

# **VIRGINIA STATE CRIME COMMISSION**

## **EXPUNGEMENT OF CRIMINAL CONVICTION RECORDS**

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### **AUTHORITY**

The Code of Virginia, § 30-156, authorizes the Virginia State Crime Commission (“Crime Commission”) to study, report and make recommendations on all areas of public safety and protection. In so doing, the Crime Commission shall endeavor to ascertain the causes of crime and recommend ways to reduce and prevent it, explore and recommend methods of rehabilitation of convicted criminals, study compensation of persons in law enforcement and related fields and study other related matters including apprehension, trial and punishment of criminal offenders.<sup>1</sup> Section 30-158(3) empowers the Crime Commission to conduct studies and gather information and data in order to accomplish its purpose as set forth in § 30-156 ... and formulate its recommendations to the Governor and the General Assembly.

### **BACKGROUND**

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.<sup>2</sup> 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 These Code sections were originally enacted in 1977,<sup>3</sup> and have remained essentially unchanged since that time.<sup>4</sup> 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,

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<sup>1</sup> VA. CODE ANN § 30-156 (Michie 2009).

<sup>2</sup> S.B. 1289, 2009 Gen. Assem., Reg. Sess. (Va. 2009).

<sup>3</sup> 1977 Va. Acts ch. 675.

<sup>4</sup> The original expungement statutes applied only to charges where the defendant was acquitted, the charge was nolle prosequed, or the charge was otherwise dismissed. 1977 Va. Acts ch. 675. In 1984, convictions that received an absolute pardon from the governor also became eligible for expungement. 1984 Va. Acts ch. 642. In 1992 it was clarified that charges dismissed pursuant to an accord and satisfaction were eligible for expungement. 1992 Va. Acts ch. 697. And in 2007, convictions dismissed pursuant to a writ of actual innocence also became eligible for expungement. 2007 Va. Acts chs. 465, 824, 883, 905.

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.<sup>5</sup>

Virginia Code § 19.2-392.2 further clarifies this general policy statement, specifically limiting the expungement process to cases where the defendant was acquitted,<sup>6</sup> the charge was nolle prosequed,<sup>7</sup> the charge was dismissed, including dismissals involving an accord and satisfaction,<sup>8</sup> the defendant received an absolute pardon from the governor,<sup>9</sup> or the charge was dismissed pursuant to a writ of actual innocence.<sup>10</sup>

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.<sup>11</sup> A copy of the petition must be served on the Commonwealth's Attorney for that jurisdiction.<sup>12</sup> 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.<sup>13</sup> 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."<sup>14</sup> 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.<sup>15</sup> Either the petitioner or the Commonwealth's Attorney may appeal the decision of the circuit court up to the Supreme Court of Virginia.<sup>16</sup>

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.<sup>17</sup> The second is when the petitioner has been granted an absolute pardon by the governor.<sup>18</sup> The third is when the petitioner has been granted a writ of actual innocence.<sup>19</sup> And, 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

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<sup>5</sup> VA. CODE ANN. § 19.2-392.1 (Michie 2009).

<sup>6</sup> VA. CODE ANN. § 19.2-392.2(A)(1) (Michie 2009).

<sup>7</sup> VA. CODE ANN. § 19.2-392.2(A)(2) (Michie 2009).

<sup>8</sup> *Id.*

<sup>9</sup> VA. CODE ANN. § 19.2-392.2(I) (Michie 2009).

<sup>10</sup> VA. CODE ANN. § 19.2-392.2(J) (Michie 2009).

<sup>11</sup> VA. CODE ANN. § 19.2-392.2(C) (Michie 2009).

<sup>12</sup> VA. CODE ANN. § 19.2-392.2(D) (Michie 2009).

<sup>13</sup> VA. CODE ANN. § 19.2-392.2(E) (Michie 2009).

<sup>14</sup> VA. CODE ANN. § 19.2-392.2(F) (Michie 2009).

<sup>15</sup> *Id.*

<sup>16</sup> VA. CODE ANN. § 19.2-392.2(G) (Michie 2009); *see also* VA. CODE ANN. § 8.01-670(A)(3) (Michie 2009).

<sup>17</sup> VA. CODE ANN. § 19.2-392.2(H) (Michie 2009).

<sup>18</sup> VA. CODE ANN. § 19.2-392.2(I) (Michie 2009).

<sup>19</sup> VA. CODE ANN. § 19.2-392.2(J) (Michie 2009).

expungement should be granted, “in the absence of good cause shown to the contrary by the Commonwealth.”<sup>20</sup>

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.<sup>21</sup> 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.<sup>22</sup>

## **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.<sup>23</sup> 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.<sup>24</sup> In Gregg, 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.”<sup>25</sup> 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.<sup>26</sup> Lastly, an expungement is not available to anyone who accepted a deferred disposition in his criminal case.<sup>27</sup> 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.<sup>28</sup>

## **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.<sup>29</sup> 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

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<sup>20</sup> VA. CODE ANN. § 19.2-392.2(F) (Michie 2009).

<sup>21</sup> VA. CODE ANN. § 18.2-57.3 (Michie 2009).

<sup>22</sup> VA. CODE ANN. § 19.2-392.2(M) (Michie 2009).

<sup>23</sup> See Commonwealth v. Dotson, 276 Va. 278 (2008); Gregg v. Commonwealth, 227 Va. 504 (1984).

<sup>24</sup> Commonwealth v. Dotson, 276 Va. 278 (2008); Gregg v. Commonwealth, 227 Va. 504 (1984).

<sup>25</sup> Gregg v. Commonwealth, 227 Va. 504, 507 (1984).

<sup>26</sup> Commonwealth v. Jackson, 255 Va. 552 (1998).

<sup>27</sup> Daniel v. Commonwealth, 268 Va. 523 (2004).

<sup>28</sup> See, e.g., Miller v. Commonwealth, 55 Va. Cir. 110 (2001).

<sup>29</sup> S.B. 1289, 2009 Gen. Assem., Reg. Sess. (Va. 2009). Under the bill, DUI offenses, most violent crimes, domestic assault, and crimes requiring registration as a sex offender would not be eligible for expungement.

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.<sup>30</sup> They, in turn, follow regulations to attempt to ensure that the record being expunged is removed from all databases, both state and federal.<sup>31</sup> 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.<sup>32</sup>

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

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<sup>30</sup> VA. CODE ANN. § 19.2-392.2(K) (Michie 2009).

<sup>31</sup> 6 VA. ADMIN. CODE § 20-120-80 (West 2009). All agencies with a copy of the record are instructed to completely remove it from its normal repository, and place it in a sealed, physically separate file, with a notice that the expunged record can only be unsealed upon receipt of a court order. *Id.*

<sup>32</sup> *Id.*

# **VIRGINIA STATE CRIME COMMISSION**

## **CIVIL COMMITMENT OF SEXUALLY VIOLENT PREDATORS**

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### **AUTHORITY**

The Code of Virginia, § 30-156, authorizes the Virginia State Crime Commission (“Crime Commission”) to study, report and make recommendations on all areas of public safety and protection. In so doing, the Crime Commission shall endeavor to ascertain the causes of crime and recommend ways to reduce and prevent it, explore and recommend methods of rehabilitation of convicted criminals, study compensation of persons in law enforcement and related fields and study other related matters including apprehension, trial and punishment of criminal offenders.<sup>1</sup> Section 30-158(3) empowers the Crime Commission to conduct studies and gather information and data in order to accomplish its purpose as set forth in § 30-156 ... and formulate its recommendations to the Governor and the General Assembly.

