VIRGINIA STATE CRIME COMMISSION




2009

ANNUAL REPORT

COMMONWEALTH of VIRGINIA

Virginia State Crime Commission

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June 16, 2010

TO: The Honorable Robert F. McDonnell, Governor of Virginia and 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 2009 Annual Report.

Very truly yours,

Janet Howell

Senator Janet D. Howell, Chair

Authority of the Crime 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 the Attorney General 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.

2009 Summary of Activities

Throughout 2009, the Commission met five times: January 13, May 11, June 25, September 16, and December 15. At the Commission's December 9, 2008, meeting, staff was requested to continue its juvenile justice study an additional year with a focus on issues related specifically to the transfer and certification of juveniles. As part of this study during 2009, staff conducted a fifty state review of other states' transfer laws, examined recent research regarding adolescent brain development, sought to obtain detailed data on juveniles who are transferred and certified in Virginia, and surveyed Commonwealth's Attorneys and Public Defenders. Due to data limitations, the Commission requested that staff continue to review this issue during 2010 in order to obtain the necessary data on juveniles who are transferred in Virginia.

The Commission was mandated by Senate Joint Resolution 358 to research public safety issues that exist in Virginia's hospital emergency rooms ("ER"), including the occurrence of violent incidents in hospital ERs, strategies that can be used by hospitals to prevent or deal with violent incidents, and identify the most effective methods of preventing ER violence and of dealing with violent incidents when they occur. As part of this study, staff created a comprehensive work group of practitioners primarily from the medical profession, conducted site visits to local hospital ERs, and sought to collect data regarding violent incidents in emergency rooms. The study also included a review of House Bill 2436, regarding assault and battery of emergency room personnel.

The Commission was also mandated by Senate Joint Resolution 363 to study issues regarding the prevalence, apprehension, and prosecution of persons with false IDs, measures to prevent the manufacture and use of false ID documents, identification of these documents by law enforcement and other persons, and judicial procedures. As part of this study, staff reviewed current Virginia statutes related to false IDs, collected data on statute usage, reviewed new technology implemented by the Virginia Department of Motor Vehicles related to Virginia IDs, and received input from Commonwealth's Attorneys and the law enforcement community on this issue.

In addition to aforementioned mandated studies, the Commission conducted studies pertaining to restorative justice, emergency vehicles proceeding past red lights, expungement of criminal conviction records, civil commitment of sexually violent predators, "sexting," and provisions related to the sex offender registry (Adam Walsh Act). The study on emergency vehicles proceeding past red lights was deferred to 2010 due to an ongoing civil lawsuit.

Commission staff also reviewed and reported on recent developments in case law pertaining to the use of telecommunications devices as a possible mechanism to help alleviate the burdens placed on the Virginia Department of Forensic Science, specifically stemming from the United States Supreme Court's decision in Melendez-Diaz v. Massachusetts. Commission staff also reviewed legislation passed during the August 2009 Special Session of the Virginia General Assembly in response to the ruling.

In addition to these studies, the Commission's Executive Director serves as a member of the Forensic Science Board pursuant to § 9.1-1109(A)(7). The Executive Director also acts as the Chair of the DNA Notification Subcommittee, which is charged with the oversight of notification to convicted persons that DNA evidence exists within old Department of Forensic Science case files that may be suitable for testing.

In accordance with § 19.2-163.02 the Commission's Executive Director also served on the Virginia Indigent Defense Commission, and specifically as a member of the Budget Committee and the Personnel and Training Committee.

MEMBERS OF THE CRIME COMMISSION

Senate Appointments

Senator Janet D. Howell, Co-Chair

Senator Kenneth W. Stolle, Co-Chair

Senator Henry L. Marsh III

House of Delegate Appointments

Delegate David B. Albo, Vice-Chair

Delegate Ward L. Armstrong

Delegate Robert B. Bell

Delegate Terry G. Kilgore

Delegate Kenneth R. Melvin*

Delegate Beverly J. Sherwood

Delegate Onzlee Ware*

Attorney General

The Honorable Robert F. McDonnell

Governor's Appointments

Mr. Glenn R. Croshaw

Colonel W. Gerald Massengill

The Honorable Richard E. Trodden

**Delegate Melvin resigned as a Member of the House of Delegates effective May 31, 2009. Delegate Onzlee Ware was appointed to the Crime Commission on July 10, 2009.*

CRIME COMMISSION STAFF

Kristen J. Howard, Executive Director

G. Stewart Petoe, Director of Legal Affairs

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The Virginia State Crime Commission would like to thank all agencies and individuals who provided assistance throughout the year.

CIVIL COMMITMENT OF SEXUALLY VIOLENT PREDATORS

During the 2009 Regular Session of the Virginia General Assembly, Delegate Morgan Griffith introduced House Bill 1843, which would have made numerous changes to Virginia's civil commitment laws that pertain to sexually violent predators. A substitute version of this bill was adopted in the House Courts of Justice Committee, and was passed by the House. The engrossed bill was referred to the Senate Courts of Justice Committee, where a substitute was adopted. The bill advanced to the floor of the Senate, where yet another substitute was adopted. The bill then went into conference, and the conference substitute was passed by both the House and the Senate. The enrolled bill was signed into law by the Governor on March 30, 2009. The Senate Courts of Justice Committee requested the Crime Commission review those parts of the engrossed House bill that were not incorporated into the final bill that was enacted.

FINAL VERSION OF HOUSE BILL 1843

House Bill 1843 was enacted into law on March 30, 2009. This Act of the General Assembly made a number of changes to Virginia's laws relating to the process of civilly committing sexually violent predators.

District courts are now required to keep the court files pertaining to certain criminal offenses for a period of fifty years. This is to assist the Office of the Attorney General in obtaining information that may be useful in civil commitment proceedings; to this end, the Attorney General is now permitted access to Juvenile and Domestic Relations district court records, and the Department of Juvenile Justice records, for purposes of handling the civil commitment of sexually violent predators. Also, the Virginia Department of Corrections, the Commitment Review Committee, ("CRC") and the Office of the Attorney General are now allowed to "possess, copy, and use all records, including records under seal" from all state agencies, boards, departments, commissions and courts, to assist them in their respective tasks involving the civil commitment process. The CRC is now clearly authorized to evaluate and make recommendations on all potential respondents, not just those who are in the custody of the Department of Corrections.

Throughout Chapter 9 of Title 37.2 of the Code of Virginia, the phrase "prisoners and defendants" has mostly been replaced with the word "respondents." A respondent in a civil commitment suit is now not permitted to raise an objection based on defects in the institution of proceedings unless he files a written motion to dismiss, stating the legal and factual grounds therefore, at least 14 days prior to the hearing or trial. Any ambiguity as to whether or not these suits must be filed in the circuit court for the judicial district or circuit where the respondent was convicted of a sexually violent offense or deemed incompetent to stand trial for such an offense, have been removed. The time requirements of Virginia Code § 37.2-905 are now deemed procedural, and not substantive or jurisdictional.

When a petition is filed, the probable cause hearing now must be held within ninety days, not sixty. The respondent is permitted to waive this hearing. If the circuit court judge finds there is probable cause to believe the respondent is a sexually violent predator, the trial must now be held within 120 days. Any expert witness for the respondent must provide, in writing, his findings and conclusions to the court and the Attorney General, not less than 45 days prior to trial. If he fails to do so, he shall not be permitted to testify. The parties may agree to a different time period, however.

If it is proven at trial that the respondent is a sexually violent predator, the trial may then be continued for not less than 45 to 60 days, rather than the previous 30 to 60 days. An additional continuance may be granted for good cause shown or by agreement of the parties. If the trial is continued in order for the court to receive additional evidence on possible alternatives to commitment, the court must then specifically consider a list of enumerated factors in making its decision. Previously, the court was allowed to consider such factors, but did not have to.

If a sexually violent predator is put on conditional release, and an emergency custody order is issued for him based on his failure to comply with the terms and conditions of his release, a law enforcement officer may lawfully travel anywhere in the Commonwealth to execute such an order and bring the predator into custody. Once taken into custody, the predator must be taken to a "secure facility" designated by the Virginia Department of Behavioral Health and Developmental Services ("DBHDS"), not just a "convenient location." The predator is then to be

evaluated by a mental health professional, who now must consider a number of specific enumerated factors in forming his opinion on whether the predator should remain on conditional release or be committed. The evaluation must now include a personal interview. The evaluator's report will now be part of the record of the case, and the evaluator may testify at the subsequent court proceeding to determine whether the predator should be committed. Finally, any predator on conditional release, who is given permission to leave the state and then fails to return in violation of a court order, shall be guilty of a Class 6 felony. This new penalty is the same as for predators who escape from the custody of the DBHDS.

DIFFERENCES BETWEEN THE ENGROSSED VERSION OF HOUSE BILL 1843 AND THE FINAL VERSION

In the engrossed version of House Bill 1843, language was added to Virginia Code § 37.2-901, prohibiting counsel for the respondent, and any experts appointed or employed to assist him, from disseminating the contents of victim impact statements, presentence reports, or post-sentence reports, to any person. This language was deleted from the enacted version of the bill. Such a prohibition could interfere with the respondent's experts, or his attorney, from seeking outside assistance in a case, and could make the preparation for trial more difficult as a result.

Under current Virginia law, anyone who receives a score of four on the Static-99 risk assessment instrument, and was convicted of aggravated sexual battery in violation of Virginia Code § 18.2-67.3, is only subject to an evaluation by the CRC for possible civil commitment as a sexually violent predator if the victim of the crime was under the age of 13 and suffered physical bodily injury as a result of the crime. The engrossed version of House Bill 1843 would have eliminated the requirement that the victim actually suffer a bodily injury; in other words, anyone convicted of aggravated sexual battery against a victim under the age of 13, who receives a score of four on the Static-99, would possibly be subject to civil commitment.

In the engrossed version of House Bill 1843, all pre-trial proceedings, including those that involve evidentiary and discovery issues, could be held via two-way electronic video and audio communication systems. In addition, the bill stated that, "When a witness whose testimony would be helpful to the conduct of the proceeding is not able to be physically present, his testimony may be received using a telephonic communication system." This language was deleted from the enacted version of the bill.

