VIRGINIA STATE
CRIME COMMISSION




2010

ANNUAL REPORT

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June 23, 2011

TO: The Honorable Robert F. McDonnell, Governor of Virginia
The Honorable Members of the General Assembly of Virginia

Pursuant to the provisions of the Code of Virginia §§ 30-156 through 30-164 establishing the Virginia State Crime Commission and setting forth its purpose, I have the honor of submitting herewith the Commission's 2010 Annual Report.

Very truly yours,

Senator Janet D. Howell, Chair

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Authority of the Crime Commission

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

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

Members of the Crime Commission

Senate Appointments

The Honorable Janet D. Howell, Chair
The Honorable Henry L. Marsh, III
The Honorable Thomas K. Norment, Jr.

House of Delegate Appointments

The Honorable Robert B. Bell, Vice-Chair
The Honorable Ward L. Armstrong
The Honorable Terry G. Kilgore
The Honorable G. M. (Manoli) Loupassi
The Honorable Beverly J. Sherwood
The Honorable Onzlee Ware

Attorney General

The Honorable Kenneth T. Cuccinelli, II

Governor's Appointments

Mr. Glenn R. Croshaw
Colonel W. Gerald Massengill
The Honorable Richard E. Trodden

Crime Commission Staff

Kristen J. Howard, Executive Director
G. Stewart Petoe, Director of Legal Affairs

Christina Barnes Arrington, Ph.D., Senior Methodologist
Holly B. Boyle, Policy Analyst
Thomas E. Cleator, Senior Staff Attorney

Steven D. Benjamin, Special Counsel

Virginia State Crime Commission
Patrick Henry Building
1111 East Broad Street
Suite B036
Richmond, Virginia 23219

Website: http://vscc.virginia.gov

Protective Order Work Group Membership

Chair

The Honorable Richard E. Trodden*
Arlington Commonwealth's Attorney

Virginia Senate

The Honorable Henry L. Marsh, III*

Virginia House of Delegates

The Honorable David B. Albo
The Honorable Robert B. Bell*
The Honorable Ward L. Armstrong*
The Honorable Terry G. Kilgore*

Inspector John Anderson
Hopewell Police Department

Linda Bryant, Deputy Commonwealth's Attorney
Norfolk Commonwealth's Attorney's Office

Mason Byrd , Magistrate Advisor
Office of the Executive Secretary
Supreme Court of Virginia

Captain Ben L. Cook
Vinton Police Department

Pam Cooke, Director
Campbell County Victim-Witness Assistance Program

Chief DeWitt Cooper
Warsaw Police Department

Glenn Croshaw*
Willcox & Savage

Gary Dillon, Accreditation Coordinator
Department of Criminal Justice Services

Major H. Wayne Duff, Jr., Deputy Chief of Police
Lynchburg Police Department

Phil Evans, Deputy Commonwealth's Attorney
Norfolk Commonwealth's Attorney's Office

Sheriff Vernie Francis
Southampton County Sheriff's Office

Charles James, Chief Deputy Attorney General
Office of the Attorney General

The Honorable Christy Jett, Clerk
Spotsylvania County Circuit Court

John Jones, Executive Director
Virginia Sheriffs' Association

Thomas Kohlbeck, Criminal Justice Program Analyst, Virginia State Police, and
Domestic Violence Program Coordinator
Virginia Association of Chiefs of Police

Ruth Lipp, Court Management Analyst
Office of the Executive Secretary
Supreme Court of Virginia

The Honorable Bradley T. Mead, Magistrate
6th Judicial District
(Hopewell and surrounding localities)

The Honorable Virginia Munoz, Chief Magistrate
9th Judicial Circuit
(Williamsburg and surrounding localities)

Mandie Patterson, Criminal Justice Manager
Department of Criminal Justice Services

Major Mike Pinson
Arlington County Sheriff's Office

The Honorable Catherine Ratliff, Clerk
Halifax Juvenile and Domestic Relations District Court

Dana Schrad, Executive Director
Virginia Association of Chiefs of Police

Major Bob Tavenner
Virginia State Police

Kristi VanAudenhove, Co-Director
VA Sexual and Domestic Violence Action Alliance

Susheela Varky, Staff Attorney
Virginia Poverty Law Center

Captain Kim Wilson, Special Operations Division Commander
Portsmouth Police Department

Corie Wolf, Assistant Attorney General
Office of the Attorney General

Kristi Wright, Staff Attorney
Office of the Executive Secretary
Supreme Court of Virginia

Lewis Wright, Intake Supervisor
14th District Court Service Unit

** Crime Commission Member*
*** Special Counsel to the Crime Commission*

Law Enforcement Work Group Membership

Chair
Colonel W. Gerald Massengill*
Retired Virginia State Police Superintendant

Virginia Senate
The Honorable Janet D. Howell**
The Honorable Thomas K. Norment, Jr.*
The Honorable Toddy Puller

Virginia House of Delegates
The Honorable David B. Albo
The Honorable Kenneth C. Alexander
The Honorable G. M. (Manoli) Loupassi*
The Honorable Delores L. McQuinn
The Honorable Beverley J. Sherwood*

Shawn Armbrust, Executive Director
Mid-Atlantic Innocence Project

Sergeant Lee Bailey
New Kent County Sheriff's Office

Steven Benjamin***
Benjamin and DesPortes, P.C

Thomas Bullock, Law Enforcement Specialist
Virginia Municipal League

Captain Steve Chumley
Virginia State Police

Steven Clark, Criminal Justice Analyst
Department of Criminal Justice Services

Sheriff J. D. "Danny" Diggs
York-Poquoson County Sheriff's Office

Shannon Dion, Assistant Attorney General
Office of the Attorney General

The Honorable Michael Doucette
Commonwealth's Attorney for Lynchburg

Colonel Thierry Dupuis, Chief of Police
Chesterfield County Police Department

Phyllis A. Errico, Esq., General Counsel
Virginia Association of Counties

Captain Pat Gallagher
Virginia Beach Police Department

Brandon Garrett, Associate Professor of Law
University of Virginia School of Law

Chief Doug Goodman
Ashland Police Department

Ben Greenberg, Legislative Director
VA Organizing Project

Sheriff Charles Jett
Stafford County Sheriff's Office

John Jones, Executive Director
Virginia Sheriffs' Association

Don LeMond, Director of Risk Management
Division of Risk Management
Department of the Treasury

Chief Kim Lettner
Division of Capitol Police

Assistant Chief David McCoy
Richmond Police Department

Major Edwin Roessler, Jr.
Fairfax County Police Department

Dana Schrad, Executive Director
Virginia Association of Chiefs of Police

Rupen Shah, Assistant Commonwealth's Attorney
Office of the Commonwealth's Attorney for Augusta

Chief Henry Stanley, Jr.
Henrico County Police Division

Chief John Venuti
VCU Police Department

Chief Steve Williams
Hillsville Police Department

** Crime Commission Member*
*** Chair of the Crime Commission*
**** Special Counsel to the Crime Commission*

2010 Summary of Activities

Throughout 2010, the Crime Commission held three meetings: September 8, November 15, and December 8. In addition to full Commission meetings, two work groups were created to review numerous bill referrals. The Law Enforcement Work Group met June 16 and the Protective Order Work Group met June 22.

During the 2010 General Assembly Session, a total of one mandated study and twelve bill referrals were sent to the Commission for review. Additionally, the Commission completed its work on the ongoing juvenile justice transfer and certification study. Staff continues to be involved in the Forensic Science Board's DNA Notification Project.

The Commission was mandated by House Joint Resolution 97 to study the penalties for taking indecent liberties with children and prostitution-related offenses involving children. The Commission was also requested to study the disparity in penalties attached to statutes prohibiting taking indecent liberties with children and the actual penalties applied to persons convicted of these offenses; how many actions have been brought for withholding wages, pandering/pimping, and soliciting for prostitution; and the process a child goes through if arrested for violating prostitution-related offenses. As part of this study, staff requested data from the Virginia Criminal Sentencing Commission, the Virginia State Police and the Virginia Department of Labor and Industry. A final report will be published as a 2011 House Document.

As previously mentioned, the Commission formed a Law Enforcement Work Group, comprised of approximately thirty members, which included Crime Commission members and representatives from around the state. The group was tasked with reviewing law enforcement issues, specifically emergency response and lineups. Senate Bill 847 (emergency vehicles proceeding past red lights) was referred to the Commission for study during the 2009 Session, but was deferred due to a pending civil lawsuit, which was settled in January 2010. In addition to reviewing emergency vehicles proceeding past red lights, the topic of police pursuits was also incorporated as a part of the law enforcement emergency response study. Staff developed a comprehensive survey which was distributed to all Virginia law enforcement agencies in an effort to obtain data on pursuits, as well as a review of law enforcement agency pursuit and emergency response policies.

