetings and conferences; (iii) conducting focus groups of juvenile justice professionals; (iv) field visits to Juvenile and Domestic Relations (JDR) courts; (v) surveys of key juvenile justice professionals; and, (vi) analysis of Title 16.1 of the Code of Virginia.

Legislative initiatives and best practice recommendations were presented and discussed by the Crime Commission at the October 14, 2008, December 9, 2008, and January 13, 2009, meetings. Commission members endorsed legislation for introduction regarding amendments to Title 16.1 during the 2009 Session of the Virginia General Assembly. Additionally, the study was approved for continuation for an additional year to devote attention solely to juvenile certification and transfer issues.

Background

A. Study History

The Crime Commission's study of juvenile justice was initiated, in part, due to a report on juvenile counsel published by the American Bar Association (ABA) Juvenile Justice Center and the Mid-Atlantic Juvenile Defender Center. In 2002, these organizations published a joint report entitled "Virginia: An Assessment of

of Access to Council and Quality of Representation in Delinquency Proceedings," that cited numerous problems with the juvenile justice system in the Commonwealth. The report asserted that quality representation is lacking in delinquency proceedings due to timing of appointment, uninformed waiver of counsel, lack of public defender offices in some localities, untrained and inexperienced counsel, lack of ancillary resources, and the perception that juvenile court is seen as a "kiddy court." It should be noted that while the report provided the impetus for a lengthy study of the juvenile criminal justice system in Virginia, it was published four years before the Crime Commission was directed to perform the study. In the interim, some of the problems identified had already been partially addressed, or completely remedied, by the legislature. The list below delineates key findings as stated in the ABA report.

- *Timing of Appointment of Counsel*

Under Virginia law, counsel is not appointed until after the initial hearing, referred to as the advisement hearing. For detained youth the advisement hearing is combined with the detention hearing. Defense counsel's inability to participate early in the process hinders representation.

- *Waiver of Counsel*

A related outcome of absence of counsel is the high incidence of children waiving their right to counsel without prior consultation with a lawyer or trained advocate.

- *Untrained and Inexperienced*

In both appointed counsel and public defender office jurisdictions there is a lack of required juvenile specific training and experience. While some training opportunities exist, attorneys reported that issue-specific training was not required, unavailable and even unnecessary.

- *Inadequate Ancillary Resources*

A lack of ancillary resources, including the assistance of support staff, investigators, paralegals and social workers was present throughout the system; it was recognized, however, that the entire juvenile justice system in Virginia is underfunded and overburdened.

- *Inappropriate Referrals*

A consistent view emerged that the juvenile justice system was being loaded down with inappropriate referrals—particularly mental health and school-related cases.

- *Second-Rate Status*

Many people view juvenile court as "kiddy court" and the overall practice of delinquency law as unimportant.

- *Over Reliance on Court Service Units*

In Virginia, the Department of Juvenile Justice (DJJ) is a powerful executive branch agency that manages community programs and services, community supervision, case management, and the custody and care of committed juveniles. The DJJ's case management division or Court Service Unit (CSU) bears enormous responsibility in juvenile court, making decisions that affect children at every stage of the process. CSU employees were found to be, at times, performing functions traditionally slated for judges and prosecutors, such as keeping a child out of the system by means of informal dispositions, authorizing detention, presenting the detention case to the court, advising youth of their rights, and presenting misdemeanor petitions to the court. Youth are left confused about the roles of court personnel and the system overall.

- *Prosecutorial Discretion*

Defenders in several jurisdictions reported abuse of prosecutorial discretion by some Commonwealth's Attorneys in leveraging negotiations by threatening to transfer cases to circuit court.

- *Overrepresentation and Disparate Treatment*

Disparate treatment of minority youth and the sentiment that skin color matters in Virginia were pervasive and glaring. Despite demographic differences, there was agreement in every jurisdiction that children and youth of color are overrepresented in Virginia's juvenile justice system.

- *Attorney Compensation*

One of the lowest in the country, the $112 maximum paid to defense counsel to see a child's case through the delinquency system inadvertently place a premium on high volume and dispensing with cases quickly, typically through a hurried plea process.

Additionally, it should be mentioned that the last major reform to the Virginia juvenile justice system was conducted over a decade ago. Legislators across the country reacted in the mid-to-late-1990s to the increase in violent juvenile crime rates seen during the 1980s by reforming their states' overall juvenile justice system. With both the national and state juvenile crime rates on the rise, many elected officials and political leaders felt the need to create tougher penalties and sanctions for juvenile offenders, focusing primarily on youth between the ages of eleven and seventeen years. Virginia was no exception. In 1994 and 1996, Virginia made its laws more punitive for transfer provisions, sentencing authority, and confidentiality of juvenile records. Following the findings from the Commission on Youth's (COY) Serious Juvenile Offenders study and recommendations made by the Juvenile Justice Reform Commission, the Virginia General Assembly adopted many of these recommendations regarding juvenile justice laws. With the exception of one dissension from the commission, there was an overwhelming push for tougher laws on juveniles in reaction to the rising crime rates. In 1994, Senate Bill 520 and House Bill 1243 made the following substantial changes:

- Lowered the age from fifteen to fourteen at which a juvenile may be tried as an adult in circuit court for felonies;

- Dissolved the requirement for a juvenile's transfer hearing to show the juvenile is not a proper person to stay in JDR court if the following charges were made:

1. A Class 1 or 2 felony violation under Chapter 4 (§ 18.2-30 et seq.) of Title 18.2 or, if the juvenile is sixteen years of age or older, a Class 3 felony violation of Chapter 4 (§ 18.2-30 et seq.) of Title 18.2 for: (i) murder under Article 1; (ii) mob-related felony under Article 2; (iii) kidnapping or abduction under Article 3; or (iv) assault or bodily wounding under Article 4; or

2. Any unclassified felony violation of Chapter 4 (§ 18.2-30 et seq.) of Title 18.2 which carries a maximum penalty of imprisonment for life or a term of imprisonment of forty years if committed by an adult;

- Established that once a juvenile is *convicted* as an adult, he will be treated as an adult in all future proceedings;

- Established that only juveniles with felony or Class 1 misdemeanor convictions would be subject to commitment to the Department of Youth and Family Services (DYFS), now the Department of Juvenile Justice (DJJ);

- Specified the hearing for early release of a juvenile from DYFS; and,

- Added the requirement that when a serious offender was to be released from DYFS, that the department notify the court, sheriff, chief of police, and the Commonwealth's Attorney from the locality where the juvenile was sentenced. The Department was also to notify any victim if the victim submitted a written request for notification.

In 1996, more reforms were added to Virginia's juvenile code. Senate Bill 44 and House Bill 251 made the following changes:

- Established that a juvenile, once *tried* as an adult, would then be treated as an adult in all future proceedings;

- Established the discretion of a Commonwealth's Attorney to determine whether to transfer a juvenile for felony charges under subsection B of §16.1-269.1 of the Code of Virginia;

- Required DYFS to notify a juvenile's local school of reentry and work with the school to establish a reenrollment plan;

- Established that court proceedings involving a juvenile over the age of fourteen would be open proceedings, unless otherwise determined. It also opened the court records of such proceedings, except for portions kept confidential to protect a witness or another juvenile;

- Limited indeterminate commitments to DYFS to 36 months or the age of 21, with exception for commitments based on murder or manslaughter; and,

- Provided for blood samples to be taken for he state's DNA bank. It also included taking fingerprints and photographs of juveniles fourteen and older having committed a felony, or Class 1 or Class 2 misdemeanor for the Central Criminal Records Exchange (CCRE). Those CCRE records no longer were to be automatically deleted at the age of 29, but kept in cases of firearm purchases, fingerprint comparison, sentencing purposes, and for Court Service Units

Given the issues identified in the ABA report and the reforms adopted in the mid-1990s in Virginia, a comprehensive review of the current juvenile justice system was appropriate. Before carrying out any formal study activities, a literature review was conducted to gain a better understanding of factors affecting juvenile delinquency, and to gather relevant national and state statistics.

B. Literature Review

During the first year of its study, staff conducted an extensive literature review of existing national, state and academic juvenile justice studies. The following section includes a brief summary of findings from the literature review.

Juvenile Justice Reform

There is much discussion in academic literature on the treatment of juveniles in delinquency and criminal cases. States across the nation are experimenting with new policies and efforts to minimize juvenile crime and detention, and looking into redirecting efforts towards the "front-end versus the back-end approach," (i.e. concentrating more on prevention than punishment and incarceration). Some studies have reported that prevention programs can be successful in reducing juvenile delinquency and other behaviors, such as truancy, that may contribute to delinquent behavior. Recent research has also shown that a juvenile's brain development is very different from that of an adult. Neurological and physiological changes occur during adolescent brain development that offers explanations for risk taking behaviors and the lack of emotional maturity seen in juveniles. The frontal lobe of the brain is the last part of the brain to develop, typically not mature until the mid 20s, and is responsible for cognitive skill development, such as decision making, planning for the future, impulsivity, judgment, and foresight of consequences. These discoveries support the assertion that adolescents are less morally culpable for their actions than competent adults and are more capable of change and rehabilitation. The bulk of the evidence suggests that transfer laws, at least as currently implemented and publicized, have little or no general deterrent effect in preventing serious juvenile crime. Evidence also suggests that the transfer of juveniles to adult court may have harmful effects, such as increasing recidivism rates, limiting a juvenile's ability to successfully participate in society, and promoting life-course criminality.