### **BACKGROUND**

During the 2009 Regular Session of the Virginia General Assembly, Delegate Morgan Griffith introduced House Bill 1843,<sup>2</sup> 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.<sup>3</sup> 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.<sup>4</sup>

District courts are now required to keep the court files pertaining to certain criminal offenses for a period of fifty years.<sup>5</sup> 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

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<sup>1</sup> VA. CODE ANN § 30-156 (Michie 2009).

<sup>2</sup> H.B. 1843, 2009 Gen. Assem., Reg. Sess. (Va. 2009).

<sup>3</sup> 2009 Va. Acts ch. 740.

<sup>4</sup> See VA. CODE ANN. §§ 37.2-900-920 (Michie 2009).

<sup>5</sup> VA. CODE ANN. § 16.1-69.55(A)(1) and (C)(4) (Michie 2009).

Attorney General is now permitted access to Juvenile and Domestic Relations district court records, and Department of Juvenile Justice records, for purposes of handling the civil commitment of sexually violent predators.<sup>6</sup> Also, the Virginia Department of Corrections, the Civil Commitment Committee, 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.<sup>7</sup> The Commitment and Review Committee is now clearly authorized to evaluate and make recommendations on all potential respondents, not just those that are in the custody of the Department of Corrections.<sup>8</sup>

Throughout Chapter 9 of Title 37.2 of the Code of Virginia,<sup>9</sup> 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 therefor, at least 14 days prior to the hearing or trial.<sup>10</sup> 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.<sup>11</sup> The time requirements of Virginia Code § 37.2-905 are now deemed procedural, and not substantive or jurisdictional.<sup>12</sup>

When a petition is filed, the probable cause hearing now must be held within ninety days, not sixty.<sup>13</sup> The respondent is permitted to waive this hearing.<sup>14</sup> 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.<sup>15</sup> 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.<sup>16</sup> If he fails to do so, he shall not be permitted to testify.<sup>17</sup> The parties may agree to a different time period, however.

If it is proven at the 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.<sup>18</sup> An

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<sup>6</sup> VA. CODE ANN. §§ 16.1-300(A)(12), 16.1-305(A)(6) (Michie 2009).

<sup>7</sup> VA. CODE ANN. § 37.2-905.2 (Michie 2009).

<sup>8</sup> VA. CODE ANN. § 37.2-902 (Michie 2009). This statute is now consistent with Virginia Code § 19.2-169.3(E), which implicitly authorizes the Commitment Review Committee to evaluate certain defendants who have been found incompetent to stand trial and are therefore not in the custody of the Virginia Department of Corrections.

<sup>9</sup> This is the chapter that sets out the provisions for the civil commitment of sexually violent predators.

<sup>10</sup> VA. CODE ANN. § 37.2-901 (Michie 2009).

<sup>11</sup> VA. CODE ANN. § 37.2-905(A) (Michie 2009).

<sup>12</sup> VA. CODE ANN. § 37.2-905.1 (Michie 2009). Virginia Code § 37.2-905 states that the Attorney General must make a decision on whether or not to pursue a civil commitment within 90 days of receiving a recommendation from the Commitment Review Committee.

<sup>13</sup> Va. Code Ann. § 37.2-906 (Michie 2009).

<sup>14</sup> *Id.*

<sup>15</sup> VA. CODE ANN. § 37.2-908(A) (Michie 2009). The former deadline was 90 days.

<sup>16</sup> VA. CODE ANN. § 37.2-907 (Michie 2009). The previous time deadline was 30 days prior to trial.

<sup>17</sup> *Id.* This is a new statutory restriction. The former version of the statute was silent as to what the repercussions would be if the respondent’s experts failed to meet the deadline for providing their reports.

<sup>18</sup> VA. CODE ANN. § 37.2-908(D) (Michie 2009).

additional continuance may be granted for good cause shown or by agreement of the parties.<sup>19</sup> 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.<sup>20</sup> 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.<sup>21</sup> 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”),<sup>22</sup> not just a “convenient location.”<sup>23</sup> 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.<sup>24</sup> The evaluation must now include a personal interview.<sup>25</sup> 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.<sup>26</sup> 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.<sup>27</sup> This new penalty is the same as for predators who escape from the custody of the DBHDS.<sup>28</sup>

### **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 Commitment Review Committee 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.<sup>29</sup> The engrossed version of

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<sup>19</sup> *Id.*

<sup>20</sup> VA. CODE ANN. § 37.2-908(E) (Michie 2009).

<sup>21</sup> VA. CODE ANN. § 37.2-913(B) (Michie 2009).

<sup>22</sup> The enacted bill refers to this agency by its previous name, the Department of Mental Health, Mental Retardation, and Substance Abuse Services. Its proper title, as of July 1, 2009, is the Virginia Department of Behavioral Health and Developmental Services. VA. CODE ANN. § 37.2-300 (Michie 2009).

<sup>23</sup> *Id.*

<sup>24</sup> *Id.*

<sup>25</sup> *Id.*

<sup>26</sup> VA. CODE ANN. § 37.2-913(B),(D) (Michie 2009).

<sup>27</sup> VA. CODE ANN. § 37.2-918) (Michie 2009).

<sup>28</sup> VA. CODE ANN. § 37.2-917 (Michie 2009).

<sup>29</sup> VA. CODE ANN. § 37.2-903(C) (Michie 2009).

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,” implying that videoconferencing equipment would not be required if the witness’ testimony would be helpful. 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.<sup>30</sup> 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 has been 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.<sup>31</sup> 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.<sup>32</sup> 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.

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<sup>30</sup> VA. CODE ANN. § 37.2-906(C) (Michie 2009).

<sup>31</sup> VA. CODE ANN. § 37.2-907 (Michie 2009).

<sup>32</sup> *Id.*



# VIRGINIA STATE CRIME COMMISSION

## SEXTING

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### AUTHORITY

The Code of Virginia, § 30-156, authorizes the Virginia State Crime Commission (“Crime Commission”) to study, report and make recommendations on all areas of public safety and protection. In so doing, the Crime Commission shall endeavor to ascertain the causes of crime and recommend ways to reduce and prevent it, explore and recommend methods of rehabilitation of convicted criminals, study compensation of persons in law enforcement and related fields and study other related matters including apprehension, trial and punishment of criminal offenders.<sup>1</sup> Section 30-158(3) empowers the Crime Commission to conduct studies and gather information and data in order to accomplish its purpose as set forth in § 30-156 ... and formulate its recommendations to the Governor and the General Assembly.