The Work Group also discussed House Bill 207 (police lineups), which was referred to the Commission for study during the 2010 Session of the General Assembly. Staff created a brief survey, which was distributed to all law enforcement agencies to ascertain the current status of department lineup policies.

A second work group was created to review seven bill referrals sent to the Commission for study, dealing with protective orders, specifically, who can obtain protective orders, service of protective orders, use of GPS monitoring devices, and penalties for violation of protective orders. The Protective Order Work Group was also comprised of about thirty members and included Crime Commission members and representatives from around the state. The following bills were reviewed:

- Senate Bill 208 (Adds dating relationships to protective orders);
- House Bill 164 (Allows GPS monitoring for people subject to a protective order);
- House Bill 216 (Penalties for violation of protective order);

- House Bill 285 (Adds companion animals to protective orders);
- House Bill 453 (Service of protective orders);
- House Bill 656 (Allows GPS monitoring for people subject to a protective order); and,
- House Bill 1156 (Minors may petition for protective order).

In addition to the ongoing juvenile transfer and certification study, two bills related to juvenile transfer were referred to the Commission this past Session for review: Senate Bill 205 (right in certain violent felony cases to appeal to circuit court) and Senate Bill 389 (offenses for which a juvenile is subject to transfer). Staff obtained new and updated data from the Department of Juvenile Justice, the Supreme Court of Virginia, and the Virginia Criminal Sentencing Commission regarding the number of juveniles who are considered for transfer, the number of juveniles who are transferred, and juvenile convictions in circuit court, respectively. Lastly, Senate Bill 287 (Law Enforcement Officers Procedural Guarantee Act) was referred to the Commission for review this year. The Commission studied this same issue in 1992 and updated those findings in reviewing the bill.

During 2010, two additional issues came to the attention of Commission members and were added to this year's study work plan – synthetic marijuana and familial DNA searching. In light of recent events, both nationwide and in Virginia, staff was requested to review legislation criminalizing synthetic marijuana, also known as "spice" or "K2." Staff consulted with the Board of Pharmacy and the Department of Forensic Science regarding the list of chemical ingredients found in synthetic marijuana. Due to two recent violent crimes committed in Virginia, members requested staff to examine issues related to familial DNA searching. To date, Colorado and California are the only two states that have developed software to perform these searches. Representatives from each state provided presentations at the November Commission meeting on their success of using this new technique to identify criminal suspects who may have otherwise gone unidentified. Members of the Commission are supportive of this new technology and are interested in seeing Virginia pursue this technique to solve violent crimes using the Virginia DNA databank.

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

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

DNA Notification Project

The Crime Commission is currently involved in a project regarding old laboratory files from the Virginia Department of Forensic Science (DFS). The Virginia Department of Forensic Science found physical evidence in old case files from investigations that now may be suitable for DNA testing. DNA testing of this evidence was not possible years ago when the cases were investigated and tried in court. Testing this DNA may provide evidence that could show whether the individuals were guilty or innocent of the crime for which they were convicted.

In December 2005, former Governor Mark Warner ordered a full review and DNA testing of any biological evidence remaining in DFS's archived files from 1973-1988 of those individuals who were convicted. During the 2008 and 2009 Sessions of the General Assembly, Budget language and Senate Bill 1391 were passed, respectively, directing the Forensic Science Board to ensure that in all cases where laboratory case files containing biological evidence suitable for DNA testing exists, the relevant individuals are informed that such evidence exists and is available for testing.

The Crime Commission's Executive Director serves as a member of the Forensic Science Board and is the Chair of the DNA Notification Subcommittee, which is charged with the oversight of this notification project. Crime Commission staff is responsible for confirming the notification of all individuals who meet the relevant criteria: a criminal conviction, and files containing evidence from their case that is available for testing. Additionally, staff is assisting in identifying the most current address for these individuals in order to expedite notification. This responsibility has involved countless hours of managing various databases and spreadsheets to either confirm notifications or to locate individuals.

Pro bono attorneys and law school students have been recruited to assist in the notification, as well as identifying the location of these individuals. Crime Commission staff is responsible for managing the assignment of pro bono attorneys to cases, where they are charged with carrying out face-to-face notifications. These face-to-face notifications allow the convicted persons to be notified that evidence in their case is currently available for testing and they may obtain the results of any DNA testing performed if they wish. In conjunction with the Mid-Atlantic Innocence Project, the Crime Commission has helped develop training materials and assisted in the coordination of multiple training sessions statewide for pro bono attorneys.

It is anticipated that this project will continue, at a minimum, through June of 2012.

Familial DNA Searching

Familial DNA searching gained widespread attention in the summer of 2010 when it was successfully used in California to identify and led to the arrest of, the "Grim Sleeper" serial killer, after decades of police investigations. Due to two recent violent crimes committed in Virginia, Crime Commission members requested staff to examine issues related to familial DNA searching.[1]

Familial DNA searching is a process used in attempting to identify a close blood relative (typically a parent, child, or sibling) of a perpetrator of a crime when the DNA profile of the specific perpetrator is not found after a search of the jurisdiction's DNA database. Familial DNA searches would produce DNA profile leads that would be available to law enforcement to assist them in their investigation. Currently, familial DNA searching is being used in California, Colorado, the United Kingdom, New Zealand, and now, Virginia. The Forensic Science Board discussed this issue at length and supported moving forward with familial DNA searching in Virginia. Additionally, the Virginia Commonwealth's Attorneys' Association passed a resolution in 2010 to support its use.

Former California prosecutor Rockne Harmon, and Denver, Colorado's District Attorney Mitch Morrissey presented at the November 15, 2010, Crime Commission meeting on their success with using this new technique to identify criminal suspects who may have otherwise gone unidentified. Presentations included background information on familial DNA searching, details of success and convictions in Colorado, California and the UK, policies and procedures for using the technology, and privacy concerns. Members also heard a detailed presentation from The Virginia Department of Forensic Science (DFS) representatives. It is important to note that Virginia's DNA databank of approximately 320,000 offender profiles is much smaller in comparison to California's databank of over 1.3 million offender profiles, but more than double the size of Colorado's 127,000 offender profiles. Crime Commission members discussed issues related to concerns regarding software validation, implementation/support costs, whether legislation in Virginia is necessary, and protocols/policies for when to conduct these searches. The Crime Commission, concurrent with the opinion of the Office of the Attorney General's Office, concluded that legislation would not be necessary to implement these searches in Virginia. Members of the Commission are supportive of the new familial DNA technology and are interested in seeing Virginia pursue its adoption in order to solve violent crimes using the Virginia DNA databank.

In December of 2010, the Denver District Attorney's Office shared with DFS, free of charge, the use of their familial DNA searching software program. The Department of Forensic Science's laboratory personnel reviewed and validated Denver's software as to its suitability for searching Virginia DNA databank profiles. On March 21, 2011, Governor Bob McDonnell announced that DFS had developed the capability to perform familial DNA searches. Policies and procedures have been established by DFS and reviewed by the Forensic Science Board both to identify cases appropriate for such searches and to conduct the necessary follow up investigations. With this new technology, law enforcement may be able to close unsolved violent crimes cases in the Commonwealth.

[1] The Commission has consistently been involved with the implementation of advanced DNA technology in Virginia and was instrumental in the creation of the Virginia Department of Forensic Science as an independent lab. Additionally, the Commission's Executive Director serves as a member of the Forensic Science Board pursuant to the Code of Virginia § 9.1-1109(A)(7).

Indecent Liberties and Prostitution Offenses Involving Children

Executive Summary

During the 2010 Session of the Virginia General Assembly, Delegate David Bulova introduced House Joint Resolution 97 (HJR 97), directing the Crime Commission to study a number of criminal justice issues connected with the crimes of taking indecent liberties and prostitution-related offenses involving children.[1] Specifically, the Crime Commission was directed to collect and review recent data related to the crimes of indecent liberties, prostitution, prostitution involving children, as well as the failure by employers to pay wages to employees. In addition, the Crime Commission also examined whether any of the recently enacted human trafficking criminal statutes have yet been utilized by prosecutors. To comply with this study request, data was obtained from the Virginia Criminal Sentencing Commission (VCSC), the Virginia Department of Labor and Industry, the Virginia State Police, and the Virginia Department of Juvenile Justice (DJJ).