National-Level Trends

Based on U.S. Census Data for the period of time between 1990 and 2000, the juvenile population, ages 10-17, increased 23% from 637,222 to 781,196. Since then, the juvenile population has continued to rise and as of the July 1, 2007, it was estimated at 815,207.

Since the passage of numerous "get tough" juvenile crime laws during the 1990s, both nationally and in Virginia, juvenile arrests have steadily been on the decline. It is unknown whether arrests declined as a result of the stricter penalties or other causes. Following almost a decade of consistency, the juvenile Violent Crime Index arrest rate began to rise in 1989 and soared in 1994, so that it was 61% above its 1988 level. However, between 1994 and 1997, the juvenile Violent Crime Index arrest rate dropped 23%, and by 1997, it had nearly returned to the 1989 level. Between 1994 and 2003, national juvenile arrests fell by 18%. In comparison, adult arrests rose 1% during that time. It is important to note that between 1980 and 1997, Violent Crime Index arrest rates increased substantially for all ages, and at a higher rate for adults than juveniles.

State-Level Trends

In the ten-year period from the 1990 to the 2000 U.S. Census, the Virginia population increased by about 865,000 people. During this time, the juvenile population increased 14.4% from 1,519,127 juveniles in 1990 to 1,738,262 juveniles in 2000. According to the Virginia State Police, there were 59,281 total juvenile arrests in 1996 and 38,599 in 2006, representing a decrease of 34%. Virginia's juvenile arrest rate

for violent crime in 2006 was 171 per 100,000, ranking the Commonwealth the 16th lowest nationally. The U.S. average was 315 arrests for violent crime per 100,000 youths. In 2006, Virginia's juvenile property crime arrest rate was 905 per 100,000, ranking Virginia the 10th lowest in the United States. The national average was 1,256 per 100,000.

JDR courts in Virginia have jurisdiction over all matters involving children under the age of eighteen, including, for example, crimes where the child is a victim, crimes where the child is alleged to have committed the offense, custody, visitation, and support matters of children, social service petitions including children in need of services cases, and parental termination cases. This is not to say that JDR courts have exclusive jurisdiction over these matters. Circuit courts can also hear these types of cases and are the courts where all appeals from JDR courts will be heard.

Prior to 1990, Virginia's juvenile corrections were administered by the Virginia Department of Corrections, which also administers adult corrections. The Virginia Department of Youth and Family Services was created in 1990 by the General Assembly and later renamed as the Virginia Department of Juvenile Justice (DJJ) with its primary responsibility as the oversight of the juvenile justice system. As part of the agency's integrated approach to addressing juvenile justice in Virginia, the DJJ oversees statewide juvenile correctional centers, provides services and programs, and collaborates with local officials and community providers. The juvenile justice system as a whole is very different from the adult criminal justice system with numerous differences in terminology and varying sentencing options available, which makes the juvenile justice system complex and oftentimes challenging to navigate. The DJJ Annual Data Resource Guide provides information related to Virginia's juvenile justice system.

Virginia is fortunate that the DJJ maintains extensive data related to juveniles. It publishes a Data Resource Guide each year with detailed information regarding juvenile demographics, CSU intake complaints, dispositions, offenses, length of stay, and other detailed case information. Based on data contained in this report, the DJJ commitments have dropped from 1,463 in FY2000 to 863 in FY2007. The DJJ's overall population has decreased over the past seven years and only the more serious offenders are being detained and treated at DJJ detention facilities. More offenders committing and recommitting crimes of lower severity are under community supervision supported by local resources.

A few things are apparent when looking at the demographics of those who are admitted to DJJ. First, males comprise the vast majority of admissions to the DJJ. Second, black youth comprised nearly two-thirds of admissions every year from 2004-2007. Finally, sixteen and seventeen year olds account for the largest proportion of admissions each year.

DJJ divides Virginia into three main regions: Western, Northern, and Eastern. The DJJ also uses these regions to group Court Service Unit districts for organizational purposes. While more juveniles come from the Eastern Region (48.1%) than the other two regions, the Eastern Region contains two more CSU districts than the other regions. Of the 35 regions, the Western Region contains 11 CSU districts and the lowest general population, the Northern Region contains 11 CSU districts, and the Eastern Region contains 13 districts.

Recidivism has declined over six percent in the past two years from 41.7% in 2004 to 35.3% in 2006. The DJJ defines recidivism by reconviction. As is consistent with the regular admissions to the DJJ, black youth show the highest reconviction rate in FY2005, making up 40.1% of the JCC release and 32.4% of the probation placement recidivist populations. Males are also more likely to be reconvicted than females. The data for the group of 18 or older is incomplete because the DJJ currently does not have the capability to track all juveniles once they are over the age of 18. Once the DJJ and the Department of Corrections are able to streamline their data, DJJ will be able to show more accurate numbers for its recidivist population.

Methodology

A. Overview of Research Plan

The spring of 2006, Crime Commission staff began activities pursuant to the HJR 136 mandates. During the initial year of study, staff focused on the collection of information from juvenile justice professionals in Virginia. Staff also conducted several focus groups and courtroom observations at JDR courtrooms across the Commonwealth and attended national and statewide juvenile justice meetings and conferences. A JDR court judge workgroup was created to help identify the most pressing concerns within the juvenile justice system. Based on the information gathered from professionals in the field and the workgroup, staff developed a comprehensive survey that was distributed to all JDR court judges and Court Service Unit (CSU) Directors across the Commonwealth. Finally, staff conducted a thorough analysis of Title 16.1 of the Code of Virginia. The information gathered from the aforementioned activities resulted in a number of legislative recommendations and best practices. Each activity is briefly summarized below.

B. Attendance at Professional Meetings and Conferences

Staff attended numerous professional meetings, trainings, and conferences at the local, state, and national levels. As this study was supported by a federal grant, staff had the opportunity to attend two national conferences, one sponsored by the National Council of Juvenile and Family Court Judges and the National District Attorneys Association and the second sponsored by the Center for the Study and Prevention of Violence. Staff consistently attended juvenile justice meetings throughout Virginia hosted by agencies and individuals such as the Virginia Department of Criminal Justice Services (DCJS), the Virginia Coalition for Juvenile Justice, the DJJ CSU directors, the DJJ Judicial Liaison Committee, the Advisory Committee on Juvenile Justice, and the Board of the DJJ. Additionally, staff participated in state and local trainings sponsored by the National Center for Family Law at the University of Richmond T.C. Williams School of Law, the Virginia Indigent Defense Commission, the Supreme Court of Virginia, the Virginia Commission on Youth, and the Virginia Department of Mental Health, Mental Retardation and Substance Abuse Services. Again, the information obtained at these meetings helped to identify the most pressing issues to focus upon in the current study.

C. Courtroom Observations and Focus Groups

Staff was given an opportunity to observe JDR courtroom proceedings in various court districts representative of the diverse demographics and regions of the Commonwealth. The localities selected included:

- Augusta County;
- City of Alexandria;
- City of Bristol;
- City of Fairfax;
- City of Richmond;
- City of Virginia Beach;
- Henry County;
- New Kent County; and,
- Roanoke County.

In each locality, staff observed JDR court proceedings and participated in focus groups with local JDR court professionals. The following individuals were requested to attend in each locality: school representatives (e.g., truancy officers, school resource officers and program directors); Court Service Unit employees (e.g., directors, intake officers, and probation officers); JDR and Circuit Court judges; law enforcement representatives; and any other participants in the juvenile justice process, such as members from advocacy groups or heads of locality-specific programs. Each focus group averaged 12-15 members and lasted approximately two hours. Topics discussed included the issues cited in HJR 136, as well as funding, truancy and Children in Need of Services (CHINS), school involvement in the juvenile justice system, mental health and resources (MH/MR), transfer, Juvenile Detention Alternatives Initiative (JDAI), collaboration of local offices involved in juvenile justice, prevention, parental involvement and accountability, challenges within the juvenile justice system, and initiatives, services, and

programs that have proven successful or have shown promise. Despite differences in population size and geographic location, all of the localities brought up similar topics, concerns, and issues. This consensus further justified the issues chosen to be the focus of the current study in addition to those already mandated.

D. Surveys

As part of the study, staff surveyed all JDR court judges and CSU directors to collect opinions and information related to the juvenile justice system in the Commonwealth. In developing measures for the survey, an academic literature review was conducted and a special meeting with a work group of JDR court judges was held to discuss relevant issues faced in the juvenile justice system. A preliminary draft of the JDR judge survey was provided to the work group for review and suggestions.