Under current Virginia law, the details of previous offenses committed by the respondent may be shown by documentary evidence, including such items as police reports, presentence reports, and mental health evaluations, but only at the probable cause hearing. The engrossed version of House Bill 1843 would allow such documentary evidence at the trial as well. In addition, the bill states that the initial Static-99 evaluation, and any expert report prepared and offered into evidence, shall be admitted. There is no requirement that the Static-99 evaluation was done correctly, or that the author of any expert report be present for cross-examination. And, the engrossed bill states that any expert who meets the requirements set forth in either Virginia Code §§ 37.2-904(B) or 37.2-907(A) may be permitted to testify as to his opinions regarding the diagnosis, risk assessment and treatment of the respondent. However, this language does not seem to require that the expert ever personally meet with the respondent prior to testifying. None of these modifications to the evidentiary rules applicable in civil commitment trials were present in the enacted version of the bill.

In the enacted version of House Bill 1843, any experts appointed or employed by the respondent are now required to file a written report with the court and the Attorney General at least 45 days prior to trial. Failure to do so results in the expert being prohibited from testifying, although a modification of the 45 day time limit can be agreed to by the parties. In the engrossed version of House Bill 1843, there was no specific prohibition on an expert testifying if he failed to provide a written report of his findings. Also, there was no provision to allow for a modification of the 45 day time limit, even if the parties agreed. However, the engrossed bill did require that the experts for both the Commonwealth and the respondent file their reports. When the phrasing of the relevant sentences were changed from "expert employed or appointed pursuant to this chapter," to "expert employed or appointed pursuant to this section," it had the effect of removing the Commonwealth's experts from the requirement that a written report be provided to opposing counsel. Making this requirement apply to both parties in a civil commitment case would probably be a good idea; reverting to the language

in the engrossed bill could help prevent due process concerns from being raised.

Any changes in these statutes have the potential to affect the total number of people who are found to be sexually violent predators, which, in turn, has the potential to affect the total number of people who are civilly committed pursuant to Virginia Code § 37.2-908 and held in a secure, in-patient facility. The greatest impact in this regard, though, comes not from changes in procedure, but from any changes that Virginia makes in the statutes that govern who is potentially eligible to be committed.

When Virginia first created the statutes that allow for the civil commitment of sexually violent predators, only four crimes could be used to trigger an initial review by the Virginia Department of Corrections and then the CRC: rape, forcible sodomy, forcible object penetration, and a conviction of aggravated sexual battery involving a victim under the age of 13. When this list was significantly expanded in 2006, to include such crimes as carnal knowledge; carnal knowledge by a parent, guardian, or custodian; abduction with the intent to defile; capital murder involving an abduction with the intent to defile; first or second degree murder if committed with the intent to commit rape, forcible sodomy or forcible object penetration; or the attempt or conspiracy to commit any of the enumerated crimes, the potential number of inmates who might qualify as a sexually violent predator increased by around 350%, as estimated by DBHDS.

This, in turn, has led to an increase in the projected number of sexually violent predators who will be committed to an in-patient facility. Using the more limited, pre-2006 list of qualifying crimes, there would likely be 94 predators committed by 2012. With the post-2006, expanded list of qualifying crimes, there are projected to be 343 predators committed by 2012, according to DBHDS. Considering that the annual cost for securing one sexually violent predator in a facility is over $100,000, the increased number of expected committed predators has significant fiscal implications for the Commonwealth.

If the list of qualifying crimes were increased still further, even larger numbers of prisoners could be found eligible for commitment. For example, pursuant to Virginia Code § 37.2-903, the Virginia Department of Corrections does not refer to the CRC any inmate who has scored a four on the Static-99 risk assessment instrument, if the qualifying crime was aggravated sexual battery of a victim under the age of 13, unless the victim suffered a physical bodily injury. It has been proposed that this requirement for a physical bodily injury be eliminated from the statute; the Department of Corrections has estimated that doing so would increase the number of evaluations performed by the CRC each year by nine or ten. If only half of those evaluated go on to be civilly committed, the cost to the Commonwealth by that one change would be around $500,000 a year.

CONCLUSION

Considering that as of September of 2009, there were already 214 respondents found to be sexually violent predators, and there are more than 20 cases currently pending, the financial implications of any additional changes to Virginia's civil commitment laws for sexually violent predators should also be considered by the General Assembly.

EXPUNGEMENT OF CRIMINAL CONVICTION RECORDS

During the 2009 Regular Session of the Virginia General Assembly, Senator Donald A. McEachin introduced Senate Bill 1289, which would have allowed, for the first time in Virginia, certain defendants convicted of a crime to have their records expunged after five years from the date of conviction. The bill was referred to the Senate Courts of Justice Committee, where it was passed by unanimously. The subject matter of Senate Bill 1289 was referred to the Crime Commission for study.

STATUTORY PROVISIONS

The procedure for the expungement of criminal records in Virginia is governed by Virginia Code §§ 19.2-392.1 and 19.2-392.2. These Code sections were originally enacted in 1977, and have remained essentially unchanged since that time. Virginia Code § 19.2-392.1 provides the "statement of policy" concerning expungements in Virginia:

The General Assembly finds that arrest records can be a hindrance to an innocent citizen's ability to obtain employment, an education and to obtain credit. It further finds that the police and court records of those of its citizens who have been absolutely pardoned for crimes for which they have been unjustly convicted can also be a hindrance. This chapter is intended to protect such persons from the unwarranted damage which may occur as a result of being arrested and convicted.

Virginia Code § 19.2-392.2 further clarifies this general policy statement, specifically limiting the expungement process to cases where the defendant was acquitted, the charge was *nolle prosequied*, the charge was dismissed, including dismissals involving an accord and satisfaction, the defendant received an absolute pardon from the governor, or the charge was dismissed pursuant to a writ of actual innocence.

A person seeking the expungement of their criminal charge must file a petition with the circuit court of the county or city where the charge was disposed of or dismissed. A copy of the petition must be served on the Commonwealth's Attorney for that jurisdiction. In addition, the petitioner must contact a law enforcement agency and arrange for a copy of his criminal record to be sent to the court where the petition is pending. At the hearing on the petition, the circuit court must find that the "continued existence and possible dissemination of information relating to the arrest of the petitioner causes or may cause circumstances which constitute a manifest injustice." It should be noted that the Commonwealth's Attorney is free to argue against the petition, even if the charge was dismissed in one of the ways that would qualify for the expungement. If the circuit court makes a determination that the petitioner has met his burden of proof, it shall order that all police and court records, including all electronic records, relating to the charge be expunged. Either the petitioner or the Commonwealth's Attorney may appeal the decision of the circuit court up to the Supreme Court of Virginia.

There are three circumstances in which the circuit court must grant the expungement to the petitioner. One is in instances of mistaken identity, when the petitioner was arrested even though another person was the subject of the arrest warrant. The second is when the petitioner has been granted an absolute pardon by the Governor. The third is when the petitioner has been granted a writ of actual innocence. Also, in Instances where the petitioner has no prior criminal record and the arrest was for a misdemeanor violation, there is a statutory presumption that the expungement should be granted, "in the absence of good cause shown to the contrary by the Commonwealth."

There are no provisions for an expungement in cases where the petitioner was found guilty of the crime. By statute, an expungement is also not available to anyone who receives a "first offender" disposition in a domestic assault case, even if the charge is then dismissed at a later date. Any expungement order that is entered where either the court or the parties failed to strictly comply with the procedures set forth by statute, or where the order itself is contrary to law, is voidable upon motion and notice made within three years after the order was signed.

CASE LAW

The Supreme Court of Virginia has ruled repeatedly that not only is expungement not

available to those who were found guilty of the offense, it is only available to those who are actually innocent. Therefore, an expungement is not available to a petitioner who had his drug possession charge dismissed under a "first offender" disposition, where he originally plead guilty, successfully completed probation, and then had the charge dismissed. In Gregg v. Commonweath, the Supreme Court held "the expungement statute applies to innocent persons, not those who are guilty. Under the first offender statute, probation and ultimate dismissal is conditioned on a plea of guilty or a finding of guilt...One who is guilty cannot occupy the status of innocent." The Supreme Court has also ruled that expungement is not available to anyone who plead "no contest" in a criminal case, if the trial court then accepted the plea and found there was sufficient evidence to support a conviction. Lastly, an expungement is not available to anyone who accepted a deferred disposition in his criminal case. Some circuit courts have even refused to expunge a criminal charge that is otherwise eligible for expungement, if the petitioner has a previous conviction for a different offense.

POLICY CONSIDERATIONS RAISED BY SENATE BILL 1289

Senate Bill 1289 would expand the expungement process in Virginia to include certain criminal convictions, including drug convictions. Because the policy in Virginia over the past thirty-two years has been to restrict expungements to those who were actually innocent of the crime with which they were charged, Senate Bill 1289 would be a radical departure.

One of the main policy concerns with allowing the expungement of drug convictions, and other crimes which have "first offender" dispositions available, is that repeat criminals might obtain multiple instances of lenient treatment and never receive a permanent conviction. Unless a database of expungement records is readily available to law enforcement or prosecutors, a prosecuting jurisdiction could be completely unaware that the defendant had previously been convicted of the same offense in another jurisdiction, received a dismissal pursuant to a "first offender" program, and then had his record expunged.

Currently, though, there is no readily available database of expungement records in the Commonwealth. On the contrary, when a circuit court grants an expungement, it sends a copy of its order to the Virginia State Police. They, in turn, follow regulations to attempt to ensure that the record being expunged is removed from all databases, both state and federal. Once the record has been expunged, access to both it and the order of expungement are extremely restricted; the State Police, which keep these sealed records, will never open them, even for an internal inspection, unless they receive a court order issued by the circuit court that originally granted the expungement.