The information obtained revealed that the majority of defendants who are convicted of the crime of indecent liberties, or indecent liberties committed by a person in a custodial or supervisory relationship (hereinafter referred to as indecent liberties by a custodian), received a punishment involving active incarceration versus probation alone. Of the defendants who received incarceration, slightly more received a prison term (more than 12 months incarceration) than a jail term (12 months or less incarceration). When imposing a sentence for these two crimes, judges are more likely to depart from the recommended sentence provided by the Virginia Sentencing Guidelines than is the reported rate for Sentencing Guidelines compliance for crimes overall. In particular, judges are more likely to depart upwards from the recommended sentence (i.e., impose a heavier punishment).

The number of prosecutions and convictions for misdemeanor prostitution crimes has remained relatively stable over the past five years. The number of prosecutions and convictions for felony prostitution crimes has remained somewhat stable, and is much lower – there were fewer than fifteen convictions throughout the state in any particular year. The number of juveniles arrested for prostitution or prostitution-related offenses is even smaller, less than five per year. Fewer than ten juveniles a year have formal criminal charges initiated against them for prostitution offenses. Conversations with DJJ staff support these figures; anecdotally, very few juveniles who are discovered to have engaged in prostitution are formally charged. Instead, every effort is made by staff to provide these juveniles with appropriate counseling and treatment.

While the Virginia Department of Labor and Industry receives over five hundred complaints per year that are deemed valid from employees who have not been paid by their employers, almost none of these cases are prosecuted criminally under Va. Code § 40.1-29. Further, the national origin or immigration status of individuals who file such complaints is not collected. Finally, the three recently enacted criminal offenses aimed at combating human trafficking, Va. Code §§ 18.2-59(iii), 18.2-59(iv), and 18.2-47(B), do not appear to have been used; the VCSC reports that there have been no prosecutions or convictions for these crimes.

Background and Analysis

Indecent Liberties and Indecent Liberties Committed by a Custodian

House Joint Resolution 97 directed the Crime Commission to examine:

- Why statutes prohibiting taking indecent liberties with children, including Va. Code §§ 18.2-370 and 18.2-370.1, are not being utilized to their fullest extent;
- To what extent fines are being assessed on those who violate the statutes prohibiting taking indecent liberties with children, including Va. Code §§ 18.2-370 and 18.2-370.1;
- The best ways to ensure that statutes prohibiting taking indecent liberties with children, including Va. Code §§ 18.2-370 and 18.2-370.1, are utilized to their fullest extent; and,
- The need for legislative change or need to adjust state sentencing guidelines to ensure that statutes prohibiting taking indecent liberties with children, including Va. Code §§ 18.2-370 and 18.2-370.1, are utilized to their fullest extent.[2]

While the phrase "utilized to their fullest extent" could refer to either the number of charges that are brought each year, or the penalties that are imposed upon conviction, the recitals in the body of the resolution imply the latter meaning is the intended focus. Recognizing that there is no benchmark by which to determine whether or not sufficient time is imposed upon defendants convicted of these crimes, data was gathered from the VCSC to ascertain what prison sentences have been imposed, on average, during Fiscal Years (FY) 2005 to 2009, compared with FY02 and FY03.

Total Number of Sentencing Events

The total number of sentencing events for both indecent liberties, in violation of Va. Code § 18.2-370, and indecent liberties by a custodian, in violation of Va. Code § 18.2-370.1, are as follows:[3]

Figure 1: Number of § 18.2-370 Indecent Liberties Sentencing Events, FY07-09

§ 18.2-370	**FY 07**	**FY 08**	**FY 09**	**Total**
As Primary Offense	104	73	63	377
As Additional Offense*	33	73	65	231
Total Sentencing Events	**137**	**146**	**128**	**608**

Source: Virginia Criminal Sentencing Commission-Sentencing Guidelines Database

Figure 2: Number of § 18.2-370.1 Indecent Liberties Sentencing Events, FY07-09

§ 18.2-370.1	**FY 07**	**FY 08**	**FY 09**	**Total**
As Primary Offense	62	49	60	299
As Additional Offense*	26	40	42	193
Total Sentencing Events	**88**	**89**	**102**	**492**

Source: Virginia Criminal Sentencing Commission-Sentencing Guidelines Database

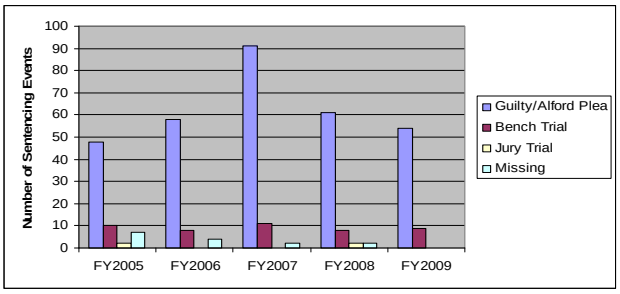
These figures are not directly comparable to the number of convictions in FY02 and FY03 that are referenced in HJR 97. The figures provided in the recitals of HJR 97 only refer to first time convictions for each crime, not subsequent convictions, and do not include convictions for violations of subsection B of Va. Code § 18.2-370.[4] A more accurate comparison would involve, for the recent figures, only violations of subsection A of Va. Code § 18.2-370 and subsection A of Va. Code § 18.2-370.1, and only in those instances where the indecent liberties offense was the primary offense as illustrated in Figures 1 and 2 above.

These figures reveal that while there is some variation from year to year, the total number of sentencing events for these offenses is relatively stable, and roughly comparable to the numbers given in HJR 97 for FY02 and FY03.

Type of Trial

Additional data from the VCSC revealed that the vast majority of these sentencing events resulted from a guilty plea, rather than a bench trial or a jury trial. From FY05 to FY09, for the 377 sentencing events involving a violation of Va. Code § 18.2-370(A), 83% (312 of 377) came after a guilty plea; 12% (46 of 377) came after a bench trial; and 1% (4 of 377) came after a jury trial. In 4% of the cases (15 of 377), data on this point was missing.

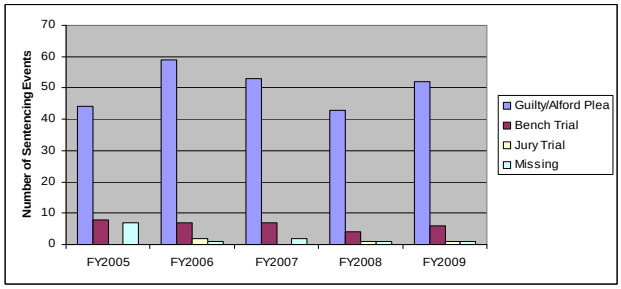
Figure 3: Type of Trial, § 18.2-370(A) as Primary Offense



Source: Virginia Criminal Sentencing Commission-Sentencing Guidelines Database

From FY05 to FY09, for the 299 sentencing events involving a violation of Va. Code § 18.2-370.1(A), 84% (251 of 299) came after a guilty plea; 11% (32 of 299) came after a bench trial; and 1% (4 of 299) came after a jury trial. In 4% of cases (12 of 299), data on this point was missing.

Figure 4: Type of Trial, § 18.2-370.1(A) as Primary Offense

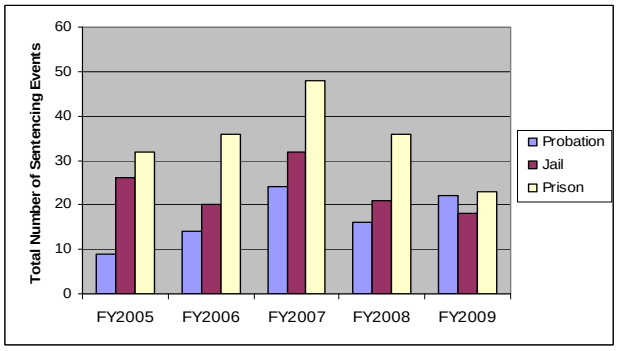


Source: Virginia Criminal Sentencing Commission-Sentencing Guidelines Database

Type of Disposition

Examining the types of dispositions received in these cases, for the 377 sentencing events from FY05 to FY09 that involved a violation of Va. Code § 18.2-370(A), 46% (175 of 377) resulted in an active prison sentence; 31% (117 of 377) resulted in an active jail sentence; and 23% (85 of 377) resulted in probation, with no active incarceration.