Juvenile and Domestic Relations (JDR) Court Judges' Survey

All JDR court judges in the Commonwealth were asked to complete a comprehensive survey regarding several juvenile justice issues. The survey was divided into the following sections: Judge and court profile, quality of representation for juveniles, § 16.1 statutory provisions, truancy and CHINS, judicial decision-making, juvenile services and diversion opportunities, and disproportionate minority contact (DMC). The survey was distributed to all 117 JDR court judges across the Commonwealth. The response rate was 76% (89 of 117). All of the responding judges presided over criminal cases. The average amount of experience serving as a JDR court judge was 7.5 years. The range of experience was between less than one year to 22 years of experience. Detailed, aggregate responses were collected; however, only the most relevant findings are cited throughout this report to provide further support or illustration of key recommendations.

CSU Directors' Survey

All CSU directors were asked to complete a survey similar to the one given to the JDR judges, but with additional sections addressing mental health and substance abuse services and programs. Crime Commission staff partnered with the College of William and Mary Thomas Jefferson Program in Public Policy graduate students to disseminate the survey on behalf of the Crime Commission. Responses were received from all (35 of 35) CSU Directors. Again, detailed, aggregate responses were collected; however, only the most relevant findings are cited throughout this report to provide further support or illustration of key recommendations.

E. Analysis of Title 16.1

A preliminary statutory review of Virginia's juvenile code was completed during the first year of study. Over 100 sections of the Code of Virginia, Title 16.1, Chapter 11, were reviewed and compiled. The goal of this process was to identify statutes that were duplicative, conflicting, unnecessary, ambiguous, or in need of relocation within the Code. During the second year, statutes were analyzed while taking into consideration survey results, written comments, and recommendations from juvenile justice professionals to determine whether there were any changes necessary to improve the juvenile criminal process. Overall, study results confirmed some of the preliminary analysis findings that some statutes are confusing, hard to locate, and contradictory.

Some of the greatest concerns centered among statutes regarding CHINS and CHINSup. Study participants stated that these sections were scattered throughout Chapter 11 and in need of reorganization. Additionally, many juvenile justice professionals felt that CHINS and CHINSup sections were confusing and lacked sufficient enforcement provisions. Other problematic issues identified within Title 16.1 include expungement and confidentiality of juvenile records, the confusing provisions related to possession of alcohol by minors and the resulting loss of driving privileges, and pre-trial diversions. Options available to the Commission included appointing a work group, agency, or Commission to further examine and complete a re-write or re-codification of Title 16.1, Chapter 11, or for staff to review specific sections in need of amendments or reorganization. The Commission voted to approve the latter approach, resulting in the identification and compilation of a wide variety of statutes with procedural and substantive issues. Recommendations to Title 16.1, Chapter 11, were introduced as a part of the Crime Commission's

legislative package during the 2009 Session of the Virginia General Assembly.

During the review of Title 16.1, it was discovered that § 16.1-298 provides for the suspension of some, but not all, judgments that are imposed by a JDR court in criminal cases, pending the *de novo* appeal to the circuit court. For instance, fines, suspensions of drivers' licenses, and commitments to the DJJ are suspended, while any disposition involving the participation in a public service project, or placement in a local juvenile detention facility, is not suspended. Thus, a juvenile who appeals his commitment is potentially able to return to his home, pending the outcome of the circuit court trial, while a juvenile who is given the lesser disposition of a month in the local detention facility must remain incarcerated while waiting for his trial date in the circuit court. Commission members requested an official advisory opinion from the Office of the Attorney General as to whether or not this aspect of § 16.1-298 was constitutional. In a letter dated, January 8, 2009, an informal opinion was rendered, stating that § 16.1-298 of the Code of Virginia is constitutional and does not violate the rights of a juvenile defendant to due process or equal protection.

F. Summary of Methodology

During the Commission's study of Virginia's juvenile justice system, staff developed and compiled a number of legislative and best practice recommendations in an effort to identify improvements upon current policies, practices, and procedures. All of the study results and information obtained are reflective of the literature review, professional meetings, trainings, conferences, JDR courtroom observations, analysis of the Code of Virginia, focus groups, and survey results that were brought to the staff's attention, or previously mentioned. The study issues and recommendations are a result of the culmination of information received from a wide variety of individuals, resources, and data, both qualitative and quantitative. Due to the enormity of the statewide juvenile justice system, only issues cited in the study mandate were included in this study.

Study Issues and Recommendations

A. Study Issues

Transfer and Certification of Juveniles

The perception of serious juvenile crime rose in the late 1980s and early 1990s. States, in turn, decided to address the rising crime rates by making juvenile laws more punitive. With regard to transfer provisions, sentencing authority, and confidentiality, all but three states changed their laws for one or all of these issues between 1992 and 1997. Nationally, transfer laws became more punitive in the mid 1990s throughout many states. As of 2006, fourteen states and the District of Columbia, allowed for prosecutorial direct-file for transfer, while all states allowed for some form of transfer or adult sanctions depending on the crime. The National Coalition for Juvenile Justice recently reported that in forty-seven states, youth can be charged in adult court through judicial waiver and twenty-nine states have statutory exclusion laws that mandate some children be charged in adult court for certain offenses.

Currently, both at the national and state levels of government, the issue of juvenile transfer has received widespread attention. Since the authority of transferring a juvenile to circuit court was changed by the Virginia General Assembly over ten years ago, research has been conducted to evaluate the successfulness of changes to juvenile laws, specifically the practice of transfer. The transfer process in Virginia creates three categories of crimes for which the transfer and certification of juveniles is permitted, referred to as subsections A, B, and C in the Code of Virginia. Transfer under subsection A provides for a transfer hearing where a judge reviews a list of criteria to determine if the juvenile is eligible for transfer. The criteria include: the juvenile's age; the seriousness and number of alleged offenses; whether the juvenile can be retained in the juvenile justice system long enough for effective treatment and rehabilitation; the appropriateness and availability of the services and dispositional alternatives; the record and previous history of the juvenile; whether the juvenile has previously absconded from the legal custody of a juvenile correctional entity; the extent, if any, of the juvenile's degree of mental retardation or mental illness; the juvenile's school record and education; the juvenile's mental and emotional maturity; and the juvenile's physical condition

and physical maturity. Mandatory transfer is required, without exception, for all the crimes under subsection B, all of which involve murder. The final category under subsection C allows for prosecutorial discretion in certification for twelve crimes including: felony homicide, felonious injury by mob, abduction, malicious wounding, malicious wounding law- enforcement officer, felonious poisoning, adulteration of products, robbery, carjacking, rape, forcible sodomy, and object sexual penetration. Transfer under subsection C is one of the only instances in all of Virginia law where an attorney (the Commonwealth's Attorney) in a case has more authority than the judge. Once transferred, juveniles will be considered as adults for all future crimes if a juvenile is convicted in circuit court.

One of the main policy decisions facing Virginia is the authority of Commonwealth's Attorneys and their level of discretion when determining to transfer cases to adult court. When a juvenile is transferred and convicted under subsection C, juveniles may not be considered for all of the dispositional alternatives available in the juvenile justice system. Study results indicate that the movement of juveniles to adult court could reduce opportunities for a juvenile to be treated or offered an array of programs designed specifically for youth offenders. The juvenile justice system offers a wide variety of competency and skill building services specially designed to address juvenile issues, such as substance abuse problems, mental health needs, and anger management classes. Services and programs vary greatly by locality. Professionals in the adult criminal justice system who do not routinely handle juvenile cases may not be aware of the numerous sentencing options available. Circuit Court judges do not receive detailed and intensive juvenile specific training and handle far fewer juvenile criminal cases, as compared to JDR court judges who predominantly hear juvenile cases and receive many hours of juvenile specific training. Commonwealth's Attorneys and their assistants typically do not receive much juvenile specific training. It should be acknowledged that prosecutors may seek additional training offered from outside approved training sources, such as the National District Attorney Association, the National College of District Attorneys, the Virginia State Bar or the Virginia CLE organization.

Instances may arise where a juvenile may be persuaded to plead guilty in the JDR court in order to avoid the possibility or threat by a Commonwealth's Attorney to transfer the case to the circuit court. Data received from the Virginia Criminal Sentencing Commission shows that of all twelve crimes eligible for transfer, robbery is transferred more often than any other crime. In Fiscal Year 2006, a total of 313 juveniles were transferred to and convicted in circuit court and a total of 411 juveniles were transferred and convicted in Fiscal Year 2007. Large increases were seen from Fiscal Year 2006 to Fiscal Year 2007 for both robbery (94 to 140) and homicide offenses (15 to 33), respectively, followed by assault offenses, narcotics, and larceny offenses.

Prior to the transfer law change in 1996, transfer reports were completed for a total of 1,168 juveniles in Fiscal Year 1996. After the transfer statute was amended in 1996, the requirement for transfer reports was greatly reduced. Whereas before, a transfer report was required in every instance, now transfer reports are only required for those that proceed under subsection A. All applications for transfer under subsection B and C are done without a transfer report being written. The number of transfer reports has steadily decreased to a low of 257 in Fiscal Year 2007, but this should not be seen as proof that prosecutors are making fewer requests for transfer. Now, many times when they request a transfer, a report is no longer required.