Therefore, if Virginia changed its expungement policy, yet wished to prevent the possibility of having some criminal defendants take advantage of the system by receiving multiple "first offender" dispositions or unfairly lenient sentences, it would have to direct the State Police to modify the handling of expunged records. While this is possible, decisions would have to be made by the legislature as to who would have access to these "semi-sealed" files, and what process would be used to obtain them. Would only prosecutors have access, or also law enforcement? Would access be granted, or a copy of the sealed record be delivered to the requester, only after the State Police had received a letter? Or, should some sort of court order be required? Or, would some type of computer network system, similar to the VCIN system, be feasible? Depending upon the options chosen, there could be a substantial fiscal impact on the Commonwealth.

CONCLUSION

At its December 15th meeting, the Crime Commission was presented with a draft bill to allow certain criminal convictions to be expunged, based upon Senate Bill 1289. No formal recommendation was made by the Commission.

FALSE IDENTIFICATION CARDS

During the 2009 Regular Session of the Virginia General Assembly, Senator Stephen H. Martin introduced Senate Joint Resolution 363, which directed the Crime Commission to "study issues regarding the apprehension and prosecution of persons with false identification cards." Also to be examined were measures to prevent the use of such cards, the identification of such cards by law enforcement and others, and judicial procedures related to the prosecution of offenses involving false identification cards.

VIRGINIA'S NEW DRIVER'S LICENSES

Beginning in March of 2009, the DMV began issuing new driver's licenses and identification cards, utilizing a number of improved security features. The transition process was incremental, office by office, throughout the state; by July of 2009, all DMV offices were issuing the new licenses. The prior driver's licenses were constructed of a poly-vinyl chloride material of a laminated construction. The new licenses are made of polycarbonate material of a monolithic construction. They feature multiple layers of security printing that are fused together in the solid body of the card. The layers are designed to prohibit anyone from trying to delaminate or peel apart the layers of the finished card. Instead of having the personal data of the license then printed on the card, the new cards make use of laser engraving.

While the former driver's licenses were given directly to a qualified applicant, and were printed and made available at every DMV branch office, the new licenses are all personalized and receive the finishing details with laser engraving at one site in Virginia, where there is twenty-four hour armed security. They are not issued in person, but are mailed to the address supplied by the applicant. (Applicants receive a temporary paper driving permit to use until they receive their new card). The basic card itself is produced in a secure Canadian banknote manufacturing facility that prints Canadian currency. The equipment needed to produce Virginia's new driver's licenses is therefore available only to legitimate manufacturers and is extremely expensive.

These new cards, along with changes in how DMV will record information on card holders who have lost their licenses and been issued new ones, will make it extremely difficult for criminals to either forge Virginia driver's licenses or make use of stolen cards.

CRIMINAL STATUTES

There are ten statutes in the Code of Virginia that deal with false identification documents or driver's licenses, containing over thirty offenses. There is considerable overlap between the offenses; in practical terms, a criminal who obtains a false identification card likely will have committed more than one violation of the law. The crimes are not laid out in a systematic way. Some of the offenses cover only driver's licenses, while others include identification cards, and still others include other documents issued by DMV, such as vehicle registrations. In part this is due to the broad language used in some of the statutes.

For instance, Virginia Code § 46.2-105.1 is a statute aimed primarily at people who obtain driving privileges illegally; subdivisions (A)(2) through (A)(5) criminalize cheating on the DMV written driver's exam. However, subdivision (A)(1), which makes it illegal to procure a license through fraud, could probably be used when an applicant provides false information to DMV in order to obtain a driver's license in another person's name. Because of the exact wording, though, the statute could not be used if someone provided false information to DMV to obtain an identification card. This should not necessarily be seen as an error in the drafting of the statute. Rather, it demonstrates how the broad language used in a statute intended for cheating on the DMV test could also be used in at least some instances when someone obtains a false driver's license.

Two statutes explicitly criminalize the use of false identification cards by persons under the age of twenty-one to purchase alcohol. Virginia Code § 4.1-305(B) is a Class 1 misdemeanor, with either a mandatory minimum $500 fine, or 50 hours of community service. In addition, the defendant's driver's license shall be suspended for a period of six months to one year. Virginia Code § 46.2-347 is a Class 3 misdemeanor, with a suspension of driver's license for thirty days to one year.

Two additional statutes explicitly mention an intent to falsify one's age in connection with false identification documents. Virginia Code § 18.2-204.2 makes the manufacture, sale, or advertising for sale of any false identification card a Class 1 misdemeanor, while the possession of such a card is a Class 2 misdemeanor. Subsection D of this statute provides that "[t]he provisions of this section shall not preclude an election to prosecute under § 18.2-172 [the general forgery statute], except to prosecute for forgery or uttering of such license or identification card...as proof of age." Virginia Code § 46.2-105.2 criminalizes obtaining, possessing, or using a Virginia driver's license, identification card, vehicle registration or title, or other DMV document if not legally entitled thereto. A violation is a Class 2 misdemeanor if the obtaining or possession of the document or card was "for the purpose of engaging in any age-limited activity, including but not limited to obtaining, possessing, or consuming alcoholic beverages;" otherwise, it is a Class 6 felony.

There are an additional four statutes in Title 46.2 of the Code of Virginia that relate to false driver's licenses and identification cards. Virginia Code § 46.2-105.1(A), mentioned above, criminalizes procuring, through fraud, theft, or other illegal means, a certificate, license, or permit from DMV. A violation is a Class 1 misdemeanor. Virginia Code § 46.2-345(I) criminalizes using a false name or giving false information in any application for an identification card. A violation is a Class 2 misdemeanor, unless the intent of the defendant was to purchase a firearm or commit a felony, in which case it is a Class 4 felony. Subdivision (A)(1) of Virginia Code § 46.2-346 criminalizes displaying or possessing any driver's license which is fictitious or altered, while subdivision (A)(4) criminalizes reproducing a driver's license with the intent to commit an illegal act. A violation of either of these two subdivisions is a Class 2 misdemeanor. Finally, Virginia Code § 46.2-348 criminalizes using a false or fictitious name or other false information in an application for a driver's license. A violation is a Class 2 misdemeanor; however, if the intent of the defendant was to purchase a firearm, or to establish proof of residency, it is a Class 4 felony.

The last two statutes related to false identification cards are located in Title 18.2 of the Code of Virginia. Virginia Code § 18.2-204.1 makes it a crime to obtain, possess, sell or transfer the birth certificate of another, or any document, for the purposes of establishing a false identity. A violation is a Class 1 misdemeanor; however, if the offense was committed with the intent to obtain a firearm, it is a Class 6 felony. Virginia Code § 18.2-186.3 is Virginia's identity theft statute. It contains within it provisions that criminalize obtaining identification documents in another person's name, with the intent to commit a fraud or to sell the identity information, or to avoid arrest or prosecution. If the amount of the fraud is $200 or less, the crime is a Class 1 misdemeanor; if the amount is greater than $200, it is a Class 6 felony; if the crime causes another person to be arrested, it is a Class 6 felony. While the main scope of the statute is not directly related to false identification cards, the broad language used could lead to a successful prosecution if a false identification card or driver's license was used for one of the listed reasons.

CONVICTION DATA

To determine the frequency with which these statutes are used, data was collected from the Virginia Compensation Board, which collects information on all inmates who have spent any time in a jail in the state of Virginia during each fiscal year. It was determined that in FY 2007, there were 1,795 individuals who were committed at least once to a jail in Virginia for one of the offenses involving false identification; of those, 650 individuals were found guilty of 1,014 offenses. It should be noted that a number of these convictions were for a violation of Virginia's identity theft statute, and may not have involved a false identification document, but rather some other item, such as a credit card. During FY 2008, there were 1,626 individuals who were committed at least once to a jail in Virginia for one of the offenses involving false identification; of those, 534 individuals were found guilty of 858 offenses.

A similar request was made to the Virginia Criminal Sentencing Commission, which maintains accurate data on all felony convictions in the Commonwealth, including those where the defendant did not receive any incarceration as part of his sentence. As with the data from the Virginia Compensation Board, a number of convictions were for identity theft, and it cannot be determined in which cases the crime involved a false identification card, versus those which did

not. In FY 2007, there were 200 felony convictions possibly involving a false identification card; 35 of those convictions were very likely to have been false identification card crimes. In FY 2008, there were 240 felony convictions possibly involving a false identification card; 80 of those convictions were very likely to have been false identification card crimes.

In an attempt to gain further data, staff requested information from Virginia DMV. According to their records, there were five convictions for a violation of Virginia Code § 46.2-347 (use of a false driver's license to obtain alcoholic beverages) in FY 2007; no convictions in FY 2008, and 1 conviction in FY 2009. Because this crime is a Class 3 misdemeanor and does not carry any potential jail time, these convictions would not be included in any of the data received from either the Compensation Board or the Sentencing Commission.

CONCLUSION

The available conviction data and anecdotal evidence suggest that the use of false ID cards in Virginia does occur on a regular basis. While it is difficult to quantify the problem, no evidence was gathered to suggest Virginia's criminal justice system is inadequate when it comes to prosecuting those individuals who are caught manufacturing, possessing, or attempting to obtain a false identification card. The introduction this year of a completely redesigned, and highly advanced, driver's license may prove to have an ameliorative effect on the problem here in the Commonwealth. As these new licenses are phased in over the next several years, it would be helpful to monitor the available data to ascertain whether the frequency of these types of crimes begins to diminish. For a complete report of this study, please refer to Senate Document 7 (2010).

HOSPITAL VIOLENCE

Senate Joint Resolution 358, introduced by Senator Kenneth W. Stolle during the 2009 Regular Session of the General Assembly, directed the Crime Commission to study issues of public safety in hospital emergency rooms. Specifically, it was resolved that the Crime Commission be directed to:

- Research public safety issues that exist in hospital emergency rooms, including the occurrence of violent incidents in hospital emergency rooms across the Commonwealth;
- Compile strategies that can be used by hospitals to prevent or deal with violent incidents; and,
- Identify the most effective methods of preventing emergency room violence and of dealing with violent incidents when they occur.