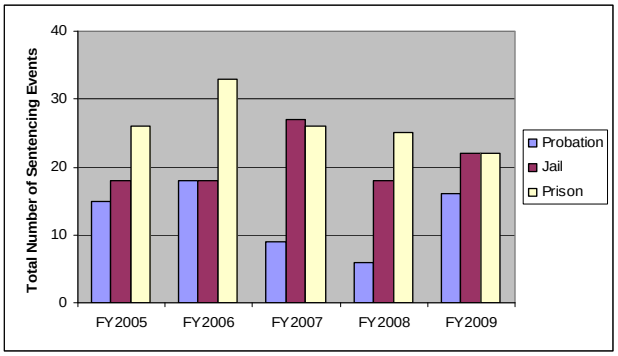
Figure 5: Type of Disposition, § 18.2-370(A), FY2005-FY2009



Source: Virginia Criminal Sentencing Commission-Sentencing Guidelines Database

For the 299 sentencing events from FY05 to FY09 that involved a violation of Va. Code § 18.2-370.1(A), 44% (132 of 299) resulted in an active prison sentence; 34% (103 of 299) resulted in an active jail sentence; and 21% (64 of 299) resulted in probation, with no active incarceration.

Figure 6: Type of Disposition, § 18.2-370.1(A), FY2005-FY2009



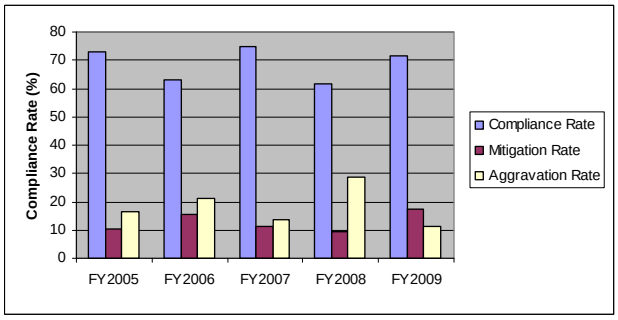
Source: Virginia Criminal Sentencing Commission-Sentencing Guidelines Database

In an effort to determine what fines are imposed upon defendants convicted of indecent liberties, and indecent liberties by a custodian, a request was made to the VCSC for this data. The Sentencing Commission reported that this information was recorded on less than half of all received reports. With such low reported numbers, the data for this topic must be regarded as incomplete and therefore unreliable. No accurate evaluations can be made due to these limitations.

Adherence to Sentencing Guidelines

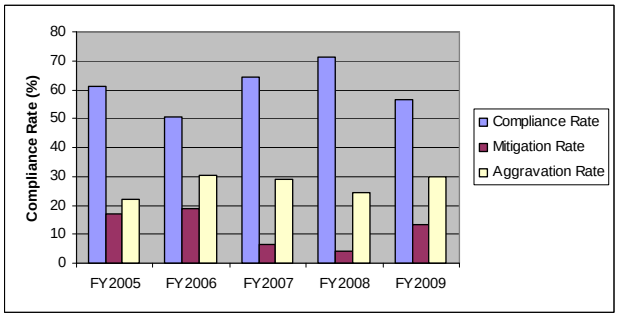
Data was requested from the VCSC to determine how frequently the sentence imposed on these defendants, whether prison time, jail time, or probation, was the sentence recommended by the Sentencing Guidelines. For both offenses, and in every year, the actual sentence imposed complied with the Sentencing Guidelines recommendation about 70% of the time, or less. It is important to note that the overall rate of compliance for all crimes is very close to 80%.[5] In other words, judges more frequently depart from the Sentencing Guidelines when it comes to the crimes of indecent liberties and indecent liberties by a custodian, than they do for other crimes.

Figure 7: VCSC Guidelines Compliance Rate, § 18.2-370(A), FY2005-FY2009



Source: Virginia Criminal Sentencing Commission-Sentencing Guidelines Database

Figure 8: VCSC Guidelines Compliance Rate, § 18.2-370.1(A), FY2005-FY2009



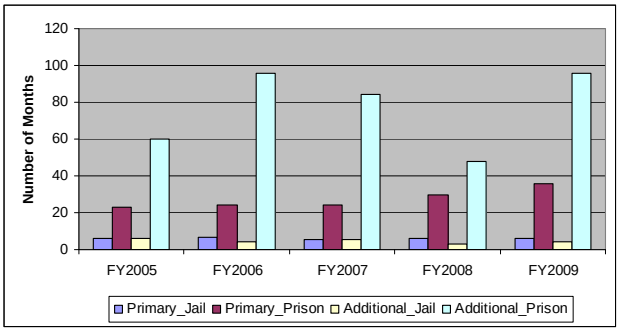
Source: Virginia Criminal Sentencing Commission-Sentencing Guidelines Database

As Figures 7 and 8 demonstrate, for the crimes of indecent liberties and indecent liberties by a custodian, when judges depart from the recommended sentence, it is more likely that the departure will be upwards, and the defendant will receive a heavier sentence. The data shows this tendency to be true for every year over the past five Fiscal Years, with only one exception – the crime of indecent liberties, in violation of Va. Code § 18.2-370(A), in FY09. This tendency for judges to depart upwards is noteworthy, because for criminal sentences overall, when judges depart from the Sentencing Guidelines, it is close to an even split on whether the departure is upwards or downwards.[6]

Length of Sentences

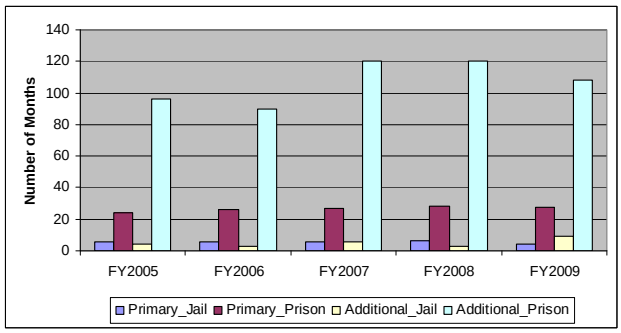
When examining the actual sentences themselves, the data revealed that there is an enormous difference in the amount of time a defendant receives when the crime of indecent liberties, or indecent liberties by a custodian, is the primary offense of the sentencing event, versus when those crimes are additional offenses. As the charts below demonstrate, when those crimes are additional offenses, the amount of active incarceration the defendant receives is typically four times as long. This is not surprising, as the two most usual crimes involved in a sentencing where indecent liberties, or indecent liberties by a custodian, are additional offenses, are rape and aggravated sexual battery. The very grave nature of these crimes, and their higher penalties, led to far lengthier periods of incarceration.

Figure 9: Comparison of Median Jail and Prison Time, § 18.2-370(A) Class 5 Felonies as Primary versus as Additional Offense



Source: Virginia Criminal Sentencing Commission-Sentencing Guidelines Database

Figure 10: Comparison of Median Jail and Prison Time, § 18.2-370.1(A) as Primary versus as Additional Offense



Source: Virginia Criminal Sentencing Commission-Sentencing Guidelines Database

Prostitution

House Joint Resolution 97 also directed the Crime Commission to examine:

- How many prosecutions have been brought against those who take or detain a person for prostitution (pimps) under Va. Code §§ 18.2-355, 18.2-356, or 18.2-357 or any other pandering/pimping-related offense over the past five years;

- How many prosecutions have been brought against solicitors of prostitution (johns) under Va. Code § 18.2-346 or any other prostitution-related offense over the past five years; and,

- How many prosecutions have been brought against women or men for prostitution under Va. Code § 18.2-346 or any other prostitution-related offense over the past five years.

There are five statutes in Virginia that are related to pandering/pimping: (1) Va. Code § 18.2-355 (detaining a person for purposes of prostitution); (2) Va. Code § 18.2-356 (receiving money for procuring a prostitute); (3) Va. Code

§ 18.2-357 (receiving money from a prostitute); (4) Va. Code § 18.2-348 (aiding of prostitution); and, (5) Va. Code § 18.2-368 (forcing one's wife to act as a prostitute). All of these offenses are felonies, except for Va. Code § 18.2-348, which is a Class 1 misdemeanor. There are three prostitution solicitation offenses in Virginia: (1) Va. Code § 18.2-346(B) (solicitation of a prostitute); (2) Va. Code § 18.2-347 (visit, or reside in, or keep, a bawdy place); and, (3) Va. Code § 18.2-349 (use of a vehicle for prostitution).[7] All of these offenses are Class 1 misdemeanors. There is only one prostitution statute in Virginia: Va. Code § 18.2-346(A), which is a Class 1 misdemeanor.[8]

General District Court, Charges and Prosecutions

To obtain these figures, staff requested data from the VCSC regarding the number of misdemeanor prostitution charges, overall, that were prosecuted in general district courts over the past five FY. The number of charges has remained fairly consistent from year to year. There were:

- In FY07, 1,270 charges involving 1,036 defendants;
- In FY08, 976 charges involving 811 defendants; and,
- In FY09, 1,037 charges involving 834 defendants.