Numerous articles reviewed in the national literature dealt with recent findings by the medical community regarding adolescent brain development, juvenile behavior, and the moral culpability of adolescents. The American Medical Association, American Psychological Association, American Psychiatric Association and the American Academy of Child and Adolescent Psychiatry all argue that the adolescent brain is still developing even at ages sixteen and seventeen, which impacts a juvenile's ability to make reasonable decisions. The American Bar Association has also taken a stance on the juvenile death penalty issue and stated that for social and biological reasons, teens have increased difficulty making mature decisions and understanding the consequences of their actions.

A recent study, focused on transfer laws, was conducted in August of 2008 by the Office of Juvenile Justice Delinquency Prevention ("OJJDP") and states that "although the limited extant research falls far short of providing definitive conclusions, the bulk of the empirical evidence suggests that transfer laws, as currently implemented, probably have little general deterrent effect on would-be juvenile offenders." In Florida, for example, the report indicates that their state has experienced a 34% increase in recidivism rates of juvenile offenders who had been transferred to circuit court. Another recent study, conducted by the Center for Disease Control, also supports the OJJDP research and states that "available evidence indicates that transfer to the adult criminal justice system typically increases rather than decreases rates of violence among transferred youth." Both of these reports provide support for the need to re-evaluate Virginia's transfer laws.

In determining whether revisions to the transfer statute would be necessary or beneficial, it is crucial to evaluate available options, as well as review past and current endeavors. Many states in the last few years have decided to re-examine their transfer statutes. During the past few Sessions of the Virginia General Assembly, legislation has been introduced regarding juvenile offenders, but none to revise the transfer statutes. The General Assembly has passed significant legislation in the last few years that may demonstrate a change in attitude toward serious juvenile offenders. For instance, during the 2008 Session of the Virginia General Assembly, legislation was passed that allowed juveniles, convicted as adults in circuit court and given a "blended sentence," i.e. sentenced to serve time both in a Juvenile Correctional Center and the Department of Corrections, to gain earned sentence credits while serving the juvenile portion of the sentence in a juvenile correctional center. At its December 9, 2008, meeting, the Commission voted to continue the juvenile justice study an additional year to specifically focus on the many issues identified regarding the transfer and certification of juveniles.

Juvenile Records

The access and availability of juvenile records has continuously been expanded and amended over the years. The Code of Virginia specifies how juvenile records are treated in Title 16.1, specifically §§ 16.1-300, 16.1-301, 16.1-305, 16.1-306, and 16.1-309.1. . These statutes require that juvenile records be available to certain individuals based on the type of criminal offense involved. Three groups of entities maintain criminal juvenile records: law enforcement, courts, and the DJJ, all of which have authority to disseminate confidential records and reports to certain additional entities. Currently, a large number of agencies, individuals, and members of the public, such as school personnel and private organizations, have a right to juvenile records, including some that are "confidential."

Study results indicate that the availability of juvenile records may impact a juvenile's ability to get a job, join the military, and go to college. Many study participants voiced concerns that Code sections related to juvenile records are confusing and difficult to locate. Specifically, statutes related to the confidentiality of juvenile records and exceptions as to confidentiality were identified as being titled in a confusing manner and not located beside one another in an orderly way. Furthermore, study participants had concerns regarding the growing list of individuals with access to confidential juvenile records.

During JDR court observations, staff noted how differently localities treat the placement of the court docket for juvenile cases. Some jurisdictions opt to post the entire docket in the hallway of the courthouse or hold open court sessions, while others announce or televise case information prior to the hearing. The treatment of the docket by publicly posting sensitive and identifying information appears to be in conflict with certain statutes regarding the confidentiality of juvenile records. Additionally, study results indicated that a discrepancy existed in the interpretation of § 16.1-305(A), related to whether juvenile records that are "open to inspection" may be photocopied. This issue was also discussed and reviewed by the Supreme Court's Committee on District Courts. In their review, it was determined that a change to the statute was necessary to authorize copies of juvenile records. Legislation was introduced to address this problem during the 2009 Session of the Virginia General Assembly by Senator Henry Marsh.

Court-Appointed Counsel: Training and Compensation Rates

The Virginia Indigent Defense Commission ("IDC") is responsible for developing and certifying training courses for attorneys seeking eligibility to serve as court-appointed counsel, as well as maintaining a statewide list of certified court-appointed counsel. In addition, in certain localities chosen by the General Assembly, the IDC is primarily responsible for providing representation to indigent defendants. As part of the obligation for providing training, the IDC provides multiple continuing legal education opportunities for juvenile defenders statewide. In response to the claim made by the ABA report that quality representation is lacking in delinquency proceedings, staff reviewed training opportunities and curriculum to determine both the availability and quality of training. During the past few years, numerous juvenile specific training opportunities were sponsored monthly in both the Richmond and Northern Virginia areas by the IDC. The Virginia CLE organization, the Virginia State Bar, the Mid-Atlantic Juvenile Defender Center, and local bar associations also sponsor similar juvenile specific trainings throughout the year, some of which are available online. All attorneys in Virginia must complete twelve continuing legal education credits per year, two of which must be in ethics. If an attorney wishes to do court-appointed work, he must complete a basic six hour course in criminal law. If an attorney desires to handle juvenile delinquency court-appointed cases, he must complete an additional four-hour introductory course in juvenile criminal law and JDR court procedures. After initially meeting these qualifications, an attorney shall maintain his eligibility by completing at least four hours of juvenile specific training every other year. Staff attended the initial four hour juvenile certification training sponsored by the IDC for court-appointed attorneys in order to personally observe training materials and procedures.

Based on information received from the IDC, as of December 9, 2008, a total of 1,187 court-appointed attorneys were eligible to accept cases. This number reflects a reduction of 255 court-appointed attorneys since April 2007. The shortage of court-appointed counsel by court district is a concern for more than half (49 of 89) of JDR court judges as indicated in the judicial survey.

The IDC has informally identified several likely reasons that cumulatively contribute to the decline:

- Juvenile law is complicated and representation of juvenile clients can take a lot more time, making these cases less cost effective for private attorneys;

- Juvenile cases were not initially included in the fee cap waiver legislation;

- Many juvenile lawyers tend toward guardian ad litem cases (which are paid hourly, with no cap); and,

- The first recertification cycle for attorneys first certified in 2005, when the list was set up, occurred in 2007. The initial certification could be waived by statute. Many waivers of the certification requirements were granted to attorneys who had been practicing. The language for recertification does not specifically provide for the same waiver. Many attorneys did not want to meet the recertification requirements for the juvenile cases.

Sections 19.2-163 and 16.1-267 of the Code of Virginia provides the fee schedule for court-appointed counsel. Virginia's compensation rate when representing a juvenile client is capped at $120 per charge in JDR court and $158 in circuit court. The JDR court, in its discretion, may waive the limitation of fees and authorize additional compensation up to the supplemental statutory waiver amount when the effort and time expended warrant such a waiver. A request can also be made for additional compensation exceeding the supplementary statutory waiver, referred to as an "extraordinary waiver." The presiding judge determines whether the amount is necessary and justified, and, if so, forwards the request for final approval to the chief judge. By contrast, a circuit court does not have the authority to grant a supplemental waiver to the $158 limit for juvenile cases that exists for that court, although an extraordinary waiver is theoretically permissible.

During the 2008 Session of the Virginia General Assembly, House Bill 536, introduced by Delegate Christopher Peace, and identical to Senate Bill 610, introduced by Senator Kenneth Stolle, addressed the issue of compensation for

court-appointed counsel. The bill sought to provide increased compensation in district courts for attorneys defending juvenile offenders. Compensation for court-appointed counsel, especially for juveniles, has long been a problematic issue, as counsel receives only $120 per juvenile charge. The bill proposed allowing court-appointed counsel to request a waiver on the compensation cap if they are appointed to defend a juvenile in district court for an offense that would be a felony punishable by confinement of 20 years or more if committed by an adult. The amount of the waiver is dependent on the charges being defended and the effort expended, the time reasonably necessary for the particular representation, the novelty and difficulty of the issues, or other circumstances warranting such a waiver.

The maximum amounts of the waivers initially were to be identical to the waivers available to attorneys representing adults in circuit court. Due to budget issues, the House Appropriations Committee decreased the proposed waiver amount by over 50%. Court-appointed counsel may now only seek up to a total of $650 inclusive of the $120 already given, as compared with the amount up to $1,235 available for defending adults for identical charges.

Even though this issue was addressed during the 2008 Session of the Virginia General Assembly, the increase for JDR court cases was nominal and totals about half of the amount available if attorneys represent adults in both district and circuit court for an offense that would be a felony if committed by an adult. Seventy-three percent (65 of 89) of JDR court judges indicated that they feel that the rate of compensation is a "serious problem." Participants from all of the focus groups each cited compensation rates as a major problem. A survey of surrounding states was conducted by staff to compare Virginia's compensation rate of court-appointed attorneys in juvenile justice cases. Out of the six states surveyed, Virginia has the lowest reimbursement rate for court-appointed attorneys handling juvenile cases. Kentucky is the only state in the survey, like Virginia, that has a fixed cap for court-appointed fees. While Kentucky has fixed caps, the caps are significantly higher than in Virginia and range from $300 to $900 per case. The other four states in the survey (Maryland, North Carolina, Tennessee, and West Virginia) have no fixed caps and allow for a waiver either by a judicial or administrative official.