Also incorporated into this study was House Bill 2436, referred to the Crime Commission by the House Courts of Justice Committee. This bill was introduced during the 2009 Regular Session of the General Assembly by Delegate Christopher K. Peace to address violence occurring in hospital emergency departments across the Commonwealth. Specifically, this bill sought to amend and reenact section C of § 18.2-57, the so called "protected class" in the assault and battery statute, by adding emergency room personnel defined as physicians, physicians' assistants, nurses, or nurse practitioners while engaged in the performance of his duties as an emergency health care provider in an emergency room of a hospital or clinic or on the premises of any other facility rendering emergency medical care.

The Crime Commission utilized several methodologies to address the directives of the mandate regarding emergency department (ED) violence, including: completing a literature and legislative review; creating a workgroup of medical and academic practitioners; attending emergency department security awareness training; identifying available data; and, conducting field observations.

There was very little literature available concerning ED violence and the studies that were available typically suffered from limitation that prevented the application of their findings to EDs in general. For example, a very recent, nationwide study was published, which surveyed ED nurses. The study was based on 3,518 responses, representing 65 EDs. One of the findings noted that there was a median of eleven violent attacks per year (for the five year reporting period) per site. The authors caution that most of the survey respondents worked in large "academic settings." Likewise, a later article also cautioned that most of the survey respondents came from EDs located in the northeastern United States and in "urban settings, which may be associated with higher incidence of violence," so the findings may not be generalizable to all EDs.

Finally, to compound the aforementioned issues is the limited scope of available data. One study noted that "(t)he true incidence of violence in U.S. EDs is not known because there are no reporting requirements, much of the research involves retrospective surveys, and there are no standards or definitions of workplace violence."

While there is no way to concretely ascertain the level or amount of violence directed at ED staff, some studies suggest reasons for violent behavior in EDs. It is thought that ED employees are subject to an increased risk for violent behavior due to exposure to:

- Patients under the influence of drugs and/or alcohol;
- Patients with psychiatric disorders;
- Prolonged waiting periods and overcrowding;
- Open, 24-7 access to EDs;
- Stress on patients' families; and,
- Criminal and street gang activity, victims, and affiliates.

In order to cope with violence in EDs, there are some steps that hospitals can make that may minimize violent behavior. Increased police and/or security presence, environmental barriers and metal detectors are cited by ED employees as a way to reduce violence. A recent article outlined "five starting points toward a safer ED;" based on recommendations from hospital security directors and other experts:

- Access Control
- Staff ID badges

- Metal Detectors
- Surveillance
- Emergency Alerts

There has been some legislative activity addressing hospital violence in the last few years by a few states: California, Washington, Oregon, and New Jersey. Unfortunately, as with the literature review, there are practically no known published comprehensive reviews available that detail the results of any of the legislation in reducing violent behavior directed at ED staff. Another way in which states may address ED violence is to increase the penalty of assault, much like the proposal in HB 2436, introduced during the 2009 Regular Session of the Virginia General Assembly. Recently, Oklahoma passed a bill that increased the penalty from a misdemeanor to a felony for an assault upon "doctors, residents, interns, nurses, nurses' aides, ambulance attendants and operators, paramedics, emergency medical technicians, and members of a hospital security force." This measure passed by the Oklahoma legislature with an emergency clause, making it effective immediately after "passage and approval."

Staff also did a 50 state survey of assault and battery statutes and determined that a little over half (26) of the states provide an enhanced or increased punishment for assaults directed at ED staff.

In order for the Crime Commission to better understand ED violence, staff invited medical and academic practitioners who were familiar with ED violence to participate in our ED violence workgroup. The following is a summary of the important issues discussed at the workgroup meeting:

- Many assaults go unreported.
- Local law enforcement data will not be specific enough to determine if the assaults occurred in the ED.
- Security varies from hospital to hospital, from full time, deputized officers to a few private security officers.
- A significant percentage of the violent or assaultive behavior is caused by patients with mental disorders or patients with drug or alcohol addictions.
- There is a reluctance to press charges against patients with mental disorders, as well as difficulties prosecuting them.
- Security training available to ED staff varies from hospital to hospital.
- Strategies to prevent or deal with violent incidents vary by hospital.

Additionally, staff conducted field visits to two local hospitals. During ED visits, staff formally met with police and security personnel to discuss their roles, activities, and difficulties as well as proactive measures undertaken to promote ED safety. These visits helped to provide an understanding of ED operations, allowed staff to observe the environment in EDs and the attached waiting rooms, identify potential data sources and their limitations, and to confirm information gathered from the workgroup and the literature review.

CONCLUSION

The most significant problem encountered with the study is the lack of reliable data concerning the prevalence of violent incidents in EDs in the Commonwealth, as well as nationally. Likewise, there are very few reports that address preventative measures that EDs can take to reduce violence. While there is some data available from U.S. Department of Labor, Virginia State Police, and local law enforcement departments, this data does not possess the requisite precision to determine if the violent acts occurred in hospital EDs, doctor's offices, or outpatient clinics or if the incidents were even related to violent acts against ED personnel. Subsequently, there is no way to determine how much of a problem violent incidents are in EDs throughout in the Commonwealth. Given the lack of available data, it is difficult to make informed legislative or policy decisions regarding ED violence in the Commonwealth.

Unless there is some change in the way violent acts are reported, internally and externally, there is no way to get an accurate picture of the pervasiveness or infrequency of violent acts in EDs. As a result of the data limitations identified during this study, no formal recommendations were made by the Crime Commission. For a complete report of this study, please refer to Senate Document 8 (2010).

JUVENILE JUSTICE: TRANSFER AND CERTIFICATION

House Joint Resolution 136, introduced by Delegate Brian J. Moran and passed during the 2006 Session of the Virginia General Assembly, directed the Crime Commission to conduct a two-year study of Virginia's juvenile justice system. The Commission was also to analyze Title 16.1 of the Code of Virginia to determine the adequacy and effectiveness of Virginia's statutes and procedures relating to juvenile delinquency.

During the 2008 Session of the Virginia General Assembly, the Commission was directed to continue its study of Virginia's juvenile justice system, pursuant to House Joint Resolution 113, also introduced by Delegate Moran. At its December 9, 2008, meeting, the Commission voted to continue the juvenile justice study an additional year due to the many issues identified regarding the transfer and certification of juveniles.

This past year, Crime Commission staff completed a comprehensive literature review, collected data regarding the transfer and certification of juveniles, conducted a fifty state review of juvenile justice legislation, and obtained preliminary research and findings on adolescent brain development. Staff provided a detailed presentation to the Crime Commission on June 25, 2009. At that meeting, members were also briefed on the transfer and certification of juveniles by the Virginia Department of Juvenile Justice, the Virginia Criminal Sentencing Commission, ("Sentencing Commission"), and Vincent Culotta, Ph.D., who highlighted some of the recent findings that address neurodevelopmental maturation and how it underlies and drives behavior and cognition in juveniles.

The Sentencing Commission provided an update of Virginia's transfer data. The information provided was a compilation of transfer data from FY2001-FY2008. The Sentencing Commission supplemented the sentencing guideline data with information from the Department of Juvenile Justice, the Department of Corrections, the Virginia Supreme Court, pre-sentence investigation reports, and local/ regional jails.

The total number of juveniles convicted in circuit court from FY2001-FY2008 was 4,591, separated by fiscal year as follows:

- FY01: 572;
- FY02: 515;
- FY03 :575;
- FY04: 524;
- FY05: 498;
- FY06: 532;
- FY07: 678; and,
- FY08: 697.

The ages of the juveniles at the time of the offense were also available. Of the 4,591 juveniles convicted in circuit court from FY2001-FY2008: 185 were 14 years old; 626 were 15 years old; 1,222 were 16 years old; and, 2, 558 were 17 years old.

Juveniles who were convicted in circuit court were broken into groups according to their most serious offense as follows:

- Robbery: 33%;
- Assault: 15%;
- Larceny/fraud: 12%;
- Drug: 8%;
- Murder/manslaughter: 6%;
- Burglary of a dwelling: 6%;
- Rape/forcible sodomy/object penetration: 5%;
- Miscellaneous/other: 4%;
- Burglary other: 3%;
- Sex offense: 3%;
- Weapon: 2%; and,
- Kidnapping: 1%.

The types of disposition for these juveniles were as follows:

- Prison: 45%;
- Jail/Probation (adult): 30%;
- DJJ Determinate: 10%;
- DJJ Indeterminate: 7%;
- DJJ Probation/Other: 6%; and,
- Blended DOC/DJJ: 2%.

Under Virginia Code § 16.1-269.1, a juvenile may be transferred under subsections A, B, or C. Subsection A allows for judicial review and a transfer hearing is held to determine whether it is proper for the juvenile to remain in JDR court. The court considers age,

seriousness of offense, prior juvenile proceedings and adjudications, prior criminal proceedings, use of weapon, extent of physical injury to victim, presence of ancillary charges, whether the juvenile system would be rehabilitative, availability of alternatives, past history with juvenile correction center, mental health, school records/educational history, and physical and emotional condition and maturity. Subsection B allows for an automatic transfer if the juvenile is charged with murder or aggravated malicious wounding. Subsection C allows for prosecutorial discretion in cases involving felony homicide, felonious injury by mob, abduction, malicious wounding, malicious wounding of a law enforcement officer, felonious poisoning, adulteration of products, robbery, carjacking, rape, forcible sodomy, and object sexual penetration. Currently, the Supreme Court is attempting to sort their data so they can determine the number of juveniles who are transferred under each subsection. By collecting and sorting data in this manner, Virginia may be able to ascertain which crimes most commonly result in transfer and certification and at which age and in what localities transfer and certification occurs.

Crime Commission staff also focused their research on national trends regarding the various methods in which juveniles are transferred. Various states have transfer provisions such as prosecutorial discretion, statutory exclusion, reverse waiver, "once an adult/always an adult policy," and blended sentencing. A fifty state review of how states transfer certain juveniles showed that 17 states utilize prosecutorial discretion, 30 states utilize statutory exclusion, 26 states allow for reverse waiver, 34 states utilize "once an adult/ always an adult," and 31 states use blended sentencing.