The number of sentencing events for these crimes, presented by year and with specific offense information, is provided in Figure 11.

Figure 11: Number of Misdemeanor Prostitution Sentencing Events, FY07-FY09

Type of Offense	FY07	FY08	FY09
§ 18.2-346(A) Prostitution for money	276	219	241
§ 18.2-346(B) Solicitation for prostitution	261	134	187
§ 18.2-347 Maintain or frequent bawdy place	34	25	32
§ 18.2-348 Aid or assist in procurement of prostitute	12	14	28
§ 18.2-349 Use vehicle to promote prostitution	2	5	9
General misdemeanor prostitution (Type cannot be determined from available data)	251	176	250
Total Sentencing Events	**836**	**573**	**747**

Source: Virginia Criminal Sentencing Commission

The number of felony prostitution charges brought in general district courts over this same time period is much smaller. There were 30 felony charges brought in FY05, 28 in FY06, 38 in FY07, 42 in FY08, and 54 in FY09. Of these charges, 5 were certified to a circuit court in FY05, 8 were certified in FY06, 11 were certified in FY07, 14 were certified in FY08, and 14 were certified in FY09. The number of defendants who were charged with a felony prostitution offense in a general district court during this time period is correspondingly small.

Circuit Court, Charges and Prosecutions

The number of felony indictments for a felony prostitution offense in circuit courts during this time period is slightly larger, indicating that prosecutors will occasionally direct indict for these offenses. There were 21 felony indictments, involving 8 defendants, in FY05; 20 felony indictments, involving 14

defendants, in FY06; 47 felony indictments, involving 18 defendants, in FY07; 20 felony indictments, involving 11 defendants, in FY08; and 14 felony indictments, involving 14 defendants, in FY09.[9] The number of felony convictions for prostitution offenses (as primary and as additional offenses) is largest for the crime of pandering as seen in Figure 12.

Figure 12: Total Number of Felony Prostitution Sentencing Events, FY07-FY09

Type of Offense	FY07	FY08	FY09
§ 18.2-355(1) Enticement/procurement	0	0	1
§ 18.2-355(2) Compel to marry by force/threats	0	0	0
§ 18.2-355(3) Parent permitting child	0	0	1
§ 18.2-356 Receive money for procurement	1	1	0
§ 18.2-357 Pander, pimp or receive money from prostitute	7	2	11
§ 18.2-368 Place or leave wife for prostitution	0	0	0
Total Sentencing Events	**8**	**3**	**13**

Source: Virginia Criminal Sentencing Commission

Child Prostitution

House Joint Resolution 97 directed the Crime Commission to examine:

- How many children have been arrested for violating Va. Code § 18.2-346, for being a prostitute, for prostitution, or for any other prostitution-related offense over the past five years; and
- The process a child goes through if that child is arrested for violating Va. Code § 18.2-346, for being a prostitute, for prostitution, or for any other prostitution-related offense.

The Virginia State Police provided information for all juveniles arrested for any prostitution-related offenses over the past five years. There were only two arrests in Calendar Year (CY) 2005; one arrest in CY06; three arrests in CY07; four arrests in CY08; and, one arrest in CY09. In an effort to determine if perhaps juveniles discovered to be engaging in prostitution were not formally arrested by the police, but were still proceeded against with criminal charges, DJJ was also contacted. According to their records, there were only eight juveniles who had criminal petitions taken out against them for prostitution-related offenses in FY06; two juveniles in FY07; seven juveniles in FY08; four juveniles in FY09; and, three juveniles in FY10. None of these petitions resulted in a conviction or adjudication of delinquency. The available data therefore indicates that few instances of child prostitution result in the criminal prosecution of the child. Anecdotal evidence, based upon conversations with staff at DJJ, and the Child Protective-Services Unit of the Virginia Department of Social Services, also indicates that very few juveniles are discovered, by authorities, to be engaging in prostitution.

In order to verify that child prostitution is not common in Virginia, at least as can be determined by documented evidence, a general request for information on this topic was made to DJJ. This led to an informal survey being sent to the thirty-five Juvenile and Domestic Relations Court Service Units (CSUs), which asked if they had encountered any instances of child prostitution recently. Nineteen of the CSUs responded; of those, eight reported no juvenile arrests or encounters with juvenile prostitution. The remaining eleven reported limited encounters with child prostitution, but no more than a few instances over the course of several years, with no more than one to four cases in any given year.

Conversations with DJJ staff revealed documented instances of juvenile prostitution were rare, but when they were discovered, every

effort was made to provide the juvenile with counseling and services. Prostitution is typically associated with a larger problem behavior, such as drug addiction, gang affiliation, or being a chronic run-away. By offering services and support for these larger behavioral problems, every attempt is made to help provide rehabilitation for the juvenile.

Wage Withholding

House Joint Resolution 97 directed the Crime Commission to examine:

- How many actions have been brought against employers who, willfully and with intent to defraud, fail, or refuse to pay wages under the withholding wages provision in Va. Code § 40.1-29 over the past five years.

The Virginia Department of Labor and Industry was contacted to determine how many complaints have been registered by them of employers who had failed to pay their employees. The following chart provides the data obtained:

Figure 13: Number of Complaints for Failure to Pay Employees, FY05-FY09

Year (CY)	Total Valid	Total Invalid	Total Cases for Year
2005	778	788	**1566**
2006	671	862	**1533**
2007	658	813	**1471**
2008	827	1015	**1842**
2009	598	992	**1590**

Source: Virginia Department of Labor and Industry

Invalid claims include those in which the complaining employee failed to provide requested information to Department, failed to keep in contact with the Department during the investigation, the complaint was not accurate or dealt with a company outside the jurisdiction of the Department (e.g., an out of state company), or the company had gone out of business before the completion of the investigation. The Virginia Department of Labor and Industry does not keep any data on the types of businesses or industries that are the subject of complaints, or the national origin or immigration status of individuals who file complaints.

According to information from the Supreme Court of Virginia's General District Court and Circuit Court Information Systems, as provided by the VCSC, from FY05 to FY09, only three individuals faced felony charges under Va. Code § 40.1-29 for failure to pay wages.[10] There were no convictions. In this time period, there was one misdemeanor conviction, in FY08, for a misdemeanor violation of Va. Code § 40.1-29.

Human Trafficking Offenses

In addition to the specific information requests made by HJR 97, the Crime Commission also contacted the VCSC to determine if there have been any convictions for any of the three recently enacted human trafficking crimes:

- Va. Code § 18.2-59(iii), enacted in 2006, criminalizes extorting another by threatening to report him as being illegally present in the United States; [11]
- Va. Code § 18.2-59(iv), enacted in 2007, criminalizes extorting another by withholding his passport of other immigration or identification document; [12] and,
- Va. Code § 18.2-47(B), enacted in 2009, criminalizes seizing, transporting, or detaining another with the intent to subject him to forced labor. [13]

Based upon the information received from the VCSC, there have not been any charges, nor any convictions for any of these offenses.

Conclusion

In reviewing the criminal offenses in Virginia that are associated with human trafficking, namely, child prostitution and extortion for purposes of obtaining labor or other services, it appears that there are few, objectively identified cases involving human trafficking which come to the attention of the Virginia criminal justice system. The crimes of indecent liberties, and indecent liberties by a custodian, which are only tangentially connected with this issue, appear to be treated as the serious crimes that they are. The majority of convictions for these offenses result in active incarceration, and of the cases that receive incarceration, slightly more receive a prison sentence than a jail sentence. Judges are more likely to depart from the recommended sentence provided by the Virginia Sentencing Guidelines for these two crimes than for other crimes, and when they depart, it is likely that they will impose a more severe sentence. All of the available data sources indicate that child prostitution is a very rare occurrence in Virginia, at least as far as can be determined by examining the objective numbers available from law enforcement and DJJ. The hard data is supported by anecdotal evidence and interviews with staff at DJJ. While undoubtedly there are juveniles in Virginia who engage in child prostitution, when they are discovered, the tendency throughout the state is to treat them as victims in need of counseling and services, rather than to prosecute them for their prostitution activity. Every effort is made to provide these juveniles with appropriate rehabilitation, usually in the context of the larger problems, such as drug addiction, which led to their engaging in prostitution.