### BACKGROUND

The Virginia Joint Commission on Technology and Science made a special request to the Crime Commission 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 cell 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 cell phone to another. Sexting has increasingly attracted nationwide attention, as many of the participants taking and receiving such photos are 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.<sup>2</sup> More troubling, the study reported that 11% of young teenage girls, between the ages of 13 and 16, had done so.<sup>3</sup>

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

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<sup>1</sup> VA. CODE ANN § 30-156 (Michie 2009).

<sup>2</sup> NATIONAL CAMPAIGN TO PREVENT TEEN AND UNPLANNED PREGNANCY, SEX AND TECH: RESULTS FROM A SURVEY OF TEENS AND YOUNG ADULTS, 1, at [http://www.thenationalcampaign.org/sextech/PDF/SexTech\\_Summary.pdf](http://www.thenationalcampaign.org/sextech/PDF/SexTech_Summary.pdf) (last visited Nov. 21, 2009).

<sup>3</sup> *Id.*

simply possess such images may have violated child pornography laws, even if unintentionally,<sup>4</sup> and may incur severe repercussions, such as being placed on a sex offender registry.<sup>5</sup> 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 a "sexually explicit visual material which utilizes or has as a subject and identifiable minor."<sup>6</sup> "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 nudity is 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.<sup>7</sup>

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,

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<sup>4</sup> See Mike Brunker, 'Sexting' surprise: teens face child porn charges, Jan. 15, 2009, at <http://www.msnbc.msn.com/id/28679588> (last visited on Nov. 21, 2009).

<sup>5</sup> See, e.g., Deborah Feyerick and Sheila Steffen, 'Sexting' lands teens on sex offender list, Apr. 8, 2009, at <http://www.cnn.com/2009/CRIME/04/07/sexting.busts/index.html> (last visited on Nov. 21, 2009). It should be recognized, though, that the subject of this news story, Phillip Alpert, had turned 18 when he committed the act which led to his being charged, convicted, and placed on Florida's sex offender registry.

<sup>6</sup> VA. CODE ANN. § 18.2-374.1(A) (Michie 2009).

<sup>7</sup> *Id.*

or the depiction of covered or uncovered male genitals in a discernibly turgid state.<sup>8</sup>

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.<sup>9</sup>

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.<sup>10</sup> 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.<sup>11</sup>

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.<sup>12</sup> 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.<sup>13</sup> 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.<sup>14</sup> (A Class 6 felony carries from 1 to 5 years incarceration; a Class 5 felony carries from 1 to 10 years incarceration).<sup>15</sup> 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.<sup>16</sup> Similarly, the person sending the photos would be guilty of multiple offenses as well.<sup>17</sup>

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<sup>8</sup> VA. CODE ANN. § 18.2-390(2) (Michie 2009).

<sup>9</sup> See, e.g. Frantz v. Commonwealth, 9 Va. App. 348 (1990) (photos of naked boys who are not aroused nor engaging in sexual activity not meeting the definition of sexually explicit visual material); cf. Asa v. Commonwealth, 17 Va. App. 714 (1994) (photo of a naked teenager, standing, does not meet the definition of sexually explicit material, even though her breasts, buttocks and genitals are pictured, but a photo of her sitting with her knees drawn up to her breasts, with the camera’s eye focused on her genitals, does meet the definition).

<sup>10</sup> VA. CODE ANN. § 18.2-374.1(B) (Michie 2009).

<sup>11</sup> VA. CODE ANN. § 18.2-374.1(C1),(C2) (Michie 2009). While higher penalties exist under the statute if the defendant is at least seven years older than the victim, they obviously would not be relevant in this scenario. Also, the heightened penalties under this statute for a second or subsequent offense only apply to defendants at least seven years older than the victim, and similarly would never be applicable to a person taking a photo of himself or herself.

<sup>12</sup> The statute specifically includes “electronically transmits” as one of the ways in which this crime can be committed. VA. CODE ANN. § 18.2-374.1:1(C) (Michie 2009).

<sup>13</sup> *Id.* The definition of “mandatory minimum” is given by Virginia Code § 18.2-12.1. When a punishment carries a mandatory minimum, the judge must impose at least the mandatory minimum amount of time, and cannot suspend any portion thereof.

<sup>14</sup> VA. CODE ANN. § 18.2-374.1:1(A),(B) (Michie 2009).

<sup>15</sup> VA. CODE ANN. § 18.2-10 (Michie 2009).

<sup>16</sup> See Mason v. Commonwealth, 49 Va. App. 39 (2006).

<sup>17</sup> *Id.* See also Slavek v. Hinkle, 359 F. Supp. 2d 473 (E.D. Va. 2005).

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.<sup>18</sup> 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 sexted 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.<sup>19</sup> 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.<sup>20</sup> If the defendant is eighteen years of age or older, it is a Class 5 felony;<sup>21</sup> if he is a minor, it is a Class 6 felony.<sup>22</sup>

It should be pointed out that in most cases, juveniles found guilty<sup>23</sup> 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.<sup>24</sup> 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.<sup>25</sup> Even in extreme cases, juveniles may not be incarcerated past their twenty-first birthday.<sup>26</sup> 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.<sup>27</sup>

## **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.<sup>28</sup> Juveniles,

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<sup>18</sup> VA. CODE ANN. § 18.2-374.1:1(C) (Michie 2009).

<sup>19</sup> VA. CODE ANN. § 18.2-374.1(B)(1) (Michie 2009).

<sup>20</sup> VA. CODE ANN. § 18.2-374.3 (Michie 2009).

<sup>21</sup> VA. CODE ANN. § 18.2-374.3(E) (Michie 2009).

<sup>22</sup> VA. CODE ANN. § 18.2-374.1:1(B) (Michie 2009).

<sup>23</sup> Technically, juveniles are not found guilty of felonies in Virginia; they are “adjudicated delinquent of an offense that would be a felony if committed by an adult.”

<sup>24</sup> VA. CODE ANN. § 16.1-278.8 (Michie 2009).

<sup>25</sup> One of the stated purposes of the JDR courts is to “divert...within the juvenile justice system, to the extent possible...those children who can be cared for or treated through alternative programs.” VA. CODE ANN. § 16.1-227 (Michie 2009). Because of this legislatively mandated philosophy, JDR courts generally try to minimize incarceration, and focus instead on the rehabilitation of the juvenile.

<sup>26</sup> VA. CODE ANN. §§ 16.1-285, 16.1-285.1 (Michie 2009).

<sup>27</sup> VA. CODE ANN. § 16.1-272(A)(2) (Michie 2009).

<sup>28</sup> VA. CODE ANN. § 9.1-902 (Michie 2009). This statute, which lists all of the various crimes requiring registration,

however, 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.<sup>29</sup> 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.<sup>30</sup>

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<sup>31</sup>

## 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.<sup>32</sup> SORNA requires all states to create sex offender registries,<sup>33</sup> or risk reductions in the amount of Byrne funding they receive.<sup>34</sup> 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.<sup>35</sup> 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.<sup>36</sup> “Aggravated sexual abuse” involves physical contact with the victim, either carried out

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includes Virginia Code §§ 18.2-374.1 (producing child pornography; soliciting a minor to appear in child pornography), 18.2-374.12:1 (possession of child pornography; reproduction or distribution of child pornography; displaying child pornography), and 18.2-374.3 (use of a communications system to solicit a minor to appear in child pornography).