CONCLUSION

The Crime Commission, at its December 15, 2009, meeting, decided to continue the study another year due to the lack of available data in hopes that additional information could be obtained. A final report will be issued for the 2010 study year.

MELENDEZ-DIAZ

Using the statutory authority granted by the General Assembly to the Crime Commission, and upon the request of its Executive Committee, staff reviewed the recent U. S. Supreme Court case of Melendez-Diaz v. Massachusetts, the legislation Virginia enacted in response to the case during the Special Session of 2009, and the possibility of using video-conferencing during criminal trials to help alleviate the burden of state lab analysts from having to testify in person multiple times each month in courts throughout the state.

CASE LAW

In 2004, in the case of Crawford v. Washington, the United States Supreme Court held that a testimonial statement may not be introduced into evidence against the accused in a criminal trial, unless the person who made the statement is unavailable for trial, and the defendant has had a prior opportunity to cross-examine the witness. In the opinion, which was authored by Justice Scalia, it was held that to allow testimonial hearsay statements into evidence against the accused would violate the confrontation clause of the Sixth Amendment. This was a new interpretation of the confrontation clause, or at least was a new emphasis on the importance of in-court testimony as required by the Sixth Amendment; previously the Supreme Court had allowed certain hearsay testimonial statements to be entered into evidence in criminal trials, provided they had an adequate indicia of reliability or trustworthiness, or the statement fell within a firmly recognized exception to the hearsay rule. Crawford, therefore, amounted to a reversal of the holding in Ohio v. Roberts and all cases which followed the Roberts line of reasoning.

Justice Scalia declined to give a comprehensive definition for "testimonial evidence" in Crawford, stating only that, "Whatever else the term covers, it applies at a minimum to prior testimony at a preliminary hearing, before a grand jury, or at a former trial; and to police interrogations." However, he did give a strong hint of what was to come, by emphasizing in the opinion the injustice of Sir Walter Raleigh's historic trial. Sir Walter Raleigh was convicted and sentenced to death on the basis of a confession, made by an alleged accomplice, which was read to the court. Although Sir Walter Raleigh repeatedly demanded that the author of the confession be brought to the court to testify in person, his requests were refused, and he was denied the right to cross-examine his accuser. This scenario, Justice Scalia emphasizes, is what the Sixth Amendment protects against—a defendant being convicted on the basis of a formal testimonial statement that is introduced into evidence without the defendant being able to cross-examine or confront the author of the statement. Justice Scalia also cautions, in footnote seven of the opinion:

Involvement of government officers in the production of testimony with an eye towards trial presents unique potential for prosecutorial abuse—a fact borne out time and again throughout a history with which the Framers were keenly familiar. This consideration does not evaporate when testimony happens to fall within some broad, modern hearsay exception, even if that exception might be justifiable in other circumstances.

Therefore, the Crawford opinion clearly foreshadows the holding of Melendez-Diaz v. Massachusetts. In Melendez-Diaz, which was also authored by Justice Scalia, the Court held that certificates of analysis prepared by laboratories in drug cases are testimonial. Following the constitutional prohibition established in Crawford, such certificates cannot be admitted into evidence in criminal trials without the presence of the person who prepared or attested to the facts contained in the certificate. Justice Scalia notes that a defendant could waive his right to cross-examine the lab analyst who prepared the certificate. Otherwise, the certificate of analysis is not admissible into evidence. Justice Scalia also notes that for the state to provide a process by which the defendant on his own could subpoena the analyst does not satisfy the requirements of the Sixth Amendment; "the Confrontation Clause imposes a burden on the prosecution to present its witnesses, not on the defendant to bring those adverse witnesses into court."

There is a suggestion in Melendez-Diaz that certificates relating to the calibration of laboratory equipment would probably qualify as business records, and therefore would not be testimonial and subject to the requirements of Crawford and the Sixth Amendment. This does

not apply to certificates relating to chain of custody, though. Justice Scalia warns that while chain of custody issues may not be critical to the prosecution's case, if the prosecution wishes to produce evidence relating to the chain, it must do so with in-court testimony.

VIRGINIA'S LEGISLATION IN RESPONSE TO MELENDEZ-DIAZ

In Virginia, the greatest impact of the Melendez-Diaz case was on the prosecution of DUI and drug offenses, where certificates of analysis are almost always essential to the Commonwealth's case. To a lesser extent, prosecutions for failure to register or reregister as a sex offender were also affected, as prior to Melendez-Diaz, the Virginia State Police would supply the prosecuting attorney with an affidavit attesting to the fact that the offender was not registered as required. Now, in all of these cases, the live testimony of the relevant witness is required, unless the defendant waives his Sixth Amendment rights.

To comply with the new requirements of Melendez-Diaz, prosecutors must issue subpoenas for the witnesses who prepare certificates; the resulting delays in scheduling trials had the potential to lead to problems for prosecutors in meeting the deadlines established by Virginia's speedy trial statute. To attempt to address this problem, the Virginia General Assembly convened in a Special Session for one day on August 19, 2009. An enrolled bill, with an emergency clause, was sent to the Governor, and was signed into law on August 21, 2009.

Under this enacted legislation, prosecutors will notify a defendant or his attorney if they intend to introduce into evidence at trial a certificate of analysis, the results of a breathalyzer test, or an affidavit from the Virginia State Police concerning a registered sex offender's failure to properly register or reregister. The affidavit must be delivered to the defendant, or his attorney, no later than 28 days prior to trial. This deadline is more of a general goal than a strict requirement, as there is no penalty to the Commonwealth if it is missed; as long as the Commonwealth has used due diligence in attempting to secure the presence of the witness who prepared the affidavit or certificate, prosecutors are entitled to a continuance if the defendant insists the witness testify and the witness is unavailable on the day of trial. Any objection the defendant has to the introduction of the certificate or affidavit without live testimony from the witness must be made within 14 days of the Commonwealth's delivery of the notice. If an objection is not made within that deadline, the defendant is deemed to have waived his objection. Any continuance granted to either the defendant or the Commonwealth because of an objection to the introduction of a certificate or affidavit does not count against the Commonwealth for purposes of the speedy trial statute. The continuance can only be for 90 days, though, if the defendant has been held continuously in custody, or 180 days if he has not been held continuously.

IMPACT ON THE DEPARTMENT OF FORENSIC SCIENCE

With Virginia's speedy trial requirements no longer applicable when the defendant makes a Melendez-Diaz objection, the procedural problems prosecutors faced prior to the enactment of the new legislation should now be alleviated, even if they are not completely dispelled. It still remains to be seen how much more frequently the lab analysts from the Virginia Department of Forensic Science now will be required to testify in court—if the amount of time analysts spend in court becomes too great, it will have an impact on the number of tests they are able to complete on a monthly basis. Therefore, the Melendez-Diaz case still has the potential to create enormous practical problems for Virginia's criminal justice system in the coming years, due to increased backlog of drug cases.

A review of the number of subpoenas the Department of Forensic Science has received since the Melendez-Diaz decision was handed down on June 25, 2009, does show an increase. While the Department received 487 subpoenas in April of 2009, 503 subpoenas in May, and 582 subpoenas in June, it received 1,884 subpoenas in July, 1,735 subpoenas in August, and 1,627 subpoenas in September. There does seem to be a slight downward trend: in October, there were 1,438 subpoenas, in November, there were 1,237 subpoenas and in December, there were 1,311 subpoenas.

The majority of all these subpoenas were for controlled substance examiners. The Department reports that the number of subpoenas for controlled substance cases was 136 in April, 142

in May, and 208 in June; after Melendez-Diaz, the numbers were 1,243 in July, 1,062 in August, 1,034 in September, 822 in October, 752 in November, and 758 in December. Most of these subpoenas were rescinded prior to trial. Only 10 examiners actually had to appear in court in April, 9 in May, and 11 in June. After Melendez-Diaz, the numbers were 123 appearances in July, 147 in August, 174 in September, 130 in October, 109 in November and 89 in December. Therefore, even though the numbers of subpoenas and court appearances is decreasing, the controlled substances examiners from the Department of Forensic Science are still making roughly ten times as many court appearances as they did before the Melendez-Diaz decision. This, in turn, has led these examiners to spend much more time out of the laboratory. While the total number of outside hours was 21 in April, 22 in May, and 19 in June, it was 324 in July, 374 in August, 539 in September, 361 in October, 332 in November, and 334 in December. (The seemingly disproportionate number of hours compared to the number of subpoenas is due to travel time and waiting in court).

Clearly, if this trend continues, it has the potential to increase the backlog of testing requests for suspected controlled substances. This in turn could lead to longer and longer delays for criminal trials. It will be imperative for the General Assembly to monitor this situation in the coming few years to ensure that the situation does not deteriorate to the point of causing irreparable strains on the criminal justice system.

THE USE OF VIDEO TESTIMONY

It has been suggested that one remedy for the increased workload placed upon the Department of Forensic Science due to the Melendez-Diaz decision is to statutorily allow lab examiners to testify at trial by two-way video conferencing. This would greatly reduce the number of hours that the examiners would have to spend out of the laboratory, and might save the Commonwealth money, as travel costs could be eliminated.

However, the constitutionality of allowing a prosecution witness to testify at a criminal trial via a closed circuit camera is unclear. The United States Supreme Court has allowed the use of one-way video testimony in child abuse cases, when the attorneys for both sides are present with the child witness who is testifying outside of the direct presence of the defendant. In Maryland v. Craig, the United States Supreme Court held that the Sixth Amendment right of a defendant to confront his accusers in open court may be modified by allowing the use of video testimony, but only if this is necessary to further an important public policy, and there has been a specific determination by the judge, on a case by case basis, that in a particular trial it is not necessary for the defendant to face the witness directly in court. It must be noted that some of the reasoning in Maryland v. Craig was based on the reasoning of the earlier case of Ohio v. Roberts, which has essentially been overruled by the Crawford decision. Justice Scalia, who authored the Crawford and Melendez-Diaz opinions, dissented strongly in the earlier Maryland v. Craig case, writing "For good or bad, the Sixth Amendment requires confrontation, and we [the Court] are not at liberty to ignore it."