The Crime Commission reviewed these findings at its September 8, 2010, meeting. As the available information indicates there are no legislative changes currently needed in Virginia for any of these topics, the Crime Commission made no recommendations as a result of this study.

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[1] H.J.R. 97, 2010 Gen. Assem., Reg. Sess. (Va. 2010).

[2] Id.

[3] A sentencing event consists of all offenses (and counts) for which an offender is sentenced before the same court at the same time. *See* VIRGINIA SENTENCING GUIDELINES, "General Instructions" (2010).

[4] Subsection B of Va. Code § 18.2-370 was not enacted until 2005. 2005 Va. Acts chs. 185, 762. That offense, involving child pornography, was not a part of indecent liberties in FY02 or FY03. The penalties referred to in HJR 97, namely, Class 5 felonies for violations of indecent liberties, and Class 6 felonies for violations of indecent liberties by a parent or guardian, are only applicable to first offenses. A second violation of indecent liberties was, and is today, a Class 4 felony, while a second violation of indecent liberties by a parent or guardian was, and is today, a Class 5 felony. VA. CODE ANN. §§ 18.2-370(C), 18.2-370.1(B) (Michie 2010).

[5] *Guidelines Compliance*, VCSC ANN. REP. (2009), at 18.

[6] For example, in FY09, 49.7% of departures were upwards, and 50.3% of departures were downwards. *Guidelines Compliance,* VCSC ANN. REP. (2009), at 18.

[7] While Va. Code §§ 18.2-347 (visit or keep a bawdy place) and 18.2-349 (use of a vehicle for purposes of prostitution) can be used against pimps or people who manage prostitutes, they are more commonly used against people who solicit prostitutes.

[8] While prostitutes may be charged with additional criminal offenses, such as sodomy or attempted sodomy, these are not crimes of prostitution, strictly speaking, and therefore fall outside the specific scope of this study.

[9] As stated earlier, the original source for this information was the Supreme Court of Virginia's circuit court Automated Information System. The circuit courts of Alexandria, Fairfax, and Prince William County did not participate in this system during the years in question. They were contacted individually; the figures for the circuit courts of Alexandria and Fairfax have been included in the listed totals. The figures for the circuit court of Prince William County were not readily available.

[10] In order for the failure to pay wages to rise to the level of a felony, the amount of the withheld wages

must be $10,000 or more; otherwise, the offense is a Class 1 misdemeanor. VA. CODE ANN. § 40.1-29(E) (Michie 2010).

[11] 2006 Va. Acts ch. 313.

[12] 2007 Va. Acts chs. 453, 547.

[13] 2009 Va. Acts ch. 662.

Law Enforcement Emergency Response/Pursuits

Executive Summary

During the 2009 Session of the Virginia General Assembly, Senator Toddy Puller introduced Senate Bill 847 (SB 847) that sought to require emergency vehicles to stop at intersections before proceeding through a red light, if they are to maintain the statutory exemption from criminal prosecution for violating a traffic law.[1] The Senate Courts of Justice Committee referred, by letter, the bill to the Crime Commission for further study. The Crime Commission delayed acting on the bill referral in 2009 due to a pending civil lawsuit. The lawsuit was settled in early 2010, and the Crime Commission continued study of the bill. Additionally, the Crime Commission's Executive Committee added the related topic of law enforcement vehicular pursuits to the study.

Crime Commission staff utilized several methodologies to accomplish the study, including: completing a literature review and legal analysis, creating a Law Enforcement Work Group, reviewing current training standards and model policies, attending a pursuit training class, and disseminating an emergency response and vehicular pursuit survey to all Virginia law enforcement agencies.

Concern and attention about vehicular pursuits has received considerable attention since the mid-1990's. There are several reports and studies on pursuits from government agencies and professional organizations, such as the U.S. Department of Justice, Centers for Disease Control, and the International Association of Chiefs of Police (IACP). The studies are helpful in defining some of the concerns and areas of improvement available to decision makers. Some of these studies have limited geographic areas, limited sample sizes, or problems with data that is not defined or collected consistently; however, findings from empirical studies are available to meaningfully assist policymakers in addressing pursuit policy.

In Virginia, there are four statutes that address emergency response and vehicular pursuits: §§ 46.2-920, 19.2-77, 46.2-817 and 46.2-921.1, but these statutes only regulate minimum requirements for law enforcement. There is no statutory requirement for Virginia law enforcement agencies to have an emergency response or pursuit policy. However, there are other states that regulate emergency responses and vehicular pursuits by requiring pursuit policies, use of emergency equipment, collection of pursuit data, or harsher punishment for eluding law enforcement.

Staff disseminated a law enforcement emergency response and pursuit survey to all Virginia law enforcement agencies. There were a number of findings that resulted from the analysis of vehicular pursuit data in Virginia during Calendar Year (CY) 2009. These findings are very consistent with other existing academic and government studies. Based on the data submitted from participating agencies, most pursuits:

- Last a median of 3 minutes;
- Travel a median of 1.9 miles;
- Involve automobiles (as opposed to trucks, SUVs, or motorcycles);
- Occur at night;
- Are initiated on dry road conditions;
- Are initiated in light traffic conditions;
- Are monitored by a supervisor;
- Do not involve any additional patrol units or outside agencies;
- Are initiated due to a traffic violation or criminal misdemeanor;
- Result in the arrest of the violator(s);
- Result in additional subsequent charges for the violator; and,
- Rarely result in injury or death to officers and violators.

As a result of the study effort, the Crime Commission endorsed the following recommendations:

- Amend Va. Code § 46.2-920 to require emergency vehicles to come to a complete stop at a "steady or flashing red signal, traffic light, stop sign, or device indicating moving traffic shall stop" or run their siren, and their lights as reasonably necessary and proceed through the stop.

- Require the Department of Criminal Justice Services (DCJS) to establish a model policy and pursuit and emergency response driver training for law enforcement officers assigned to vehicle patrol duties.

- Amend Va. Code § 46.2-817 to include vehicle forfeiture for felony violations of eluding.

Background

Concern and attention about vehicular pursuits has been recent; during the 1960's and 1970's the primary concern with vehicular pursuits was officer safety.[2] During the late 1990's, pursuits become a national concern and many jurisdictions began to carefully review, and in some cases revise, their pursuit policies, due to concerns with civil lawsuits.[3] There have been two national studies focusing on pursuits: one by the U.S. Department of Justice, Pursuit Management Task Force, and another sponsored by the Centers for Disease Control and Prevention, focusing on fatalities. Additionally, the IACP has created a national pursuit database.

Pursuit Management Task Force Report

In 1996, the Pursuit Management Task Force (PMTF) was created by the U.S. Department of Justice to examine and define police practices and the role of technology in high-speed police pursuits.[4] Additionally, the group was to look at the "entire range of pursuit issues including preemption of pursuits, control of pursuits in progress, and termination of pursuits."[5]

One of many issues the group studied was agency pursuit policies.[6] The group examined current procedures and policies from 419 responding agencies that submitted policies.[7] The group determined that policies tended to be one of three types: severely restrictive, officer discretion, or contain minimal standards.[8] One of the more interesting conclusions reached through the policy review was that although "policy, supervision, and training are all important to providing successful pursuit outcomes, they are not the sole answer to safe pursuits."[9] Furthermore, the group stated that the "solution that actually stops fleeing vehicles lies in the potentially synergistic relationships between policy, law, supervision, training, and technology."[10]

The group made six final recommendations as a result of the study; four of these recommendations are applicable to state policy makers:

1. Resources at regional and local levels should be allocated to the study and testing of viable pursuit termination, management, and prevention technologies;
2. Establish a model for collecting and establishing pursuit statistics;
3. States should adopt legislation that ensures that fleeing from a lawful attempt at detention/arrest in a motor vehicle is a serious crime with significant penalties; and,
4. Improve communications that would be beneficial in safely managing interagency or long-distance pursuits.[11]

While this study is helpful in understanding some of the issues involved with vehicular pursuits, it has some limitations. First, while it is a "national" study, it is limited to information and data collected from the western part of the country. Additionally, the overall response rate of the study was only 29% and is likely not generalizable to all U.S. law enforcement agencies.[12]

Centers for Disease Control and Prevention: Pursuit Fatality Study

In 2004, a study was issued based on National Highway Traffic Safety Administration (NHTSA) data concerning deaths resulting from vehicular pursuits during a nine year period (1994-2002).[13] This report examined the data from NHSTA's Fatality Analysis Reporting System (FARS) for the nine year period and stated that an average of between 260-325 persons were killed per year as a result of vehicular pursuits.[14] The total number of fatalities for the time period was 3,146; Of this amount, 2,055 fatalities were categorized by the report as "people in the fleeing vehicle" and 1,088 fatalities[15] were categorized by the report as "people not in the fleeing vehicle."[16]