<sup>29</sup> VA. CODE ANN. § 9.1-902(G) (Michie 2009).

<sup>30</sup> *Id.*

<sup>31</sup> VA. CODE ANN. § 9.1-901(A) (Michie 2009).

<sup>32</sup> 42 U.S.C. § 16901 *et seq* (2009).

<sup>33</sup> 42 U.S.C. § 16912 (2009).

<sup>34</sup> 42 U.S.C. § 16925 (2009).

<sup>35</sup> 42 U.S.C. §§ 16911, 16915 (2009).

<sup>36</sup> 42 U.S.C. § 16911(8) (2009).

against the victim's will, or involving a child under the age of 12.<sup>37</sup> 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.<sup>38</sup> Juveniles who are convicted as adults are also subject to these registration requirements.<sup>39</sup> 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.<sup>40</sup>

## 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 to place 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 a safety and awareness issue. Therefore, the Crime Commission recommended that a letter be sent to the 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 Department of Education was already working on this and sent a letter to the members of the Crime Commission detailing their work.

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<sup>37</sup> 18 U.S.C. §§ 2241, 2246(2) (2009).

<sup>38</sup> 42 U.S.C. §§ 16911, 16915 (2009).

<sup>39</sup> National Guidelines for Sex Offender Registration and Notification, 73 Fed. Reg. 38,030, 38,050 (Jul. 2, 2008).

<sup>40</sup> Virginia currently requires adults who produce child pornography to register for life as sex offenders. VA. CODE ANN. §§ 9.1-902(E)(1), 9.1-908, 9.1-910 (Michie 2009). Adults who distribute child pornography must register for life, or at least 25 years. *Id.* Adults who possess child pornography must register for at least 15 years. *Id.* Adults convicted of a single count of possession of child pornography for an offense that occurred before July 1, 2006, do not have to register. VA. CODE ANN. § 9.1-902(B)(1) (Michie 2009). This lack of retroactive application is the one small aspect of Virginia's registration statutes governing child pornography offenses that does not meet the requirements of SORNA, as clarified by the United States Attorney General's Final Guidelines. *See* U.S. DEP. OF JUSTICE, OFFICE OF ATTORNEY GENERAL, NATIONAL GUIDELINES FOR SEX OFFENDER REGISTRATION AND NOTIFICATION, FINAL GUIDELINES, 16 (Jun. 2008). However, as this compliance problem only exists for adult convictions for offenses that occurred in the past, it does not have much relevance for the vast majority of sexting offenses as described in this report.

# **VIRGINIA STATE CRIME COMMISSION**

## **SEX OFFENDER REGISTRY (ADAM WALSH ACT)**

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### **AUTHORITY**

The Code of Virginia, § 30-156, authorizes the Virginia State Crime Commission (“Crime Commission”) to study, report and make recommendations on all areas of public safety and protection. In so doing, the Crime Commission shall endeavor to ascertain the causes of crime and recommend ways to reduce and prevent it, explore and recommend methods of rehabilitation of convicted criminals, study compensation of persons in law enforcement and related fields and study other related matters including apprehension, trial and punishment of criminal offenders.<sup>1</sup> Section 30-158(3) empowers the Crime Commission to conduct studies and gather information and data in order to accomplish its purpose as set forth in § 30-156 ... and formulate its recommendations to the Governor and the General Assembly.

### **BACKGROUND**

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),<sup>2</sup> 1928 (Lewis),<sup>3</sup> 1962 (Mathieson),<sup>4</sup> 1963 (Mathieson),<sup>5</sup> and 2274 (Poindexter).<sup>6</sup> 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.<sup>7</sup> It contains seven Titles, the first of which is known as the Sex Offender Registration and Notification Act, or (“SORNA.”)<sup>8</sup> 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

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<sup>1</sup> VA. CODE ANN § 30-156 (Michie 2009).

<sup>2</sup> H.B. 1898, 2009 Gen. Assem., Reg. Sess. (Va. 2009).

<sup>3</sup> H.B. 1928, 2009 Gen. Assem., Reg. Sess. (Va. 2009).

<sup>4</sup> H.B. 1962, 2009 Gen. Assem., Reg. Sess. (Va. 2009).

<sup>5</sup> H.B. 1963, 2009 Gen. Assem., Reg. Sess. (Va. 2009).

<sup>6</sup> H.B. 2274, 2009 Gen. Assem., Reg. Sess. (Va. 2009).

<sup>7</sup> Adam Walsh Child Protection and Safety Act of 2006, Pub. L. No. 109-248, 120 Stat. 587-650.

<sup>8</sup> 42 U.S.C. §§ 16901-16962 (2009).

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.<sup>9</sup> 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.<sup>10</sup> To date, only Ohio has been deemed in compliance.<sup>11</sup> 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.<sup>12</sup> 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.<sup>13</sup> 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.<sup>14</sup>

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.<sup>15</sup> In 2008, Senate Bill 590 was introduced in an attempt to bring other aspects of Virginia's registry laws into compliance with SORNA.<sup>16</sup> At that time, the preliminary fiscal impact statement from the Virginia Department of Planning and

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<sup>9</sup> 42 U.S.C. §16925 (2009). Byrne funds are more properly known as Bureau of Justice Assistance Edward Byrne Memorial State and Local Law Enforcement Assistance Grant Program.

<sup>10</sup> *Id.*

<sup>11</sup> Press Release, Office of Justice Programs, U.S. Dep. of Justice, Justice Department Announces First Two Jurisdictions to Implement Sex Offender Registration and Notification Act (Sept. 23, 2009), *available at* <http://www.ojp.usdoj.gov/newsroom/pressreleases/2009/SMART09154.htm> (last visited Nov. 25, 2009). The other jurisdiction is the Confederated Tribes of the Umatilla Indian Reservation, located in Oregon.

<sup>12</sup> Office of the Attorney General, Order No. 3081-2009 (May 26, 2009), *available at* (<http://www.ojp.usdoj.gov/smart/pdfs/sornaorder.pdf>) (last visited Nov. 25, 2009).

<sup>13</sup> *Blanket Extension*, SMART WATCH (Office of Sex Offender Sentencing, Monitoring, Apprehending, Registering and Tracking, U.S. Dep. of Justice, Washington D.C.), Summer 2009, [http://www.ojp.usdoj.gov/smart/smartwatch/09\\_august/pfv.html#blanket](http://www.ojp.usdoj.gov/smart/smartwatch/09_august/pfv.html#blanket) (last visited Nov. 25, 2009). “The Attorney General may authorize up to two 1-year extensions of the deadline.” 42 U.S.C. §16924(b) (2009).