At first glance, the use of two-way video conferencing for witness testimony would seem to grant even stronger Sixth Amendment protections to a criminal defendant than the one-way closed circuit television broadcasts allowed in Maryland v. Craig and should therefore pass muster constitutionally. However, when confronted with the issue of whether or not the use of two-way video testimony in criminal trials is permissible, most of the federal circuit courts have relied upon the reasoning of Maryland v. Craig, holding that there must be an important public policy that requires the use of video testimony in such cases, and an individualized showing in a particular case that there is some necessity that the witness not be forced to testify in court in front of the defendant. All of the cases where the use of video testimony has been allowed have involved child witnesses, after a determination by the trial judge that the child would not be able to testify competently in front of his or her attacker due to the stress of the situation, or, in one instance, involved a witness in the witness protection program, who was terminally ill with cancer and physically unable to leave the hospital. In all of the cases, the witness' testimony probably would not have been available at all, at any time, if the use of two-way video conferencing had not been permitted. It is doubtful that the federal courts will equate mere scheduling delays, or

transportation costs to the Commonwealth, as manifesting the same need of requirement such that video testimony will be permitted over a defendant's Sixth Amendment objections.

Additionally, the Commonwealth must consider the financial costs involved in such a proposal. Not all courtrooms in the Commonwealth currently have the capability to send and receive two-way video testimony. The Office of the Executive Secretary of the Supreme Court of Virginia has been looking at this issue; although they have not completed a formal study, information they have gathered suggests that the costs to install suitable equipment in all of the courts throughout the Commonwealth would be considerable. Rough estimates indicate that the price would be 4 to 6 million dollars for initial installation, with costs of two to three million dollars annually thereafter for maintenance, staff support, and related expenses. And, as with most technology, the equipment would probably have to be replaced or updated every four to six years.

CONCLUSION

At its December 15 meeting, the Crime Commission considered the subject of allowing two-way video testimony for lab analysts in criminal cases to help alleviate the burden on the Virginia Department of Forensic Science created by the Melendez-Diaz decision. Due to the potential costs involved and the uncertainty as to whether or not such video testimony would be constitutional, the Crime Commission made no formal recommendations on this issue.

RESTORATIVE JUSTICE

Senate Joint Resolution 362 (SJR 362) was introduced by Senator Thomas K. Norment, Jr. during the 2009 Regular Session of the General Assembly. Although SJR 362 was left in House Rules, the Executive Committee of the Crime Commission approved study of the resolution. As such, the Crime Commission was directed to examine a number of key issues regarding various types of restorative justice initiatives, specifically including victim-offender reconciliation programs, legal and practical issues, and possible recommendations relating to the preferred types of restorative justice. It should be emphasized that the primary purpose of the study was to provide an update and overview of restorative justice practices in Virginia, as the subject has not been examined in over 10 years.

Crime Commission staff utilized several methodologies to address the directives of the mandate regarding restorative justice, including an overview of national, state and academic literature, statutory review of Virginia Code relating to restorative justice and a multi-state survey of statutory and legislative restorative justice efforts.

Restorative justice practices have become increasingly popular in recent years. Restorative justice can be defined as a theory of justice that focuses on repairing the harm that a criminal offense inflicts on victims, offenders, and communities. There are many different forms of restorative justice practices, which involve key stakeholders to varying degrees. The extent to which these programs have been evaluated varies widely; however, research has produced consistent findings that victims, offenders and communities can benefit greatly from such practices. In particular, victim-offender reconciliation, also known as victim-offender dialogue or mediation, appears to be the most widely implemented practice and provides the most evidence of positive outcomes for the victim and offender in regards to levels of satisfaction, perceived fairness, and reduced recidivism rates.

When examining other state statutes relating to restorative justice, it can be concluded that there is no one specific approach that is used; rather, each state appears to provide limited authority for certain types of restorative justice programs for specifically designated classes of offenders or offenses. The Virginia Code affords the ability to include restorative justice-based principles in sentencing in the following ways:

- As part of a suspended sentence or as part of probation (§ 19.2-303);
- As community-based probation for non-violent offenders (§ 9.1-174);
- As part of any juvenile's sentence, provided that he is not tried as an adult (§ 16.1-278.8);
- As part of victim impact statements (§ 19.2-299.1, § 16.1-273); and,
- Ability of Crime Victim and Witness Assistance Programs to establish a victim-offender reconciliation program (§ 19.2-11.4).

Restorative justice-based programs have been operating in Virginia since the 1980's with promising outcomes for victims, offenders, and communities. There are several types of restorative justice-based initiatives operating in Virginia, which are based in a variety of settings, including courts, prisons, jails, and schools. In summary, the traditional approach of justice in Virginia can, at a minimum, be supplemented by some innovative, evidence-based restorative justice approaches. It also appears that victim-offender mediation is the preferred method due to the fact that it is the approach that has been researched the most and is therefore considered evidence-based. However, it is recommended that more consistent, rigorous program evaluations be carried out for *all* types of restorative justice-based initiatives in order to justify wider implementation in Virginia. The Crime Commission made no formal recommendations as a result of this study. For a complete report of this study, please refer to Report Document 48 (2010).

SEX OFFENDER REGISTRY

During the 2009 Regular Session of the Virginia General Assembly, five different House bills were introduced which had as their subject matter modifications to Virginia's sex offender registry laws: House Bills 1898 (Watts), 1928 (Lewis), 1962 (Mathieson), 1963 (Mathieson), and 2274 (Poindexter). All five bills were passed by the House of Delegates and were referred to the Senate Courts of Justice Committee. The Committee unanimously passed by all five bills, and referred the subject matter of the bills to the Crime Commission for review, to determine whether these bills were required to bring Virginia's sex offender registry laws into compliance with the federal Adam Walsh Act.

The Adam Walsh Act, 42 U.S.C. 16901 *et seq.*, was enacted by Congress in 2006. It contains seven Titles, the first of which is known as the Sex Offender Registration and Notification Act, or "SORNA." SORNA requires that all fifty states maintain sex offender registries, and provides detailed requirements as to who must register, how long they must remain on the registry, what information must be provided to the registry, what information must be available to the public through the internet, and what verification processes the states must use to ensure the accuracy of the information. Two of the underlying goals of SORNA are to create greater uniformity for all of the states' registry laws, and to make it easier for states to share information and keep track of registered offenders who move from one state to another.

Strictly speaking, states cannot be forced to adopt the provisions of SORNA. However, SORNA specifies that states that do not comply with its requirements will be penalized by having a ten percent reduction in the amount of Byrne grant funding they receive. The Attorney General of the United States is given the authority to make the determination as to which states "substantially implement" the requirements of SORNA and which do not. To date, only Ohio has been deemed in compliance. On May 26, 2009, the Attorney General granted a one year waiver to all of the states to give them additional time to bring their registries into compliance. It is also possible for states to request an additional one year waiver to take effect when the current waiver expires on July 27, 2010. Along with the authority to determine which states will be subject to a reduction in their Byrne grant funding for failing to "substantially implement" SORNA, the Attorney General may also expand certain provisions of SORNA, and is required to issue interpretive guidelines.

Many of the provisions of the five House bills are necessary if Virginia is to come into compliance with SORNA. There are also a number of additional statutory changes that must be made. Many of these changes carry a fiscal impact; the Virginia legislature will have to decide, as a matter of public policy, whether the costs to implement these many changes are worth the reduction in Byrne funding that otherwise might occur. Although it cannot be known for certain how much Byrne grant funding will be available to Virginia in the future (the amount provided for states varies from year to year, sometimes substantially), for the current fiscal year, Virginia is expected to receive around $6,300,000. In 2008, Senate Bill 590 was introduced in an attempt to bring other aspects of Virginia's registry laws into compliance with SORNA. At that time, the preliminary fiscal impact statement from the Virginia Department of Planning and Budget was over twelve million dollars for 2009, and over eight and a half million dollars for every year thereafter.

HOUSE BILL 1898

House Bill 1898 would expand the amount of information that sex offenders would have to provide to the registry with the following:

- Any telephone number the registered offender uses, or intends to use.

  This requirement is not found in the relevant section of SORNA, but is mandated by the United States Attorney General in the Final Guidelines, pursuant to his authority to require states to maintain additional information on offenders. It should be noted that the Final Guidelines recommend against, but do not prohibit, providing these phone numbers to the general public on the registry website.

- The immigration status information of the registered offender.

  This requirement is not found in the relevant section of SORNA, but is mandated by the United States Attorney General in the Final Guidelines, pursuant to his authority to require states to maintain additional information on offenders.

It should be noted that the Final Guidelines specifically prohibit providing any travel or immigration document numbers on the public registry website.

- Information regarding any professional or occupational licenses held by the registered offender.

  This requirement is not found in the relevant section of SORNA, but is mandated by the United States Attorney General in the Final Guidelines, pursuant to his authority to require states to maintain additional information on offenders.

- Information on "place of employment" must include all places and physical job site locations, including volunteer work**.**

  The requirement of providing all physical job site locations is not precisely required by SORNA; the exact language of the federal statute is "name and address of any place where the sex offender is an employee or will be an employee." The Final Guidelines provide further clarification by stating, "if the sex offender is employed but does not have a definite employment address, other information about where the sex offender works" should be provided. In such cases, the offender should give "whatever definiteness is possible under the circumstances, such as information about normal travel routes or the general area(s) in which the sex offender works." The Final Guidelines make clear, however, that daily updates on work locations are not required; in these situations (e.g., employment as a day laborer or delivery driver), the offender should provide the information about employment location in more general terms. Therefore, if Virginia were to adopt this change, employing similar language might be preferable to the phrase "physical job site locations." The inclusion of volunteer work order is required by both SORNA and the Final Guidelines.

- Vehicle registration information for all vehicles regularly used by the registered offender.