The following is a synopsis of each state's compensation rates:

- Virginia allows an hourly rate of $90 with a fixed cap of $120 per case and allows an extra $120 in misdemeanor and simple felony cases, or an extra $650 for more serious felonies with a judge's discretion. An additional waiver may be requested, but requires the approval of both the presiding judge and the chief judge of the court. (There is an unlimited cap in capital murder cases.)

- Kentucky provides a rate of $40 per hour with caps ranging from $300 to $900, dependent on the type of case. For violent felonies, the hourly rate is $50 with the caps ranging from $1,200 to $1,500.

- Maryland provides an hourly rate of $50 with waiveable caps dependent on the discretion of agency heads.

- North Carolina's compensation gives an hourly rate of $65 without caps. The vouchers must be approved by the judge.

- Tennessee's system provides a more elaborate compensation plan dependent on the type of charge and in-court versus out-of-court rates. The compensation rate is $40 out-of-court and $50 in-court with the caps ranging from $3,000 to $4,000 dependent on the charge. For capital cases, the hourly rate ranges from $60 to $100 based on the counsel and location.

- West Virginia provides $45 per hour for in-court time and $65 per hour for out-of-court time with ambiguous caps.

A close examination of the court-appointed counsel fee schedule reveals that juvenile court-appointed counsel receive considerably lower compensation rates than court-appointed counsel who represent adults. Attorneys who are appointed to defend a juvenile in district court for an offense that would be a felony if committed by an adult, can request a waiver on the compensation cap up to a total of $650. By means of illustration, if an attorney is representing a juvenile for a first offense felony distribution of narcotics in a JDR court, counsel could potentially receive up to $770 (The authorized amount of $120, plus the supplemental waiver amount of $650). Yet, if an attorney is

representing an adult for the same offense, counsel could potentially receive up to $2,325 because the initial statutory fee provided for adults is ten times higher than the fee for representing juveniles. If the court-appointed counsel appeals the case to circuit court, a supplemental waiver is not available. This discrepancy may create a monetary incentive for an attorney to not appeal a JDR court juvenile felony conviction to circuit court in some cases. In the previous illustration, the attorney handling the narcotics distribution case, who received $770 in JDR court, could only receive an additional $158 for appealing the case to the circuit court, and re-trying it. This could lead the attorney to discourage his client from pursuing the appeal.

Information was obtained from the Office of the Executive Secretary of the Supreme Court of Virginia to ascertain how often these extraordinary waivers are requested and granted in all courts. During Fiscal Year 2008, a total of 6,126 waiver requests were submitted by court-appointed counsel, of which a total of 5,952 were approved, for a total cost of $1,845,171. Of the 5,952 waivers approved, a total of 1,080 were for juvenile offenders, resulting in a cost of $185,442. For the first quarter (July 1 – September 2008) of Fiscal Year 2009 a total of 1,250 extraordinary waivers were requested in all courts. Of those, 1,227 were processed for payment above the statutory waiver amount. No extraordinary waivers were requested for juvenile delinquency appeals in circuit court during this time period.

Many focus group participants voiced concerns regarding the complexity of forms necessary to request waivers and the lack of promotion regarding statutory changes made in 2008 to expand criteria and funding for permissible waivers. Additionally, concerns were raised regarding the exclusion of CHINS and termination of parental rights cases for waiver of fee caps. Available options to remedy issues associated with court-appointed compensation rates include the following proposals:

- Allow compensation amounts in juvenile cases to be identical to adult cases;

- Provide waivers for juvenile circuit court appeals that are at least identical to JDR waivers; and,

- Include CHINS and termination of parental rights cases as eligible for waiver of fee caps.

Disproportionate Minority Contact

Disproportionate Minority Contact (DMC), a problem which gained recognition as early as 1988, is a major concern in Virginia, as well as throughout the country, affecting many social and criminal justice systems. There is racial disparity at almost every level of the juvenile justice system in Virginia. Based on a report of Virginia's Advisory Committee on Juvenile Justice (VACJJ), the Commonwealth's juvenile justice system faces important challenges, especially DMC within the juvenile justice system. According to VACJJ, although only 23% of the juvenile population are minorities, they represent disproportionate percentages throughout the juvenile justice system: minorities comprise 38% of intake offenders, 45% of intake and technical and delinquent offenders, 50% of secure detention admissions, and 66% of commitments to juvenile correctional centers. In 2002, blacks constituted 16% of the national juvenile population, but 29% of the national delinquency caseload. With regard to juveniles in corrections, the Virginia juvenile custody rate (per 100,000) for whites is 143, while the rate for blacks is 715 and 273 for Hispanics. According to the DJJ, the number of black and Hispanic youth in Virginia detention homes and correctional centers continues to increase while the numbers for white youth have been decreasing. In addition, these minority juveniles were more likely than white juveniles to be held under locked arrangements.

In 2003, Virginia began a partnership with the Annie E. Casey Foundation to implement the Juvenile Detention Alternatives Initiative (JDAI). Currently, the following eight jurisdictions are involved in the initiative: Newport News, Hampton, City of Richmond, Petersburg, Hopewell, Lynchburg, Bedford City and County, and Norfolk. JDAI seeks to detain only the juveniles who most present a public safety risk prior to trial. According to DJJ, the goals are to protect public safety, reduce the unnecessary or inappropriate use of secure detention, and to re-direct public finances to more effective purposes. Most participants in the focus groups supported JDAI. While only one locality that staff visited was actively involved as a test site for JDAI, most of the other localities utilized the

JDAI detention assessment instrument, which helps determine whether an apprehended juvenile should be detained. A few problems were noted by focus group participants with either JDAI or the assessment instrument that included:

- The JDAI instrument does not have the juvenile's history or family/ living situation as weighted options for determining whether to detain a juvenile.

- Local CSU workers need a blanket system for override authority on the instrument.

- There is no legal holding area for juveniles once it has been determined that they will not be detained. The police officers who brought the juvenile in must then stay with the juvenile until the parents arrive to pick up the juvenile. Police officers expend many hours on a shift to apprehend a juvenile and some admit to avoiding arresting juveniles because the process is too complicated and the amount of time required takes away from their regular patrol duties.
- A lack of communication and collaboration exists between the numerous local departments and agencies that handle juveniles.

Barriers to Service

Many of the local focus groups cited specific problems that hinder services to juveniles in the community. The following section summarizes programs, initiatives, and services that have suffered budget cuts or elimination over the past years:

Substance Abuse Reduction Effort (SABRE): Several rural localities mentioned the usefulness of the SABRE program, which is no longer in existence. This statewide program, cut due to budgetary issues, addressed drug dependency through each CSU. SABRE required mandatory drug treatment for first-time offenders. It also provided for retesting, treatment, and reintegration programs. The localities that mentioned this program cited its successfulness and need for the program to be reinstated.

Office on Youth: A few of the rural localities mentioned the need to reestablish the Office on Youth, once a statewide program that assisted in juvenile issues by providing social and delinquency services. One of the localities visited was able to continue their Office on Youth and its cases. services, albeit at a much lower capacity, through federal grants. The localities stated that when the offices were fully funded and operational, the services they provided greatly helped the needs of juvenile delinquents and CHINS

Local Corroboration: Overall, the localities with positive relationships among its court system, schools, and law enforcement agencies reported fewer problems and a higher level of ability to provide juveniles with programs and services. Some of these localities had even established regularly scheduled meetings with representatives from schools, JDR courts, law enforcement, CSUs, nonprofits with juvenile programming, and other community members active in youth services. One of the courts even had its own volunteer program that helped lighten the load for regular employees of the JDR court.

Truancy and CHINSup

During the 2006-2007 school year, there were 39,099 attendance incidents reported statewide. This number represents 10.51% of all discipline, crime, and violence incidents reported. The Virginia Department of Education (DOE) reported that the efforts of attendance officers, school resource officers, school child study/student assistance teams, Family Assessment and Planning Teams (FAPT), and juvenile courts are frequently used by all localities to address truancy. According to the DOE's study, they found the following regarding the activity of truancy intervention:

- School resource officers (SRO) were reported as routinely involved in attendance cases in 22% of school divisions, occasionally involved in 48%, and rarely or never involved in 30%.

- Community-based agencies were reported to be routinely involved in intervention efforts by 24% of school divisions, occasionally involved by 48%, and rarely/never involved by 16%.

- Thirty-nine percent of school divisions reported that inter-agency reviews were conducted before approaching juvenile court intake, 23% reported reviews occurred after a judicial hearing but before disposition, and 13% reported the reviews occurred as part of the juvenile court intake process. Another 16% reported variable

timelines, depending on case circumstances.

- In exploring the process and criteria used by school divisions to determine whether to pursue court action against a child or a parent, it was found that fewer than half the attendance officers interviewed reported consulting with a school board or city/county attorney, 15% reported always consulting and 33% reported consulting "as needed." Just over one-third reported having written procedures or guidelines for pursuing court action; upon closer examination, however, guidelines reviewed typically were found to be re-statements of statutory requirements rather than detailed procedures or guidance documents. Where the attendance officers consulted with a school board or city/county attorney, the school divisions were three times as likely to report written guidelines.