However, there are some problems with the FARS data. The authors note that the FARS data has "a specific field in which the investigating officer must respond to whether the crash was police pursuit-related or not."[17] The problem with this data is that these numbers are based on the NHSTA definition of a pursuit,[18] which is open to some interpretation by reporting agencies, and may underreport actual pursuit-related fatalities.[19] Additionally, there is no mandatory national reporting system, which hampers NHSTA's ability to collect accurate data on pursuit deaths.[20]

IACP Police Pursuit Database

As a direct result of the PMTF, the IACP undertook the task of creating a national database to collect police pursuit information.[21] The primary purpose of the database is to provide information to law enforcement decision makers "that facilitates effective pursuit-related training and policy decisions."[22] More specifically, the database is intended to be used to "identify and respond to training needs, reduce liability, dispel false information, and inform the public."[23] The database tracks 28 "data elements" which include items such as: starting/termination date and time, initial violation, traffic/road conditions, and termination reason/method.[24]

The preliminary database included information detailing 2,239 pursuits, representing agencies from across the country.[25] Findings from the 2004 interim report highlighted that:

- 60% of all pursuits end in 3 minutes or less;
- 67% cover 3 miles or less;
- Suspects stop in 35% of pursuits;
- 1 in 5 pursuits are ended voluntarily by police;
- 95% of pursuits occur on dry roads;
- 76% of pursuits occur in urban areas;
- 99% of pursuits involve no injury to law enforcement or bystanders; and,
- 5% of pursuits were terminated by active police termination.[26]

In 2008, the IACP Police Pursuit Database interim report was updated.[27] The total number of pursuits included in the database increased to 7,737 pursuits.[28] The data was collected from February 2001 through May 2007. The following summarizes some of the significant findings:

- 42% of all pursuits were initiated based on traffic violations, 14% were suspected

DUIs, and only 8% were based on violent felonies;[29]

- 76% of pursuits ended without either property damage of injury, 9% ended with an injury (81% of those end in minor injury);[30]
- The average pursuit speed was 66 mph, with the fastest speed over 135 mph;[31]
- The most prevalent reason for pursuit termination, 35%, was the suspect stopping;[32] and,
- There was no termination method utilized (such as tire deflators or the PIT maneuver[33]) in the vast majority of pursuits, over 94%.[34]

Based on the updated data, the report's basic conclusion was that without "accurate, timely, consistent, and comprehensive collection and analysis" of police pursuits, law enforcement agencies will have difficulty making effective "street-level discretionary decisions."[35]

Academic Literature

When examining the academic literature and other government reports, there is a relatively high convergence in findings relating to the basic characteristics of pursuits despite variations in the source, method, or time-frame of data collection. There are several consistent themes reflected in the literature. First, the vast majority of pursuits do not result in serious injury or death.[36] However, studies have revealed that about one-quarter to one-third of all pursuits result in an accident.[37] Additional studies have identified certain types of pursuits being at higher risk of resulting in accidents than others. For instance, higher risk pursuits typically occur at night-time,[38] involve felony pursuits versus non-felony pursuits,[39] or include factors relating to weather conditions, number of police units involved, reason for the pursuit or road conditions.[40] Such variables all factor into a higher likelihood of an accident occurring as a result of a pursuit being initiated.

Second, pursuits are generally very short in distance and time.[41] Third, most pursuits result in the apprehension of the suspect.[42] Fourth, while most pursuits are initiated due to traffic or minor infractions, many result in more serious charges.[43] And, finally, other research focuses on characteristics of the officers or suspects involved in pursuits. For instance, younger officers were found to be more likely to have negative outcomes than officers who were older or with more years of service.[44] Other studies have focused on offender characteristics citing youth, driving under the influence, status of driver's license and previous chase experience as being factors in determining likelihood of fleeing from officers in a vehicle.[45]

In sum, based on a review by Lum and Fachner of all the available studies, they conclude that there is enough empirical data for agencies to begin making policy decisions regarding pursuits, but that there is a strong need for "evidence based practices," founded on continued review and collection of pursuit data.[46]

Summary of Literature Review

Overall, there are studies that provide a basic understanding of pursuits nationwide. The problem with some reports, such as the IACP database and PMTF, is the sample size of the data is very limited which makes it difficult to draw generally applicable conclusions. Another difficulty is highlighted by the Centers for Disease Control study, where inconsistent interpretation of data requirements and data collection, again prevent the application of general conclusions. However, there is a fairly consistent body of empirical research that can provide agencies with a good understanding of

issues surrounding pursuits, which may be useful in addressing policy deficiencies or improvements.

Model Policies and Accreditation

Under current Virginia law, law enforcement agencies are not required to have a pursuit or emergency response policy. If agencies wish to adopt a policy, IACP has a model policy available, as well as a policy directive available from DCJS. Finally, there are two accreditation bodies that law enforcement agencies may consider, which require agencies to have written policies relating to emergency calls and pursuits. A description of each is provided in this section.

IACP Model Policy

The IACP developed a model policy that covers each of the accreditation requirements set by the Commission on Accreditation for Law Enforcement (CALEA).[47] This policy provides the following definition for vehicular pursuit: "(a)n active attempt by an officer in an authorized emergency vehicle to apprehend a fleeing suspect who is actively attempting to elude the police." The policy also outlines that the decision to initiate a pursuit must be based on "the immediate danger to the officer and the public created by the pursuit is less than the immediate or potential danger to the public should the suspect remain at large."[48] Also, this policy outlines the responsibilities of the supervisor, dispatcher, and pursuing officer, as well as pursuit tactics, inter-jurisdictional pursuits, termination, and written reporting.[49]

DCJS General Directive 2-9

The DCJS General Directive 2-9 addresses a policy for both emergency responses and pursuits.[50] The emergency response section defines emergency calls as either "Code 1 where preservation of life is a consideration,[51] or "Code 2" for calls other than the preservation of life.[52] The directive permits officer-initiated calls.[53] Additionally, the directive notes that responses must be compliant with Va. Code § 46.2-920, which outlines the requirements for when, and under what circumstances, emergency vehicles may disregard traffic regulations.[54] The pursuit section provides three potential policy approaches to use: restrictive,[55] less restrictive,[56] or decision matrix.[57] Agencies may adopt one of the three options for creating their pursuit policies. As discussed in the PMTF report, the three examples in General Directive 2-9 are similar to the three general types of pursuit polices identified in the report.[58]

Accreditation

All Virginia law enforcement agencies may acquire accreditation from either CALEA or the Virginia Law Enforcement Professional Standards Commission (VLEPSC). As part of their accreditation process, CALEA requires agencies to meet Accreditation Standard 41.2.1, requiring a written policy that "establishes procedures for responding to routine and emergency calls, and includes guidelines for the use of authorized emergency equipment."[59] The pursuit standard requires a written policy that covers the following: evaluating the circumstances, initiating officer's responsibilities, designating secondary unit's responsibilities, roles of "marked, unmarked, or other types of police vehicle involvement in the pursuit," assigning dispatcher's responsibilities, describing supervisor's responsibilities specifying when to terminate pursuit, engaging in inter- and intra-jurisdictional pursuits, and requiring a written report and an administrative review of each pursuit.[60]

The VLEPSC,[61] which is administered by DCJS, requires a written policy for emergency responses for law enforcement agency

accreditation.[62] The VLEPSC accreditation program standards manual requires a written directive for vehicular pursuits that covers: evaluating the circumstances; initiating officer's responsibilities; secondary officer(s) responsibilities; dispatcher's and supervisor's responsibilities; forcible stopping/roadblock; inter-jurisdictional and intra-jurisdictional pursuits; when to terminate pursuits; and, procedures for administrative review of pursuits.[63]

Training

Currently, DCJS mandates that all Virginia law enforcement officers complete "Emergency Vehicle Operator's Course" (EVOC) training, during basic academy training.[64] Typically, this class involves about 40 hours of training, which includes classroom instruction and practical driving exercises. The training covers responding to emergency calls and the following topics with regard to pursuits:

- Factors applicable to initiating a pursuit;
- Identifying hazards in emergency or pursuit driving;
- Factors that influence the termination of a pursuit; and,
- Legal considerations (Virginia Code, case law, and local policy).

At this time, however, there is no required follow-up or in-service training for emergency or pursuit driving.