  Currently, Virginia only requires vehicle registration information for vehicles owned by the registered sex offender. SORNA requires the offender to provide information on any vehicle "owned or operated" by him. The Final Guidelines clarify this to mean "any vehicle that the sex offender regularly drives, either for personal use or in the course of employment." It should be noted that at the present time, Virginia does not provide any vehicle information to the general public; the Final Guidelines mandate that this information be made available on the public registry website.

- Information on "temporary lodging," i.e., any place a registered offender stays for seven or more days when away from his residence.

  This requirement is not found in the relevant section of SORNA, but is mandated by the United States Attorney General in the Final Guidelines, pursuant to his authority to require states to maintain additional information on offenders. The bill specifies that any change in temporary lodging must be reported by the offender, in person, within three days of establishing or changing the temporary lodging. A three business day deadline is mandated by the Final Guidelines, and while in person reporting is perfectly acceptable, it is not mandated. Only changes in name, residence, employment, or school attendance must be reported in person.

- An out-of-state registered offender who enters Virginia for an extended visit of seven days or longer must register in person**.**

  Currently, Virginia requires out-of-state registered offenders who enter Virginia for an extended visit of thirty days or longer to register in person. Changing the time limit to seven days is not required by SORNA, nor by the Final Guidelines, which also set a limit of thirty days. Of course, Virginia would not be prohibited from making this change.

- An out-of-state registered offender who enters Virginia for employment for a period of time exceeding seven days must register in person.

  Currently, Virginia requires out-of-state registered offenders who enter Virginia for employment for a period of time exceeding fourteen days to register in person. Changing the time limit to seven days is not required by SORNA, nor by the Final Guidelines. Of course, Virginia would not be prohibited from making this change.

HOUSE BILL 1928

House Bill 1928 clarifies an ambiguity in Virginia's current law as to how soon after a name change a registered offender must reregister in person. The current statute reads:

"(i) Any person required to register shall also reregister in person with the local law enforcement agency following any change of name, or any change of residence, whether within or without the Commonwealth. (ii) If his new residence is within the Commonwealth, the person shall register in person...within three days following his change in residence. (iii) If the new residence is located outside of the Commonwealth, the person shall register... within 10 days prior to his change of residence."

Although the implication is that a change of name must also be reported within three days, if not ten days prior to the change, the statute does not specifically state this. House Bill 1928 makes clear that when a registered offender changes his name, he must provide this information, in person, within three days following the change. This is essentially required by SORNA, which states that "a sex offender shall, not later than 3 business days after each change of name... appear in person...and inform that jurisdiction of all changes in the information required for that offender in the sex offender registry."

House Bill 1928 also creates a requirement for registered offenders to reregister in person within three days following a significant change in appearance. This new requirement is not mentioned in either SORNA nor in the Final Guidelines. Enactment of this provision may result in problematic prosecutions for failure to comply, as the phrase "significant change in appearance" could lead to highly subjective interpretations.

HOUSE BILL 1962

House Bill 1962 would make any sentencing order that permits a convicted sex offender to remain off the registry, in violation of Virginia's laws, invalid and *void ab initio.* It also requires the Virginia State Police to notify the Executive Secretary of the Virginia Supreme Court and the chairmen of the House Courts of Justice Committee, the Senate Courts of Justice Committee, and the House Committee on Militia, Police and Public Safety, that a void order was entered, along with the name of the judge who entered the order. While the requirements of this bill are outside the direct scope of SORNA, they are certainly within the spirit of the Act. SORNA requires that any person convicted of a qualifying sexual offense be placed on the sex offender registry, without exception.

HOUSE BILL 1963

House Bill 1963 would add a subsection to the statute that defines and lists all of the registerable offenses. The new subsection would state that if an offense requires registration only if the victim is a minor, is physically helpless, or is mentally incapacitated, neither the charging document nor the final order of conviction need to state the relevant condition. Furthermore, the relevant condition may be established by other information available to the Virginia State Police.

Existing law in Virginia does not require that a necessary condition for registration be specifically mentioned in a final conviction order or sentencing order. Instead, the requirement to register is triggered upon conviction for a qualifying offense, and if registration is only required if there are additional conditions, then the requirement to register will exist if those conditions were present during the commission of the offense. In other words, if a person meets all of the requirements to register, then he must register, regardless of what the sentencing order states. In that sense, House Bill 1963 is only restating existing law, and is mandated by SORNA, which similarly requires registration if a defendant is convicted of a qualifying offense that meets all the necessary requirements for registration.

The current law in Virginia is silent as to whether or not the Virginia State Police may establish or prove relevant facts that are not contained within a final order of conviction, if an individual challenges his inclusion on the registry. House Bill 1963 would make it clear that the Virginia State Police can do so. Allowing outside evidence, beyond what is contained in a sentencing order, to help determine if a defendant must be placed on the sex offender registry does not conflict with SORNA, and may even be required by SORNA in some situations.

HOUSE BILL 2274

House Bill 2274 would mandate that Virginia's public registry website include information on whether a registered offender is wanted for any criminal offense, not just for failing to register or reregister, as is the current law. The Virginia State Police already possess the authority to publish such information on the public registry website under certain circumstances; they may provide "such other information as [they] may from time to time determine is necessary to preserve public safety...." The bill would remove this discretion from the Virginia State Police, although it would allow them the option of not specifically listing the offense or offenses for which the registrant was wanted. This bill is required by SORNA, which mandates that information about arrest warrants issued for registered offenders be kept by the registry, and that all registry information, with a few exceptions, be made available to the general public via the Internet. One of the exceptions, though, is for any information that is exempted from public disclosure by the United States Attorney General. In the final guidelines, a list is given of all information that must be disclosed to the public on the public registry website; this list is deemed "exhaustive," and does not include information about outstanding warrants. Therefore, Virginia would not need to enact the provisions of House Bill 2274 in order to be deemed in compliance with SORNA, at least at the present time.

ADDITIONAL AREAS WHERE VIRGINIA IS NOT IN COMPLIANCE WITH SORNA

A comparison of Virginia's sex offender registry laws with the provisions of SORNA and the Final Guidelines reveal a number of additional areas where Virginia is not in compliance:

- Virginia currently prohibits the retroactive application of certain offenses to require registration.

  If committed before July 1, 2006, convictions under Virginia Code §§ 18.2-67.5:1, 18.2-374.1:1, or 18.2-91 with an intent to commit a felony listed in Virginia Code § 9.1-902, do not require registration. This is in violation of the Final Guidelines, as well as earlier released federal regulations, which require that offenses committed before the enactment of SORNA still result in registration.

- A first offense of failing to register or register is a Class 1 misdemeanor.

  If an offender, who has not been convicted of a sexually violent offense, fails to register or reregister as required by law, he is guilty of a Class 1 misdemeanor for the first violation. (A second violation is a Class 6 felony, as is a first violation if the offender was convicted of a sexually violent offense). SORNA mandates that violations by offenders of the requirements of registration must "provide a criminal penalty that includes a maximum term of imprisonment that is greater than 1 year." Because a Class 1 misdemeanor carries a maximum term of imprisonment of twelve months, Virginia does not satisfy this provision of SORNA.

- Abductions of a minor that do not involve an intent to extort money nor an intent to defile are eligible for removal from the registry after 15 years.

  Anyone who is convicted of abduction of a minor in violation of Virginia Code §§ 18.2-47(A) or 18.2-48(i) must register as a sex offender. However, these offenses, for a first conviction, do not qualify as "sexually violent offenses," which means an offender can petition to have his name removed from the registry after 15 years. (If the offender was convicted of abduction of a minor with the intent to defile in violation of Virginia Code § 18.2-48(ii), or of a minor under the age of 16 for purposes of prostitution in violation of Virginia Code § 18.2-48 (iii), that would qualify as a conviction for a "sexually violent offense," and the registry requirements would be for life). SORNA requires that any kidnapping offense involving a minor, unless committed by a parent or guardian, result in lifetime registration.

- Not all convictions for sexual battery result in registration.

  Sexual battery in Virginia is a Class 1 misdemeanor. While some sexual battery offenses that involve minors or multiple convictions can result in registration, sexual battery by itself is not a registerable offense. SORNA requires that all sexual offenses, defined as any "criminal offense that has an element involving a sexual act or sexual contact with another," result in registration. If the sex-

ual offense involves a minor, it must result in registration for at least 25 years.

- A conviction for carnal knowledge where the offender is less than five years older than the victim is eligible for removal from the registry after 15 years.

  Anyone convicted of carnal knowledge in violation of Virginia Code § 18.2-63 must register as a sex offender. If the difference in age between the offender and his victim was more than five years, it is deemed to be a "sexually violent offense," and the registration is for life. Otherwise, the offender can petition to have his name removed from the registry after 15 years. SORNA requires that anyone convicted of a felony that involves consensual sexual contact with a victim between the ages of 13 and 16 be registered for at least 25 years, if the difference in age between the offender and the victim was more than four years. Therefore, under some circumstances, the length of required registration for a conviction of carnal knowledge under Virginia law might not suffice for the requirements of SORNA.

- Offenders who are on the registry for having committed a "sexually violent offense" are only subject to in person verifications of their address every six months.

  Under Virginia's registration laws, offenders convicted of a "sexually violent offense" are subject to semi-annual verification of their reported address by the Virginia State Police, as are all registered sex offenders. SORNA requires that an in person verification of the offender's information be undertaken every three months if the offender was convicted of certain violent offenses.

- Juveniles over the age of fourteen are not automatically required to register as sex offenders upon being adjudicated delinquent of certain violent sex crimes.

  In Virginia, juveniles who are not tried as adults, but are adjudicated delinquent of an offense that would require registration if committed by an adult, are only required to register if they are over the age of 13 at the time of the offense, the Commonwealth's Attorney files a motion with the court requesting registration, and the court finds that the circumstances of the offense justify registration. (Juveniles who are tried as adults for an offense that requires registration must register if convicted). SORNA requires that any juvenile 14 years of age or older at the time of the offense, who is adjudicated delinquent of an offense comparable to aggravated sexual abuse, be registered, without exception.