- Eighty-six percent of school divisions reported filing at least one CHINSup petition in the past school year; the number filed ranged from 1 to over 200. Fifty-nine percent of school divisions reported filing at least one complaint against a parent; the number of such complaints ranged from 1 to 92. Educational neglect complaints were reported to have been filed by only ten school divisions."

The study also noted that 66% of attendance officers surveyed said there were inadequate personnel to respond to truancy cases in a timely and intensive manner. The study concluded that, because practices addressing truancy were so diverse throughout the state, localities could benefit from receiving model guidelines about comprehensive approaches to the issue of truancy.

Focus group participants stated that they believed one of the contributing factors of truancy was due to a perceived notion regarding the value of a high school diploma. This was, in part, related to the number and types of available vocational or technical education programs. Participants voiced concerns that students in high schools without these programs felt that a high school diploma served little or no purpose in the "real world." In 2007, the Virginia General Assembly passed House Bill 2039 and Senate Bill 1147, which required the DOE to establish technical education degrees. The DOE is currently amending their standards of accreditation to include these technical degrees, which will allow non-college bound students the opportunity to obtain a meaningful diploma for employment.

As was noted by most study participants, either by discussion or through survey, truancy negatively impacts the juvenile justice system. Truant juveniles are often sent to court and are more inclined to become delinquent than non-truant youth. Chronic truant juveniles are seven times more likely to be arrested than non-truants. In 2005, almost 4,900 petitions were referred to court for truancy. Seventy-one percent of those were petitioned to court as CHINSup. As reported in the DJJ Data Resource Guide, CHINS and CHINSup complaints increased 4% from FY05 to FY07. Additionally, focus group participants voiced concerns regarding the long time requirements necessary to exhaust remedies through the school before coming to court on a petition.

The Commission on Youth is currently conducting a two-year extensive study regarding truancy and plans to issue a detailed report with recommendations regarding similar issues as discussed above. Available options to remedy issues associated with truancy and CHINSup include the following proposals:

Parental Involvement and Accountability

A major issue, often linked with truancy and CHINSup cases, is that of parental involvement and accountability. All of locality focus groups cited cyclical delinquency as a result of inadequate parenting, which usually results in a multi-generational pattern of the same. A few localities mentioned the need for mandatory parenting skills classes to be required of all parents of truant children, delinquent children, and children subject to CHINS and CHINSup orders. Another pattern of parental instability was the lack of parental ability to enforce school attendance. Again, this was mentioned as a problem that starts early on at the elementary school level. A suggested corrective method would be to sanction the parents of elementary aged truant children. This option would require the proactive cooperation of school systems to inform the courts in a timely manner of a child missing from school. The courts would need clear enforcement of attendance with the power to impose sanctions, including jail time, for those not taking young children to school. Reducing the compulsory school attendance age was also a suggestion discussed by many focus groups participants.

In response to the many complaints and problems regarding parental accountability, staff reviewed current law to determine the adequacy and availability of penalties. Based on this analysis, staff identified ten statutes in the Code of Virginia that address parental accountability, with some allowing for jail time: § 18.2-371, §§ 22.1-254, 22.1-255, 22.1-258, 22.1-262, 22.1-263, 22.1-265, 22.1-267, 22.1-279.3 and § 16.1-241.2. Data obtained from the Virginia Compensation Board for FY03 – FY08 indicated that at least a handful of localities are making use of the statutes that allow parents to be criminally charged for repeatedly allowing their children to be truant. It appears that, should judges opt to punish parents, there are adequate statutory remedies available.

B. Recommendations

As a result of numerous meetings with juvenile justice professionals and a thorough review of survey results and written comments, staff identified the following best practices as potential methods to address specific issues within the juvenile justice system. Due to the wide range of issues cited as problematic and the fact that many overlap, each of the best practices listed below may not be applicable statewide because of the diverse nature of localities in Virginia. This list of recommended best practices was disseminated to all relevant agencies to consider for adoption. It is underscored that these best practices were not formally adopted by the Crime Commission, but rather approved for dissemination to the professional juvenile justice community for consideration.

Commonwealth's Attorneys' Services Council

- The Commonwealth's Attorneys' Services Council should provide additional juvenile specific training for Commonwealth's Attorneys and their assistants.

Supreme Court of Virginia

- The Court should develop a policy on how the juvenile docket is treated, e.g. whether it should be posted, televised, announced;
- The Court should provide additional mandatory juvenile specific training and resources for circuit court judges;
- The Court should develop a policy on whether juvenile records "open to inspection" include copies of documents (§ 16.1-305(A)); and,
- Courts should consider the establishment of preventative programs and collaborative approaches to truancy at an early age.

The Department of Juvenile Justice

- CSU Directors should maintain a list of resources, programs, services, and options, specific to each jurisdiction, to assist JDR and circuit court judges in the identification of available dispositions;
- The Department of Juvenile Justice should encourage the participation and implementation of truancy teams in localities;
- The Department of Juvenile Justice should encourage and provide programs and services that focus on family and underlying issues that contribute to juvenile delinquency;
- The Department of Juvenile Justice should have a systematic approach to address underlying family issues for "at-risk" juveniles;
- The Department of Juvenile Justice should clarify the definition of "informal diversion" and include its use in trainings for CSU staff;
- The Department of Juvenile Justice should develop public information guides for parents and juveniles to be made available in JDR courts and CSU offices to aid them in the navigation of the overall juvenile justice system and in procedures specific to their locality;
- The Department of Juvenile Justice should work with localities to develop initiatives addressing the transportation difficulties that parents and children may face when it comes to attending programs and services;
- The Department of Juvenile Justice should encourage localities to offer programs/ services to neighboring localities, when possible, or develop a statewide system for diversion opportunities so that programs/services can be consistent throughout the state;

- The Department of Juvenile Justice should consider providing each CSU with direct access to a substance abuse counselor and mental health psychologist;

- The Department of Juvenile Justice should continue the use of the Detention Assessment Instrument unless more effective measures can be identified; and,

- The Department of Juvenile Justice should give priority to evidence-based programs for alternatives to detention.

Due to the current budget issues facing Virginia, the following list of best practices were identified as part of the study as having significant fiscal impact and therefore were not reported to specific agencies or addressed by the Crime Commission.

- Courts and schools should establish preventative programs and collaborative approaches to truancy at an early age;

- Schools should offer vocational programs for non-college bound students;

- Localities should explore the implementation of truancy teams, truancy court, community truancy meetings and truancy dispute resolutions;

- Programs and services for juveniles also need to focus on family issues;

- Priority should be given to evidence-based programs for alternatives to detention;

- A systematic approach to addressing underlying family issues for "at-risk" juveniles should be considered (social services, mental health, substance abuse, domestic violence, etc.);

- Allow compensation amounts in juvenile cases to be identical to adult cases;

- Provide waivers for juvenile circuit court appeals at least identical to JDR court waivers;

- Include CHINS and termination of parental rights cases for waiver of fee caps;

- Follow-up on results and recommendations from DCJS Juvenile Services Section Three-Year DMC plan;

- Follow-up on criminal justice and public safety recommendations identified by the Commission on Youth truancy and CHINS study;

- Fund CSU standards requirement for staff and personnel (example: substance abuse counselor);

- Fund transportation of detained youth;

- Fund mental health screenings of juveniles;

- Fund delinquency prevention programs; and,

- Fund community-based juvenile services.

Conclusion

Overall, the study on juvenile justice revealed that professionals who participate in the juvenile justice field are satisfied with the way the system works. Several issues were identified throughout the entire study, both at the state and local levels, that may require more attention and improvement, such as truancy, mental health, and various barriers to service. One of the greatest concerns held by many juvenile justice practitioners was the disparate treatment juveniles receive based on the locality in which they reside. Funding for juvenile programs and services was also a major issue in many localities. Because the juvenile justice system is so complex and different from that of the adult criminal justice system, it would be beneficial for juveniles and their families to have information provided to them that would aid in the navigation of the overall juvenile justice system, including practices and procedures specific to their locality. While it is impractical to implement statewide requirements and oversight for all of the identified problematic issues, some aspects of the system could be remedied by increasing collaboration within localities, as well as neighboring localities, implementing programs and services that focus on family issues, and mandating juvenile specific training for individuals who work with juveniles on a limited basis.

Additionally, revisions to Title 16.1 were identified as part of the study, both substantive and technical, that may be necessary to clarify certain statutes, such as CHINS.

One of the difficulties in studying the transfer and certification of juveniles to circuit court was the lack of data on juvenile offenders who have been transferred to circuit court. Currently, data is not available from the Supreme Court of Virginia to determine, by Code subsection, the number of juvenile cases transferred to circuit court. Because of the data limitations with the Court's tracking of juvenile offenders, it is unable to provide a true count of juveniles who committed a crime prior to turning age eighteen and are transferred, but who are eighteen years old when their case is heard in court. This scenario creates a "black hole," in that juveniles are not being counted because they are no longer considered juveniles at the time of trial. Also, DJJ cannot provide a breakdown of crimes for which a court has ordered a transfer. Data is only available for cases where there has been a transfer report, meaning that the transfer occurred under subsection A of § 16.1-269.1. Any transfers made under subsections B and C are not currently documented in detail by DJJ. As there is no statewide databank that captures all of the transfer data by jurisdiction, there is no means, short of going to each locality to review juvenile case files in Commonwealth's Attorneys' offices, to obtain this information. As part of the continued study in 2009, staff plans to continue to review literature related to adolescent brain development, conduct a fifty state review on other states' transfer laws, and obtain additional transfer data from the Supreme Court and DJJ.