<sup>14</sup> 42 U.S.C. §16912(b) (2009) (the A.G. shall issue guidelines and regulations to interpret and implement this title); 42 U.S.C. §16914(a)(7) (2009) (in addition to what is required by statute, the A.G. may require additional information to be submitted by the offender to the registry); 42 U.S.C. §16918 (2009) (in addition to what is required by statute, the A.G. may exempt other information about offenders from disclosure to the public).

<sup>15</sup> Information supplied by Virginia Department of Criminal Justice Services.

<sup>16</sup> S.B. 590, 2008 Gen. Assem., Reg. Sess. (Va. 2008). Among other things, the original bill made a first time offense of failure to register a felony, increased the verification times for violent sex offenders, and raised carnal knowledge from a registerable offense to a sexually violent offense.



Budget was over twelve million dollars for 2009, and over eight and a half million dollars for every year thereafter.<sup>17</sup>

## ANALYSIS

### **House Bill 1898**<sup>18</sup>

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

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

This requirement is not found in the relevant section of SORNA,<sup>19</sup> but is mandated by the United States Attorney General in the Final Guidelines,<sup>20</sup> pursuant to his authority to require states to maintain additional information on offenders.<sup>21</sup> 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.<sup>22</sup>

- The immigration status information of the registered offender.

This requirement is not found in the relevant section of SORNA,<sup>23</sup> but is mandated by the United States Attorney General in the Final Guidelines,<sup>24</sup> pursuant to his authority to require states to maintain additional information on offenders.<sup>25</sup> It should be noted that the Final Guidelines specifically prohibit providing any travel or immigration document numbers on the public registry website.<sup>26</sup>

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

This requirement is not found in the relevant section of SORNA,<sup>27</sup> but is mandated by the United States Attorney General in the Final Guidelines,<sup>28</sup> pursuant to his authority to require states to maintain additional information on offenders.<sup>29</sup>

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<sup>17</sup> See the attached impact statement for S.B. 590, 2008 Gen. Assem., Reg. Sess. (Va. 2008).

<sup>18</sup> H.B. 1898, 2009 Gen. Assem., Reg. Sess. (Va. 2009).

<sup>19</sup> 42 U.S.C. §16914 (2009).

<sup>20</sup> National Guidelines for Sex Offender Registration and Notification, 73 Fed. Reg. 38,030, 38,055 (Jul. 2, 2008). The Final Guidelines only refer to sex offenders' telephone numbers, not any telephone number they intend to use. It may be advisable to substitute more specific language than "intends to use," to make clear the reporting requirement is only for numbers that the offender regularly uses.

<sup>21</sup> 42 U.S.C. §16914(a)(7) (2009).

<sup>22</sup> National Guidelines for Sex Offender Registration and Notification, 73 Fed. Reg. 38,030, 38,054, 38,059 (Jun. 2008).

<sup>23</sup> 42 U.S.C. §16914 (2009).

<sup>24</sup> National Guidelines for Sex Offender Registration and Notification, 73 Fed. Reg. 38,030, 38,056 (Jul. 2, 2008).

<sup>25</sup> 42 U.S.C. §16914(a)(7) (2009).

<sup>26</sup> National Guidelines for Sex Offender Registration and Notification, 73 Fed. Reg. 38,030, 38,058 (Jul. 2, 2008).

<sup>27</sup> 42 U.S.C. §16914 (2009).

<sup>28</sup> National Guidelines for Sex Offender Registration and Notification, 73 Fed. Reg. 38,030, 38,056 (Jul. 2, 2008).

<sup>29</sup> 42 U.S.C. §16914(a)(7) (2009).

■ 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.”<sup>30</sup> 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.<sup>31</sup> 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.”<sup>32</sup> 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.<sup>33</sup> Therefore, if Virginia were to adopt this change, employing similar language might be preferable to the phrase “physical job site locations.” Including information on volunteer work is required by both SORNA<sup>34</sup> and the Final Guidelines.<sup>35</sup>

■ 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.<sup>36</sup> SORNA requires the offender to provide information on any vehicle “owned or operated” by him.<sup>37</sup> 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.”<sup>38</sup> 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.<sup>39</sup>

■ 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,<sup>40</sup> but is mandated by the United States Attorney General in the Final Guidelines,<sup>41</sup> pursuant to his authority to require states to maintain additional information on offenders.<sup>42</sup> 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

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<sup>30</sup> 42 U.S.C. §16914(a)(4) (2009).

<sup>31</sup> National Guidelines for Sex Offender Registration and Notification, 73 Fed. Reg. 38,030, 38,059 (Jul. 2, 2008).

<sup>32</sup> National Guidelines for Sex Offender Registration and Notification, 73 Fed. Reg. 38,030, 38,056 (Jul. 2, 2008).

<sup>33</sup> National Guidelines for Sex Offender Registration and Notification, 73 Fed. Reg. 38,030, 38,065-66 (Jul. 2, 2008).

<sup>34</sup> 42 U.S.C. §16911(12) (2009).

<sup>35</sup> National Guidelines for Sex Offender Registration and Notification, 73 Fed. Reg. 38,030, 38,056 (Jul. 2, 2008).

<sup>36</sup> VA. CODE ANN. § 9.1-903(B) (Michie 2009).

<sup>37</sup> 42 U.S.C. §16914(a)(6) (2009).

<sup>38</sup> National Guidelines for Sex Offender Registration and Notification, 73 Fed. Reg. 38,030, 38,057 (Jul. 2, 2008).

<sup>39</sup> National Guidelines for Sex Offender Registration and Notification, 73 Fed. Reg. 38,030, 38,059 (Jul. 2, 2008).

<sup>40</sup> 42 U.S.C. §16914 (2009).

<sup>41</sup> National Guidelines for Sex Offender Registration and Notification, 73 Fed. Reg. 38,030, 38,056 (Jul. 2, 2008).

<sup>42</sup> 42 U.S.C. §16914(a)(7) (2009).

Guidelines,<sup>43</sup> and while in person reporting is perfectly acceptable, it is not mandated.<sup>44</sup> (Only changes in name, residence, employment, or school attendance must be reported in person).<sup>45</sup>

■ 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.<sup>46</sup> Changing the time limit to seven days is not required by SORNA,<sup>47</sup> nor by the Final Guidelines, which also set a limit of thirty days.<sup>48</sup> Of course, Virginia would not be prohibited from making this change.<sup>49</sup>

■ 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.<sup>50</sup> Changing the time limit to seven days is not required by SORNA,<sup>51</sup> nor by the Final Guidelines.<sup>52</sup> Of course, Virginia would not be prohibited from making this change.<sup>53</sup>

### **House Bill 1928**<sup>54</sup>

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:

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. If his new residence is within the  
Commonwealth, the person shall register in  
person...within three days following his change in  
residence. If the new residence is located outside

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<sup>43</sup> National Guidelines for Sex Offender Registration and Notification, 73 Fed. Reg. 38,030, 38,066 (Jul. 2, 2008); *cf.* 42 U.S.C. §16913(c) (2009) (changes in residence must be reported not later than 3 business days after the change).

<sup>44</sup> National Guidelines for Sex Offender Registration and Notification, 73 Fed. Reg. 38,030, 38,067 (Jul. 2, 2008).