CONCLUSION

At its December 15 meeting, the Crime Commission considered the subject matter of House Bills 1898, 1928, 1962, 1963, and 2274, as well as the other areas in which Virginia's sex offender registry laws currently do not comply with the requirements of the federal Sex Offender Registration and Notification Act. In light of the enormous costs of bringing Virginia fully into compliance, it was decided that no recommendation would be made as to the introduction of any legislation in this area of the law.

SEXTING

The Crime Commission received a letter from the Virginia Joint Commission on Technology and Science requesting that a study be conducted on the general topic of "sexting." This request was approved by the Executive Committee, and staff was directed to additionally concentrate on the sex offender registry requirements under state and federal law for any juveniles convicted under any of Virginia's current criminal statutes.

"Sexting" is a recently invented term that refers to the act of taking a sexually suggestive digital photo of oneself, or arranging for a friend to take such a photo, and then transmitting it electronically, usually via a text picture message sent from one cellular phone to another. The word itself is a derivation from the slightly older word "texting," which refers to the sending of text messages from one cellular phone to another. Sexting has increasingly attracted nationwide attention, as many of the participants taking and receiving such photos are considered juveniles. One recent study found that 22% of teenage girls, and 18% of teenage boys, have sent or posted images or video showing themselves nude or semi-nude. More troubling, the study reported that 11% of young teenage girls, between the ages of 13 and 16, had done so.

When juveniles engage in sexting, the nude or sexually suggestive photos involved may meet the legal definition of child pornography. Thus, juveniles who create, send, duplicate, or simply possess such images may have violated child pornography laws, even if unintentionally, and may incur severe repercussions, such as being placed on a sex offender registry. Sexting has therefore raised general policy debates across the country. Child pornography laws were enacted to criminalize the predatory behavior of older adults who victimize children, and the products of their illegal activities. Are they appropriate for teenagers who have engaged in sexting voluntarily? Should juveniles, who erroneously thought these photos were simply the equivalent of flirtatious love notes, be subject to the criminal justice system? What is the best way to curtail this behavior by juveniles, and educate them as to the long-term embarrassment or other, even more harmful repercussions that may arise from taking and then transmitting pornographic photos of themselves?

CRIMINAL STATUTES UNDER VIRGINIA LAW

The act of sexting may violate or lead to a violation of a number of Virginia's laws that criminalize various actions related to the production, possession, transmission, or solicitation for child pornography. The photo or image must meet the legal definition of "child pornography," which is defined as "sexually explicit visual material which utilizes or has as a subject an identifiable minor." "Sexually explicit visual material" is defined, in turn, as:

"a picture, photograph, drawing, sculpture, motion picture film, digital image, including such material stored in a computer's temporary Internet cache when three or more images or streaming videos are present, or similar visual representation which depicts sexual bestiality, a lewd exhibition of nudity, as defined in § 18.2-390, or sexual excitement, sexual conduct or sadomasochistic abuse, as also defined in § 18.2-390, or a book, magazine or pamphlet which contains such a visual representation."

The definition of "nudity" provided by Virginia Code § 18.2-390 is:

"a state of undress so as to expose the human male or female genitals, pubic area or buttocks with less than a full opaque covering, or the showing of the female breast with less than a fully opaque covering of any portion thereof below the top of the nipple, or the depiction of covered or uncovered male genitals in a discernibly turgid state."

Therefore, it is possible under Virginia law for a photo of a minor who is not naked, but is wearing revealing lingerie, to qualify as child pornography. It is also possible, however, that a photo of a completely naked minor would not qualify as child pornography, even if the genitals were fully visible, provided the genitals were not the main focus of the photo, and the minor was not positioned in a "lewd" posture.

If a photo does meet the definition of child pornography, the production of it is a felony under Virginia Code § 18.2-374.1(B)(2); the language of the statute does not exempt a person who makes such a photo of himself or herself. The penalty depends upon the age of the subject of the photo: if the minor is under the age of 15 years, it is an unclassified felony carrying from 5 to 30 years; if the minor is 15 years old or older, it

is an unclassified felony carrying from 1 to 20 years.

The act of sexting the photo would constitute a separate crime, distribution of child pornography, which is a felony under Virginia Code § 18.2-374.1:1. The punishment is from 5 to 20 years incarceration; a second offense is also punishable by 5 to 20 years, but carries a mandatory minimum 5 years, no part of which can be suspended. The person who receives the sexted photo would be guilty of possession of child pornography, which is a Class 6 felony for a first violation, and Class 5 felony for a second or subsequent violation. (A Class 6 felony carries from 1 to 5 years incarceration; a Class 5 felony carries from 1 to 10 years incarceration). If two or more photos are sexted, even at the same time, the recipient would be guilty of a separate offense for each photo he possessed, and at least one "second or subsequent offense" would be applicable. Similarly, the person sending the photos would be guilty of multiple offenses as well.

If the recipient of the sexted photos displays them "with lascivious intent" to a friend, that would constitute yet another violation of Virginia Code § 18.2-374.1:1, carrying the same penalty as transmission, or re-transmission, of the images: 5 to 20 years for a first offense, and for a second offense, 5 to 20 years, with a mandatory minimum of 5 years. Considering how easy it is to forward electronic photos to multiple people all at once, it becomes apparent that a single illegal photo that is shared could rapidly lead to dozens or even hundreds of people being guilty of one of the above mentioned felonies.

Two additional crimes could be involved in some sexting scenarios. It is a felony to solicit a minor to appear in child pornography; the penalty is the same as for producing child pornography. Therefore, if a teenager asks his underage girlfriend to send him a nude photo, he would be guilty of a crime, even if the girlfriend refused and no photo was sexted. If this solicitation occurred by e-mail or by texting, that would be an additional felony, as it is a separate crime to solicit child pornography through an electronic communications system or over the phone. If the defendant is eighteen years of age or older, it is a Class 5 felony; if he is a minor, it is a Class 6 felony.

It should be pointed out that in most cases, juveniles found guilty of any of these crimes would not receive the lengthy sentences specified in the criminal statutes. Juveniles are generally tried in Juvenile and Domestic Relations district courts, and if "adjudicated delinquent," usually receive a disposition far different than what an adult would receive. Typically, juveniles do not receive punishments that involve extensive periods of incarceration, as the philosophy and spirit of the juvenile justice system is to focus on rehabilitation whenever possible. Even in extreme cases, juveniles may not be incarcerated past their 21st birthday. However, any teenagers who are adults at the time of an offense that involves sexting would be tried and sentenced as adults, and could receive lengthy prison sentences. Also, a juvenile who is transferred and tried as an adult, pursuant to Virginia Code § 16.1-269.1, can be sentenced as an adult, and could receive a similarly lengthy prison sentence.

REGISTRATION REQUIREMENTS UNDER VIRGINIA LAW

Under Virginia law, adults who are convicted of any offense involving child pornography must register with Virginia's Sex Offender and Crimes Against Minors Registry. However, juveniles, are not subject to mandatory registration if they are found delinquent of a sex offense, including those that involve child pornography. They are only required to register if they are over the age of 13 at the time of the offense, the offense was one which requires registration if committed by an adult, the prosecutor makes a motion for the juvenile to be registered, and the court finds that the circumstances of the crime require registration. Factors the court is to consider in making this determination are:

(i) the degree to which the delinquent act was committed with the use of force, threat or intimidation, (ii) the age and maturity of the complaining witness, (iii) the age and maturity of the offender, (iv) the difference in the ages of the complaining witness and the offender, (v) the nature of the relationship between the complaining witness and the offender, (vi) the offender's prior criminal history, and (vii) any other aggravating or mitigating factors relevant to the case.

Therefore, most juveniles who currently commit a sexting offense in Virginia would probably not be required to register as sex

offenders, even if tried and convicted. Teenagers who are adults at the time of the offense would have to register, though, as would juveniles who are tried as adults; registration for these defendants is automatically required upon conviction

REGISTRATION REQUIREMENTS UNDER FEDERAL LAW

The federal Sex Offender Registration and Notification Act ("SORNA") is the first part of the more comprehensive Adam Walsh Act. SORNA requires all states to create sex offender registries, or risk reductions in the amount of Byrne funding they receive. SORNA contains many specific requirements as to which offenses must result in registration after a conviction, and how long different offenders must remain on the registry. Under SORNA, juveniles who are adjudicated delinquent of a sex offense must be placed on their state's registry, but only if they were 14 years of age or older at the time of the offense, and the offense was "comparable to or more severe than aggravated sexual abuse," or was an attempt or conspiracy to commit such a crime. "Aggravated sexual abuse" involves physical contact with the victim, either carried out against the victim's will, or involving a child under the age of 12. Therefore, SORNA does not require that a state place juvenile offenders on its sex offender registry for sexting type offenses, although a state may choose to do so. In this regard, Virginia is not out of compliance with SORNA.

SORNA does require that adults convicted of offenses involving child pornography be placed on a sex offender registry: production and distribution of child pornography require registration for at least 25 years, while possession of child pornography requires registration for at least 15 years. Juveniles who are convicted as adults are also subject to these registration requirements. Virginia's registration requirements for any sexting offenses committed by adults, or juveniles convicted as adults, at the present time meet or exceed the SORNA requirements.

CONCLUSION

At its December 15 meeting, the Crime Commission considered the topic of sexting. Discussion was held as to whether or not a separate criminal statute should be created specifically for the crime of sexting. The general consensus was that Virginia's criminal laws are currently sufficient to handle the egregious cases, and for less severe cases, prosecutors are free to use their discretion by either declining to prosecute the matter and instead arranging for a Child in Need of Services (CHINS) petition to be filed, or, alternatively placing the defendant on a probationary period with a deferred disposition. As the criminal justice system seems at this time to be able to adequately address the problem from that perspective, sexting should be seen more as an issue of safety and awareness. Therefore, the Crime Commission recommended that a letter be sent to the Virginia Board of Education, informing them on the results of the study and requesting them to inform/educate students, parents, and teachers on the dangers and illegality of sexting. The Virginia Department of Education was already working on this issue and sent a letter to the members of the Crime Commission detailing their work.