Acknowledgements

Over the three years that the Crime Commission has been involved with this detailed, lengthy study, we have received assistance from hundreds of people who generously gave their time, insights, and opinions. This study absolutely would not have been possible without their help. So many professionals working in this area willingly provided their particular insights that it is impossible to adequately thank everyone who made this report possible.

KILLING OF A NEWBORN BABY

Background

The Virginia State Crime Commission received a letter from Senator Hurt, asking the Commission to study the standard required for prosecuting the death of a newborn. Specifically, a Commonwealth's Attorney from his district asked the Senator to look into changing the standard, as it is currently set forth in Lane v. Commonwealth.

Analysis

The standard for prosecuting the killing of a newborn was established by the Virginia Supreme Court in Lane v. Commonwealth. This standard, as articulated in Lane, requires the Commonwealth to prove three elements to find an individual guilty of infanticide: (1) the child was born alive; (2) the child had an independent and separate existence from its mother; and, (3) the accused was the criminal agent that caused the infant's death. The Virginia Supreme Court did not develop or create the "born alive rule;" rather, the Court adopted a long standing common law rule. The "born alive rule" has been prevalent in the common law since the 16th century, and is still followed in at least the majority of jurisdictions. This standard is an adaptation and extension of the traditional *corpus delicti* rule in homicide cases, which requires that a living person be killed by the criminal act of the defendant. It should be understood that the "born alive rule" does not require direct evidence to prove each element. Rather, as in all *corpus delecti* cases, proof of each or all elements "may be furnished by circumstantial evidence."

In Lane the defendant was accused of killing her newborn child. The Commonwealth proved that the child was "born alive;" however, it could not prove conclusively that the child had an "independent and separate existence" from its mother. Also, while the evidence showed the child's death was caused by a lack of oxygen, the evidence was insufficient to prove the criminal agency of the mother. There is only one other published decision in the Commonwealth using the Lane standard. In Aldridge v. Commonwealth, the Virginia Court of Appeals upheld the conviction of a defendant for killing her newborn child. The medical evidence, like the medical evidence in Lane, was not conclusive to a "medical certainty" to prove the elements required in Lane, but combined with the defendant's statements, there was sufficient evidence for the Court of Appeals to uphold the conviction in Aldridge.

While the Lane standard does require evidence to prove three separate elements, it does not require definitive medical evidence to prove each or all of the elements. This standard requires, as in all homicide cases, that the Commonwealth prove that a living human being's death was caused by the defendant. This determination is a question to be made by the finder of fact. Since the Lane standard is flexible, and not fixed, any advances in forensic science and medical technology will increase the ability of a finder of fact to determine whether each element of the Lane standard is satisfied.

There has been some criticism of the "born alive rule" because it does not cover deaths prior to birth, that is, the killing of a fetus cannot be prosecuted under the rule. In Virginia, as well as other jurisdictions, feticide is also punishable as a separate crime. This crime applies when the killing occurs prior to birth. The crime of feticide in the Virginia Code, § 18.2-32.2, is punished as a Class 2 felony for any "person who unlawfully, willfully, deliberately, maliciously and with premeditation kills the fetus of another." Additionally, under § 18.2-32.2, an individual may receive a sentence of no less than 5 years or more than 40 years if the malicious killing of a fetus is done without premeditation.

Only six states (Arkansas, California, Massachusetts, Missouri, Oklahoma and South Carolina) have adopted standards treating the fetus as a person before birth for the purposes of prosecuting feticide cases. However, in all of these states the prosecution must prove either viability or a separate and independent existence prior to birth. Even though these states have abrogated the "born alive rule," all they have done is extend the rule to cover feticide. It is also very likely that these states will continue to follow the "born alive" standard after birth, just as South Carolina expressly did when it extended the "born alive" rule to feticide.

Conclusion

Senator Hurt, at the suggestion of his constituent, requested that language be drafted for a bill that would alter the Lane standard. The proposed language sought to add the following definition to §18.2-6: *The word "person" includes a human infant that has been born alive regardless of whether the infant has achieved an independent and separate existence from the mother*. This proposal would essentially remove the requirement of proving the "separate and independent existence" of the newborn, as required by Lane. This proposed change is a very significant departure from not only the Lane standard, but also from the common law *corpus delicti* requirement that murder requires the death of a live, human being. The entire purpose of the Lane or "born alive" rule was to ensure that the newborn was "alive," so that the defendant could not be convicted of murdering a dead or still born child. Even if the proposal were adopted, the difficulties in proving a "separate and independent existence" would likely shift to become a sub-issue concerning the criminal agency of the defendant.

MISDEMEANOR ARREST

Background

Crime Commission staff was asked to brief the Commission on the anticipated decision by the U.S. Supreme Court in Virginia v. Moore and its effect on Code of Virginia § 19.2-74.

Analysis

Virginia Code § 19.2-74 restricts law enforcement to the issuance of a summons for class 1 or 2 misdemeanors, and does not allow them to make an arrest unless one of the following three exceptions applies: (1) the person fails/refuses to discontinue the unlawful act; (2) the person is believed by the arresting officer to be likely to disregard the summons; or, (3) the person is reasonably believed by the arresting officer to pose a threat to himself or others. There is no statutory remedy available for a defendant if an officer makes an arrest in lieu of issuing a summons.

The Supreme Court of Virginia applied the Fourth Amendment exclusionary rule to violations of § 19.2-74 in Moore v. Commonwealth. In Moore the defendant was pulled over by police for driving on a suspended license, a Class 1 misdemeanor. Instead of being issued a summons, as required by § 19.2-74, he was arrested. Pursuant to a search incident to arrest, the arresting officer found crack cocaine in his jacket pocket. The defendant was later indicted for possession of a controlled substance, with intent to distribute. The defendant argued at his suppression hearing that the violation of § 19.2-74 was grounds to exclude the evidence against him, since it was not obtained though a search incident to a valid arrest. The trial court denied his motion to suppress and he was convicted.

A three judge panel of the Court of Appeals of Virginia reversed the conviction, for the reasons the defendant argued at his suppression hearing. The full, *en banc* panel, of the Court of Appeals later reversed the three judge panel's decision. The Supreme Court of Virginia then reversed the *en banc* decision of the Court of Appeals, holding that the arrest in lieu of a summons violated Moore's Fourth Amendment rights.

The U.S. Supreme Court, in Virginia v. Moore, unanimously overturned the Virginia Supreme Court's decision, holding that the Fourth Amendment is inapplicable to state arrest laws of this nature. In its decision, the U.S. Supreme Court stated that, in a long line of cases, "when an officer has probable cause to believe a person committed even a minor crime in his presence, the balancing of private and public interests is not in doubt... the arrest is constitutionally reasonable." It also noted that states are free to develop rules that provide greater protection than what is permitted in the Fourth Amendment, but it cannot utilize the Fourth Amendment to enforce those greater protections.

Conclusion

The U.S. Supreme Court's decision in Virginia v. Moore removes the ability of defendants in the Commonwealth to apply the Fourth Amendment to violations of Va. Code § 19.2-74 by law enforcement. Without a statutory remedy available, evidence gathered in violation pursuant to an arrest that violates Va. Code § 19.2-74 will not be excluded for trial. Alternatively, if the Commonwealth wishes to ensure that any such evidence be admissible, the result of Virginia v. Moore eliminates the need to modify Va. Code § 19.2-74 with new legislation.

SALE OF ITEMS PROHIBITED FROM USE

Background

Using the statutory authority granted to the Crime Commission, staff was requested to investigate the use of tinted license plate covers by members of the public in Virginia.

Virginia Code § 46.2-716(B) provides:

No colored glass, colored plastic, racket, holder, mounting, frame, or any other type of covering shall be placed, mounted, or installed on, around, or over any license plate if such glass, plastic, bracket, holder, mounting, frame, or other type of covering in any way alters or obscures (i) the alpha-numeric information, (ii) the color of the license plate, (iii) the name or abbreviated name of the state wherein the vehicle is registered, or (iv) any character or characters, decal, stamp, or other device indicating the month or year in which the vehicle's registration expires. No insignia, emblems, or trailer hitches or couplings shall be mounted in such a way as to hide or obscure any portion of the license plate or render any portion of the license plate illegible.

A violation of this statute is a traffic infraction, punishable by a fine of up to two hundred and fifty dollars.