<sup>45</sup> 42 U.S.C. §16913(c) (2009); National Guidelines for Sex Offender Registration and Notification, 73 Fed. Reg. 38,030, 38,067 (Jul. 2, 2008).

<sup>46</sup> VA. CODE ANN. § 9.1-905 (Michie 2009).

<sup>47</sup> 42 U.S.C. §16914 (2009). SORNA only requires the registered offender to provide information on his residence, which is defined as his "home or other place where the individual habitually lives." 42 U.S.C. §16911(13) (2009).

<sup>48</sup> National Guidelines for Sex Offender Registration and Notification, 73 Fed. Reg. 38,030, 38,062 (Jul. 2, 2008), which further defines "habitually lives" as a period of thirty days or longer.

<sup>49</sup> "[J]urisdictions in their discretion may require registration more broadly (for example, based on presence in the jurisdiction for a period shorter than 30 days)." *Id.*

<sup>50</sup> VA. CODE ANN. § 9.1-905 (Michie 2009).

<sup>51</sup> 42 U.S.C. §16914 (2009).

<sup>52</sup> See National Guidelines for Sex Offender Registration and Notification, 73 Fed. Reg. 38,030, 38,056, 38,059, 38,066 (Jul. 2, 2008).

<sup>53</sup> National Guidelines for Sex Offender Registration and Notification, 73 Fed. Reg. 38,030, 38,062 (Jul. 2, 2008).

<sup>54</sup> H.B. 1928, 2009 Gen. Assem., Reg. Sess. (Va. 2009).

of the Commonwealth, the person shall register...  
within 10 days prior to his change of residence.<sup>55</sup>

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.”<sup>56</sup>

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.<sup>57</sup> 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.<sup>58</sup>

### **House Bill 1962**<sup>59</sup>

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 at initio*.<sup>60</sup> 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.<sup>61</sup>

### **House Bill 1963**<sup>62</sup>

House Bill 1963 would add a subsection to the statute that defines and lists all of the

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<sup>55</sup> VA. CODE ANN. § 9.1-904(A) (Michie 2009).

<sup>56</sup> 42 U.S.C. §16913(c) (2009).

<sup>57</sup> The Final Guidelines imply that the periodic in person verifications required for all registered offenders should be sufficient to keep track of an individual’s change in physical appearance over time. National Guidelines for Sex Offender Registration and Notification, 73 Fed. Reg. 38,030, 38,067 (Jul. 2, 2008).

<sup>58</sup> While extreme changes in appearance may be simple to recognize as “significant,” it is much more difficult when only slight changes are made. Would a change in hair color qualify as requiring reregistration? Growing a mustache? Losing fifteen pounds? The lack of certainty with this requirement might lead to either vagueness or due process challenges.

<sup>59</sup> H.B. 1962, 2009 Gen. Assem., Reg. Sess. (Va. 2009).

<sup>60</sup> Null from the beginning and without legal effect, as opposed to “voidable,” which requires a petition and a judicial finding before the order is then pronounced unenforceable. See BLACK’S LAW DICTIONARY 1411 (5<sup>th</sup> ed. 1979).

<sup>61</sup> 42 U.S.C. §16911(1) (2009); see National Guidelines for Sex Offender Registration and Notification, 73 Fed. Reg. 38,030, 38,050 (Jul. 2, 2008).

<sup>62</sup> H.B. 1963, 2009 Gen. Assem., Reg. Sess. (Va. 2009).

registerable offenses.<sup>63</sup> 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,<sup>64</sup> 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.<sup>65</sup> 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.<sup>66</sup>

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.<sup>67</sup>

### **House Bill 2274**<sup>68</sup>

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.<sup>69</sup> 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

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<sup>63</sup> VA. CODE ANN. § 9.1-902 (Michie 2009).

<sup>64</sup> For example, a first offense of sexual battery, in violation of Virginia Code § 18.2-67.4. VA. CODE ANN. § 9.1-902(B)(2) (Michie 2009).

<sup>65</sup> VA. CODE ANN. § 9.1-902 (Michie 2009).

<sup>66</sup> 42 U.S.C. § 16911 (2009); "a 'sex offender' as defined in SORNA [someone who must register] is a person who was 'convicted' of a sex offense." National Guidelines for Sex Offender Registration and Notification, 73 Fed. Reg. 38,030, 38,050 (Jul. 2, 2008). In other words, if a criminal defendant was convicted of a crime that meets the elements of a "sex offense," he must register, regardless of how his conviction or sentencing are styled.

<sup>67</sup> As discussed in note 65, SORNA requires registration if there is a conviction, and the conviction involved a crime that meets the definition of a "sex offense," as it is further defined. By means of illustration, an adult convicted of soliciting a prostitute would not have to register if the prostitute were an adult; he would have to register if the prostitute were a minor. 42 U.S.C. § 16911 (2009). The requirement to register is triggered by the age of the victim, not what the final order of conviction states. In this way, two defendants could be convicted of the same "offense," under the same statute, yet only one of them would be required to register. The deciding factor, the age of the victim, might have to be determined by looking beyond the final court order, and examining the facts of the case.

<sup>68</sup> H.B. 2274, 2009 Gen. Assem., Reg. Sess. (Va. 2009).

<sup>69</sup> VA. CODE ANN. § 9.1-913 (Michie 2009).

determine is necessary to preserve public safety....”<sup>70</sup> 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,<sup>71</sup> and that all registry information, with a few exceptions, be made available to the general public via the Internet.<sup>72</sup> One of the exceptions, though, is for any information that is exempted from public disclosure by the United States Attorney General.<sup>73</sup> 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.<sup>74</sup> 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.<sup>75</sup>

### **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:<sup>76</sup>

■ 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,<sup>77</sup> 18.2-374.1:1,<sup>78</sup> or 18.2-91<sup>79</sup> with an intent to commit a felony listed in Virginia Code § 9.1-902,<sup>80</sup> do not require registration.<sup>81</sup> 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.<sup>82</sup>

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<sup>70</sup> *Id.*

<sup>71</sup> 42 U.S.C. § 16914(b)(3) (2009).

<sup>72</sup> 42 U.S.C. § 16918 (2009).

<sup>73</sup> *Id.* at subsection (b)(4).

<sup>74</sup> National Guidelines for Sex Offender Registration and Notification, 73 Fed. Reg. 38,030, 38,059 (Jul. 2, 2008). The Final Guidelines go on to state that “All other types of registration information are excluded from required Web site posting....” *Id.*

<sup>75</sup> The possibility always remains, for this requirement as for all others, that in the future the office of the United States Attorney General might change the requirements for a state to be deemed as having “substantially implemented” the provisions of SORNA.

<sup>76</sup> The following is not an exhaustive list of every change that Virginia might have to make, which of course, depends upon the determinations made by the United States Attorney General, and could change over time or from administration to administration. 42 U.S.C. § 16925 (2009). The list only reflects the major discrepancies between Virginia’s laws, SORNA, and the Final Guidelines as they now exist.