Analysis

The wording of Va. Code § 46.2-716(B), with the broad prohibition expressed by the phrase "in any way alters or obscures," indicates, in a general way, that possibly no tinted or colored license plate covers are lawful in Virginia—the argument being that even a light tint could, in certain circumstances, ever so slightly obscure the lettering of the plate. No appellate cases exist in Virginia which provide any further guidance on this issue, or clarify that lightly tinted license plate covers are permissible. Unlike the statute which regulates tinted windows on cars, there are no definite standards as to which commercially available tinted license plate covers are legal, and which are not. Therefore, Virginia residents who purchase tinted license plate covers for their automobiles may unknowingly be committing traffic infractions, and thus be subject to traffic stops by law enforcement, as well as court fines and costs. Unlike other traffic offenses, the use of tinted license plate covers is not immediately apparent as an unlawful activity, especially as these covers are widely available for purchase at auto goods stores and other larger retailers throughout the state.

There are five main options available to the legislature in regards to this situation. One is to pass no legislation, and maintain the uncertainty of the status quo. Another is to authorize and direct either the State Police or the Virginia Department of Motor Vehicles to promulgate regulations that would provide more specificity as to which tinted license plate covers, if any, will be acceptable on Virginia's roadways. A third option would be to authorize or encourage the State Police to have a public awareness campaign on this topic, similar to the campaigns focused on seat belt laws or bringing attention to the seriousness of drunk driving. Such a campaign would warn Virginians that having a tinted license plate cover could lead to being stopped and ticketed by law enforcement.

A fourth option would be for such a warning to be delivered by merchants who sell these covers—the warning being mandated either through statute or regulation. The fifth option would be to completely outlaw the sale of tinted license plate covers in the state, similar to the prohibition on the sale of any radar detectors. Doing this would help to clarify that tinted license plate covers are not permitted on cars driven on public highways in Virginia, and would protect Virginia residents from receiving a false assurance that because these covers are openly sold in Virginia stores, they are lawful to use. This last approach has been taken by a few other states. For instance, when Illinois prohibited the use of all license plate covers, including those that are clear, they prohibited at the same time the sale of any such covers in all Illinois stores.

Conclusion

The members of the Crime Commission considered these proposals at the December 9, 2008, meeting. Concerns were raised that if specific legislation were to be enacted for all potential automobile modifications or accessories

that are illegal or potentially illegal, the General Assembly would be faced with a never-ending task; each year, a new safety awareness campaign would have to be approved or mandated, or the sale of yet another item, otherwise lawful in itself, would be made illegal. After deliberations, the Crime Commission voted for the first option, to maintain the status quo.

WRITS OF ACTUAL INNOCENCE

Background

Prior to 2001, there was no judicial mechanism in Virginia to directly reverse a guilty verdict in a criminal case if more than twenty-one days had passed after the entry of the final order in the case, even if new evidence was discovered that conclusively proved the innocence of the defendant. While a writ of habeas corpus might indirectly provide relief to a defendant, habeas corpus is a collateral attack on a conviction, not a direct appeal, and therefore cannot be used to determine the guilt or innocence of the prisoner. In at least some circumstances, proof of innocence is insufficient grounds to grant a writ of habeas corpus. Furthermore, there exist strict time limits within which a petition for habeas corpus relief must be filed, or no relief can be granted: generally, within two years from final judgment of the trial court or one year from final disposition on appeal, whichever is later, in non-capital cases; and 120 days from denial of a petition for a writ of certiorari by the United States Supreme Court in capital cases. There also exist strict time limits for the filing of a petition for habeas corpus relief in federal courts: generally, one year from the final disposition of any state appeal or habeas petition.

In 2001, Virginia created a special writ to handle instances where a defendant had newly discovered biological evidence that demonstrated his actual innocence. The time limit for filing a petition for relief under the writ of actual innocence was not calculated from the time of final judgment in the criminal case, but from the time of the test results on the new DNA evidence. Under this writ, the Supreme Court of Virginia has the authority to directly vacate the conviction of a defendant who is found to be innocent of the crime for which he was convicted. In addition to other requirements, though, the writ is only available to those persons who are currently incarcerated. A person who has served all of his time, or who is out on probation or parole, cannot petition for a writ of actual innocence. Additionally, the writ is only available to defendants who entered a plea of not guilty at their original trial, unless they were convicted of capital murder, a Class 2 felony, or a felony that carries a maximum penalty of life imprisonment.

In 2004, a second special writ was created to deal with cases where the newly discovered evidence that proves innocence is not DNA or biological in character. Petitions for this writ are submitted to the Virginia Court of Appeals rather than the Supreme Court, although the parties may petition the Supreme Court of Virginia to accept an appeal from any final decision made by the Court of Appeals. The writ of actual innocence based on nonbiological evidence does not require that the petitioner be incarcerated at the time of the suit. It also differs from the writ of actual innocence in that there are no exceptions to the requirement that the defendant must have plead not guilty at the time of the original trial. Even if the defendant has been sentenced to life in prison, or has been convicted of capital murder and is facing execution, he may not make use of this writ if he originally plead guilty.

Analysis

Crime Commission staff requested information from the Supreme Court of Virginia on the number of petitions that have been filed for writs of actual innocence since the writ was first created. The following numbers were reported: there were no petitions filed in 2002 (the writ did not become available until November 15, 2002); there were 10 petitions filed in 2003; 11 petitions filed in 2004; 2 petitions filed in 2005; 2 petitions filed in 2006; and 3 petitions filed in 2007. As of October 14, no petitions had been filed in 2008. The Supreme Court dismissed all 28 of these petitions (every one that has been filed to date).

It was suggested that because so few petitions have been filed for writs of actual innocence, the availability of this writ, and the writ of actual innocence based on nonbiological evidence, might be increased without creating undue burdens on the judicial system. Accordingly, the Crime Commission considered eliminating the requirement that the petitioner be incarcerated in order to apply for a writ of actual innocence. It was also proposed that the requirement of having plead not guilty be eliminated for both writs.

Conclusion

The members of the Crime Commission considered these proposals at the January 13, 2009, meeting. After deliberations, the Crime Commission voted to eliminate the requirement that a petitioner be incarcerated in order to file a petition for a writ of actual innocence. The Crime Commission voted not to change any of the existing requirements that the petitioner must have plead not guilty at the original trial.

SUMMARY OF CRIME COMMISSION LEGISLATION

Animal Control Officers

HB 2263 (Delegate Kilgore)
Oversight of animal control officers. Directs the Department of Criminal Justice Services to establish minimum standards for employment, job entry and in-service training curricula, and certification for animal control officers. In developing the training, the Department is to consult with the State Veterinarian on issues relevant to the duties and training of these officers.

Left in House Agriculture, Chesapeake and Natural Resources Committee.

Capital Murder of Firefighters

SB 1069 (Senator Martin)
Capital murder; fire marshals. Adds fire marshals and assistant fire marshals with law-enforcement powers to the capital murder statute so that the death sentence can be imposed for the murder of such a fire marshal.

Passed House and Senate, and was signed by the Governor.

DNA Notification

SB 1391 (Stolle)
Criminal convictions; DNA Notification. Permits the dissemination of Virginia criminal history information to certain individuals who volunteer in the identification, location, and notification of individuals convicted of crimes prior to the advent of DNA testing and the case files of which have since been found to contain evidence suitable for DNA testing. The bill also specifies other aspects of the notification process and has an emergency clause.

Passed House and Senate, and was signed by the Governor.

SB 1435 (Howell)
Forensic Science Board. Adds the chairmen of the House and Senate Courts of Justice Committees or their designees to the Board.

Passed House and Senate, and was signed by the Governor.

Gun Show Loophole

SB 1385 (Senator Stolle)
Firearms shows; state police presence. Requires the promoter of a firearms show to arrange and pay for a law-enforcement officer from the Department of State Police to be present at all times during a firearms show. Also allows the Superintendent of State Police to enter into agreements with the federal Bureau of Alcohol, Tobacco, Firearms and Explosives whereby law-enforcement officers with the Department of State Police may be granted federal law-enforcement authority for the purposes of enforcing firearms laws of the United States.

Left in Senate Courts of Justice Committee.

Juvenile Justice

SB 1149 (Senator Howell)
Juvenile Code. Makes various clarifying changes in Code sections pertaining to juveniles and juvenile court provisions. The bill specifies that the statutory deferred disposition provisions for underage possession of alcohol apply only to adults, since the law pertaining to juveniles already allows deferred dispositions, allows juvenile probation officers to keep relevant photographs in their files, specifies that a petition must be filed (rather than proceeding informally) if the offense for which the juvenile had been previously adjudicated delinquent would be a felony if committed by an adult, and provides that a petition may be filed for assault and battery against a family or household member.

Passed House and Senate, and was signed by the Governor.

SB1392 (Senator Stolle)
Children in need of supervision or services. Creates an article entitled "Children in Need of Supervision or Services" into which certain existing statutory provisions relating to intake, violations of court orders, and the criteria for detention or shelter care are either moved or duplicated.

Passed by indefinitely by Senate Courts of Justice.

Writs of Actual Innocence

SB 1381 (Stolle) HB 2312 (Melvin)
Writs of actual innocence; requirements. Extends the ability to petition for a writ of actual innocence based on previously unknown or untested biological evidence to individuals who are not incarcerated.

Both passed the House and Senate and was signed by the Governor.