<sup>77</sup> A third conviction for the listed sexual misdemeanors in this statute (e.g., sexual battery, consensual intercourse with a minor 15 years of age or older) is a Class 6 felony. VA. CODE ANN. § 18.2-67.5:1 (Michie 2009).

<sup>78</sup> First time possession of child pornography. VA. CODE ANN. § 18.2-374.1:1 (Michie 2009).

<sup>79</sup> Statutory burglary with the intent to commit assault and battery, larceny, or any felony other than murder, rape, robbery or arson. VA. CODE ANN. § 18.2-91 (Michie 2009).

<sup>80</sup> The list of offenses that require registration. VA. CODE ANN. § 9.1-902 (Michie 2009). In other words, burglary with the intent to commit a registerable offense that is a felony will itself require registration upon conviction, but only if the burglary occurred on or after July 1, 2006.

<sup>81</sup> VA. CODE ANN. § 9.1-902(B)(1) (Michie 2009).

<sup>82</sup> National Guidelines for Sex Offender Registration and Notification, 73 Fed. Reg. 38,030, 38,046 (Jul. 2, 2008); *see* Applicability of the Sex Offender Registration and Notification Act, 28 C.F.R. § 72.3 (2009); 72 Fed. Reg. 8894, 8895-96 (Feb. 28, 2007); 42 U.S.C. § 16913(d) (2009).

■ A first offense of failing to register or reregister 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.<sup>83</sup> (A second violation is a Class 6 felony,<sup>84</sup> as is a first violation if the offender was convicted of a sexually violent offense).<sup>85</sup> 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.”<sup>86</sup> Because a Class 1 misdemeanor carries a maximum term of imprisonment of twelve months,<sup>87</sup> 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.<sup>88</sup> However, these offenses, for a first conviction, do not qualify as “sexually violent offenses,”<sup>89</sup> which means an offender can petition to have his name removed from the registry after 15 years.<sup>90</sup> (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,”<sup>91</sup> and the registry requirements would be for life).<sup>92</sup> SORNA requires that any kidnapping offense involving a minor, unless committed by a parent or guardian, result in lifetime registration.<sup>93</sup>

■ Not all convictions for sexual battery result in registration.

Sexual battery in Virginia is a Class 1 misdemeanor.<sup>94</sup> While some sexual battery offenses that involve minors or multiple convictions can result in registration,<sup>95</sup> 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.<sup>96</sup> If the sexual offense involves a minor, it must result in registration for at least 25 years.<sup>97</sup>

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<sup>83</sup> VA. CODE ANN. § 18.2-472.1(A) (Michie 2009). This offense also includes providing materially false information when registering.

<sup>84</sup> *Id.*

<sup>85</sup> VA. CODE ANN. § 18.2-472.1(B) (Michie 2009).

<sup>86</sup> 42 U.S.C. § 16913(e) (2009). It should be noted that SORNA does not require any minimum term of imprisonment for such violations.

<sup>87</sup> VA. CODE ANN. § 18.2-11 (Michie 2009).

<sup>88</sup> Virginia Code § 18.2-47 is the generic abduction statute. Abduction with the intent to extort money is criminalized in Virginia Code § 18.2-48(i); abduction with the intent to defile is criminalized in Virginia Code § 18.2-48(ii). Parental abduction is criminalized in subsection (D) of Virginia Code § 18.2-47.

<sup>89</sup> VA. CODE ANN. § 9.1-902(B)(2) (Michie 2009). A second conviction for either of these offenses, however, would qualify as a conviction for a “sexually violent offense.” VA. CODE ANN. § 9.1-902(E)(2) (Michie 2009).

<sup>90</sup> VA. CODE ANN. § 9.1-910 (Michie 2009).

<sup>91</sup> VA. CODE ANN. § 9.1-902(E)(1) (Michie 2009).

<sup>92</sup> VA. CODE ANN. §§ 9.1-908, 9.1-910 (Michie 2009).

<sup>93</sup> 42 U.S.C. §§ 16911(4)(B), 16911(5)(A)(ii), 16911(7)(A), 16915(a)(3) (2009).

<sup>94</sup> VA. CODE ANN. § 18.2-67.4 (Michie 2009).

<sup>95</sup> VA. CODE ANN. § 9.1-902(E)(1) (Michie 2009) (sexual battery by an adult where the victim is under the age of six); VA. CODE ANN. § 9.1-902(B)(1) (Michie 2009) (third or subsequent conviction of sexual battery).

<sup>96</sup> 42 U.S.C. § 16911(5)(A)(i) (2009).

<sup>97</sup> 42 U.S.C. §§ 16911(3)(A)(iv), 16911(5)(A)(ii), 16911(7)(I) (2009).

■ 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.<sup>98</sup> 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,”<sup>99</sup> and the registration is for life.<sup>100</sup> Otherwise, the offender can petition to have his name removed from the registry after 15 years.<sup>101</sup> 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,<sup>102</sup> if the difference in age between the offender and the victim was more than four years.<sup>103</sup> 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.<sup>104</sup> 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.<sup>105</sup>

■ 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.<sup>106</sup> (Juveniles who are tried as adults for an offense that requires registration must register if convicted).<sup>107</sup> 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,<sup>108</sup> be registered, without exception.<sup>109</sup>

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<sup>98</sup> VA. CODE ANN. § 9.1-902 (Michie 2009). The crime of carnal knowledge involves consensual sexual activity with a minor between 13 and 15 years of age. VA. CODE ANN. § 18.2-63 (Michie 2009).

<sup>99</sup> VA. CODE ANN. § 9.1-902(E)(1) (Michie 2009).

<sup>100</sup> VA. CODE ANN. §§ 9.1-908, 9.1-910 (Michie 2009).

<sup>101</sup> VA. CODE ANN. § 9.1-910 (Michie 2009).

<sup>102</sup> 42 U.S.C. §§ 16911(3)(A)(iv), 16915(a)(2) (2009). The definition of “abusive sexual contact” provided in 42 U.S.C. § 16911(3)(A)(iv) references 18 U.S.C. § 2244, which in turn references 18 U.S.C. § 2243, and includes a “sexual act with another person who (1) has attained the age of 12 years but has not attained the age of 16 years; and (2) is at least four years younger than the person so engaging.” 18 U.S.C. § 2243(a) (2009).

<sup>103</sup> See 42 U.S.C. § 16911(5)(C) (2009).

<sup>104</sup> VA. CODE ANN. § 9.1-907(C) (Michie 2009).

<sup>105</sup> 42 U.S.C. §§ 16916(3) (2009).

<sup>106</sup> VA. CODE ANN. § 9.1-902(G) (Michie 2009).

<sup>107</sup> VA. CODE ANN. § 9.1-901 (Michie 2009).

<sup>108</sup> Aggravated sexual abuse is essentially a sexual act carried out against the victim’s will, through force, threat, or rendering the victim unconscious, or a sexual act carried out with a victim under the age of 12. 18 U.S.C. § 2241 (2009). The term “aggravated sexual abuse” generally corresponds to Virginia’s crimes of rape, forcible sodomy, forcible object penetration, and aggravated sexual battery.



## 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.

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<sup>109</sup> 42 U.S.C. § 16911(8) (2009).

# VIRGINIA STATE CRIME COMMISSION

## MELLENDEZ-DIAZ V. MASSACHUSETTS

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### AUTHORITY

The Code of Virginia, § 30-156, authorizes the Virginia State Crime Commission (“Crime Commission”) to study, report and make recommendations on all areas of public safety and protection. In so doing, the Crime Commission shall endeavor to ascertain the causes of crime and recommend ways to reduce and prevent it, explore and recommend methods of rehabilitation of convicted criminals, study compensation of persons in law enforcement and related fields and study other related matters including apprehension, trial and punishment of criminal offenders.<sup>1</sup> Section 30-158(3) empowers the Crime Commission to conduct studies and gather information and data in order to accomplish its purpose as set forth in § 30-156 ... and formulate its recommendations to the Governor and the General Assembly.

### BACKGROUND

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 State 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.<sup>2</sup> 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.<sup>3</sup> Crawford, therefore, amounted to a

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<sup>1</sup> VA. CODE ANN § 30-156 (Michie 2009).

<sup>2</sup> Crawford v. Washington, 541 U.S. 36 (2004).

<sup>3</sup> *Id.* at 60, citing Ohio v. Roberts, 448 U.S. 56, 66 (1980).

reversal of the holding in Ohio v. Roberts<sup>4</sup> 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.”<sup>5</sup> 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.<sup>6</sup> 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.<sup>7</sup> 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.<sup>8</sup>

Therefore, the Crawford opinion clearly foreshadows the holding of Melendez-Diaz v. Massachusetts.<sup>9</sup> In Melendez, 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.<sup>10</sup> Justice Scalia notes that a defendant could waive his right to cross-examine the lab analyst who prepared the certificate.<sup>11</sup> 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

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<sup>4</sup> Ohio v. Roberts, 448 U.S. 56 (1980).

<sup>5</sup> Crawford v. Washington, 541 U.S. 36, 68 (2004).

<sup>6</sup> *Id.* at 44, 62.

<sup>7</sup> *Id.*

<sup>8</sup> *Id.* at 56.

<sup>9</sup> Melendez-Diaz v. Massachusetts, 557 U.S. \_\_\_, 129 S. Ct. 2527 (2009).

<sup>10</sup> *Id.*

<sup>11</sup> *Id.* at 2534, note 3, 2542.

prosecution to present its witnesses, not on the defendant to bring those adverse witnesses into court.”<sup>12</sup>

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.<sup>13</sup> 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.<sup>14</sup>

### **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.<sup>15</sup> 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.<sup>16</sup>

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.<sup>17</sup> The affidavit must be delivered to the defendant, or his attorney, no later than 28 days prior to trial.<sup>18</sup> 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

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<sup>12</sup> *Id.* at 2540.

<sup>13</sup> “Additionally, documents prepared in the regular course of equipment maintenance may well qualify as nontestimonial records.” *Id.* at 2532, note 1.

<sup>14</sup> “It is up to the prosecution to decide what steps in the chain of custody are so crucial as to require evidence; but what testimony *is* introduced must (if the defendant objects) be introduced live.” *Id.*

<sup>15</sup> VA. CODE ANN. § 19.2-243 (Michie 2009). The speedy trial statute only applies to circuit court trials, but it requires the dismissal of charges, with prejudice, if trial is not commenced within a certain amount of time after the case comes to the circuit court. Faced with a speedy trial deadline, prosecutors must either initiate the prosecution before the deadline expires, or must nolle prosequere the charge, and initiate the case again, usually with a direct indictment.

<sup>16</sup> VA. CODE ANN. §§ 18.2-472.1, 19.2-187.1 (Michie 2009); 2009 Special Session I Va. Acts chs. 1, 4.

<sup>17</sup> VA. CODE ANN. §§ 18.2-472.1, 19.2-187.1 (Michie 2009); 2009 Special Session I Va. Acts chs. 1, 4.

<sup>18</sup> *Id.*

insists the witness testify and the witness is unavailable on the day of trial.<sup>19</sup> 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.<sup>20</sup> 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.<sup>21</sup> 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.<sup>22</sup>

## **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.<sup>23</sup> 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

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<sup>19</sup> *Id.* For juveniles being tried in a JDR district court, the time limitations imposed on the Commonwealth by Virginia Code § 16.1-277.1 are similarly extended if the defendant makes such an objection. VA. CODE ANN. § 16.1-277.1 (Michie 2009); 2009 Special Session I Va. Acts chs. 1, 4.

<sup>20</sup> VA. CODE ANN. §§ 18.2-472.1(H), 19.2-187.1(B) (Michie 2009); 2009 Special Session I Va. Acts chs. 1, 4. Note that the objection must be made within 14 days of when the Commonwealth delivered the notice and filed a copy with the court, not when the defendant actually received the notice. Due to the delivery times involved with sending the notice through the mail, most defendants will likely have slightly fewer than 14 days in which to respond with their objection. Any objection by the defendant regarding the failure of the Commonwealth to provide notice within the statutory time deadlines must be made when the notice is received, or before the start of trial. The remedy for the defendant, though, is only that a continuance will be granted. *Id.*

<sup>21</sup> VA. CODE ANN. § 19.2-243 (Michie 2009); 2009 Special Session I Va. Acts chs. 1, 4.

<sup>22</sup> VA. CODE ANN. §§ 18.2-472.1(I), 19.2-187.1(C) (Michie 2009); 2009 Special Session I Va. Acts chs. 1, 4.

<sup>23</sup> All data about subpoenas and court appearances was obtained from the Virginia Department of Forensic Science.

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.<sup>24</sup> 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.<sup>25</sup> 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.”<sup>26</sup>

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

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<sup>24</sup> Maryland v. Craig, 497 U.S. 836 (1990). Cf. VA. CODE ANN. § 18.2-67.9 (Michie 2009) (which allows child testimony in such cases only if the testimony is delivered via two-way closed circuit television).

<sup>25</sup> Maryland v. Craig, 497 U.S. 836 (1990).

<sup>26</sup> *Id.* at 870.

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.<sup>27</sup> 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.<sup>28</sup> 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 four to six 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.

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<sup>27</sup> See United States v. Bordeaux, 400 F.3d 548 (8<sup>th</sup> Cir. 2005); United States v. Weekley, 130 F.3d 747 (6<sup>th</sup> Cir. 1997); United States v. Quintero, 21 F.3d 885 (9<sup>th</sup> Cir. 1994); United States v. Carrier, 9 F.3d 867 (10<sup>th</sup> Cir. 1993). To date there have not been any direct rulings on this issue in the United States Court of Appeals for the Fourth Circuit.

<sup>28</sup> United States v. Gigante, 166 F.3d 75 (2d Cir. 1999). The Second Circuit did not apply the Maryland v. Craig two factor test, but announced a new test which is also fairly stringent—to permit two-way video testimony, the trial court must find that there are exceptional circumstances, and the use of the video testimony must be necessary to further the interest of justice. *Id.*