In order to gain a better understanding of the vehicular training provided to law enforcement officers, staff observed the pursuit portion of EVOC training at the Northern Virginia Criminal Justice Academy (NVCJA). Specifically, staff observed the trainees going through the practical pursuit driving exercises. The NVCJA recently opened its new, state-of-the-art EVOC facility in December of 2010, which will provide training in an "urban driving environment," as well as actual controlled intersections.[65]

Technology

As part of the background research, staff was invited to participate in the National Institute of Justice's (NIJ) Pursuit Technical Work Group (Pursuit TWG), which was held during the fall of 2010. This group is comprised of law enforcement representatives from around the country, which meet on an annual basis to discuss emerging issues and solutions for high speed police pursuits. Members heard several presentations regarding available technology for ending pursuits, synergistic approaches to handling high-speed pursuits, and live product demonstrations from a variety of vendors. The Pursuit TWG also developed recommendations and new priorities for future study by NIJ that included the following items:

- Operational deployment of "The Grabber;"
- Use of Radio Frequency ID (EZPass);
- Legal barriers for OnStar to stop vehicles;
- Vehicle Taser by StarChase;
- Inviting a representative from the National Highway Traffic Safety Administration as a member of the group;
- IntelliDrive Dedicated Short Range Communication;
- Vehicle tracking other than GPS;
- Update 1996 PMTF report and review recommendations;
- Control of intersection traffic signals;
- Review of StopStick database on pursuit data; and,
- Intersection warnings to drivers of emergency situations.

Among one of the presenters was OnStar, which provides a variety of services for owners of GM vehicles. Currently, OnStar is available in over 30 GM vehicles and has approximately 5.8 million subscribers. Most relevant to the issue of pursuits are OnStar's Stolen Vehicle Assistance services. OnStar uses GPS technology to

pinpoint the exact location of stolen vehicles and can then work with law enforcement to recover the vehicle using their Stolen Vehicle Slowdown and Remote Ignition Interlock systems. These features are included with a subscription to OnStar with model year 2009 and newer vehicles. As reported by OnStar, they provide approximately 400 notifications per month to law enforcement on stolen vehicles. As of October 2010, they have performed 1,400 successful Remote Ignition Blocks and 70 Stolen Vehicle Slowdown deployments.

Additionally, during the summer of 2010, staff met with representatives of StarChase and attended a live demonstration of StarChase's Pursuit Management System real-time vehicle tagging and tracking. This system deploys a GPS tagging and tracking device to a vehicle in pursuit by law enforcement. This allows the officer to end the pursuit immediately while monitoring the GPS location of the vehicle so the suspect can be apprehended at a later time.

Legal Analysis

Constitutional Law

Constitutional law intersects with vehicular pursuits almost exclusively in situations where an injured (or deceased) suspect is suing a law enforcement agency for a violation of his civil rights, typically in a case of excessive force.[66] Until recently, if a suspect was injured as a result of police action during a pursuit, he would file a federal § 1983 lawsuit against the agency for a violation of his 4th amendment rights.[67] The U.S. Supreme Court adopted a test to determine the reasonableness of force used against a fleeing suspect in Tennessee v. Garner.[68] Garner outlines a three part test to determine Fourth Amendment reasonableness, where the:

- Suspect must pose an immediate threat of serious physical harm to the officer or the public;
- Deadly force must have been necessary to prevent escape; and,
- Suspect is given warning, if feasible.[69]

Typically, this test is applied, as it was in Garner, where police use a firearm to prevent the escape of a suspect. Recently, the U.S. Supreme Court created an extension of its use of force Fourth Amendment reasonableness test to vehicular pursuits.[70] In Scott v. Harris, the police executed a PIT maneuver, which terminated the pursuit and left the suspect a paraplegic.[71] The Court held that "[a] police officer's attempt to terminate a dangerous high-speed car chase that threatens the lives of innocent bystanders does not violate the Fourth Amendment, even when it places the fleeing motorist at risk of serious injury or death."[72] It is not clear how this new holding will be applied in the future, but one commenter stated the decision made "it harder for plaintiffs to recover for harms suffered in high-speed chases under an alternative theory, that the police used excessive force."[73] Generally, Scott will only apply in federal civil law suits, and will not affect suits filed under violations of state law or department policies.

Virginia Law

Under Virginia law there are four statutes that typically apply to vehicular pursuits or emergency responses: Va. Code §§ 46.2-920, 46.2-817, 19.2-77, and 46.2-921.1.

Va. Code § 46.2-920

Generally, Va. Code § 46.2-920 provides exemptions from criminal prosecution of traffic laws for drivers of emergency vehicles "when such vehicle is being used in the performance of public services, *and* when such vehicle is operated under emergency conditions."[74] Emergency conditions are not specifically

defined, however, law enforcement officers must be in "the chase or apprehension of violators of the law or persons charged with or suspected of any such violation" or "in response to an emergency call."[75] Specifically, drivers of these vehicles, including any "law-enforcement vehicle operated by or under the direction of a federal, state, or local law-enforcement officer," are exempt from certain traffic regulations and may:

- Disregard speed limits;
- Move through posted stops if the speed of the vehicle is sufficiently reduced to enable it to pass;
- Park or stop notwithstanding the other provisions of this chapter;
- Disregard regulations governing a direction of movement of vehicles turning in specified directions;
- Move around or pass another vehicle at any intersection;
- Pass or overtake stopped or slow-moving vehicles on the left, in a no-passing zone or by crossing the highway center line, on the way to an emergency; and,
- Pass or overtake stopped or slow-moving vehicles by going off the paved or main traveled portion of the roadway on the right.[76]

Law enforcement officers are required to exercise these exemptions "while having due regard for safety of persons and property."[77] Additionally, the exemptions only apply when the operator of the emergency vehicle "displays a flashing, blinking, or alternating emergency light or lights;" and, "sounds a siren, exhaust whistle, or air horn designed to give automatically intermittent signals, as may be reasonably necessary."[78] Also, the vehicle must be covered by standard motor vehicle liability insurance or a certificate of self insurance.[79] Furthermore, law enforcement officers will lose these exemptions from criminal prosecution for "conduct constituting reckless disregard of the safety of persons and property."[80]

In addition to exemptions for criminal prosecution, the statute also has civil liability implications. At the end of subsection B, the statute states that "nothing in this section shall release the operator of any such vehicle from civil liability for failure to use reasonable care in such operation,"[81] although the Virginia Supreme Court has held that "one will not be held negligent *per se* for the specific acts authorized under the statute."[82]

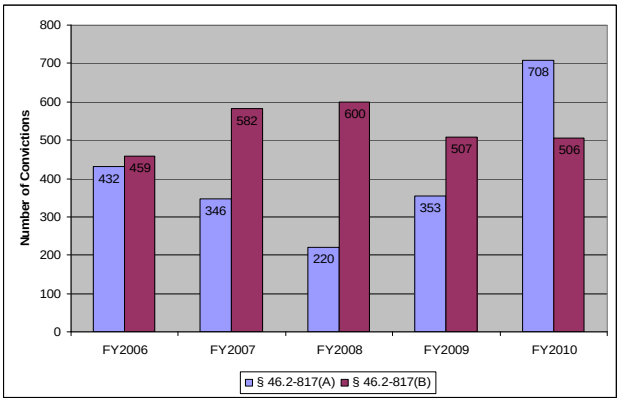
Emergency Vehicle Exemptions from Other States

There are at least 43 states that provide exemptions to traffic laws for emergency vehicles, similar to Va. Code § 46.2-920.[83] Fourteen of these states require the use of both lights and sirens to obtain the exemptions,[84] while 29 states require either the lights or sirens operating to obtain the exemptions.[85] Only one state, Massachusetts, requires emergency vehicles to make a complete stop at a controlled intersection,[86] while at least 29 states require the officer to slow down or exercise due care when moving though a controlled intersection.[87]

Va. Code § 46.2-817

The penalty for eluding or fleeing law enforcement is set forth in Va. Code § 46.2-820. If a person ignores a signal and drives in "wanton or willful" disregard of that signal, he can be subject to a Class 2 misdemeanor.[88] The penalty is increased to a Class 6 felony if the defendant drives in such way as to "interfere with or endanger" the operation of a law enforcement vehicle.[89] And finally, if a law enforcement officer is killed as a "proximate result of the pursuit," the defendant can be charged and punished with a Class 4 felony.[90] Additionally, a defendant's driver's license may be suspended for a conviction of this section for either 30 or 90 days.[91] Figure 1 illustrates the total number of misdemeanor and felony eluding convictions for FY06 to FY10.

Figure 1: Total Misdemeanor and Felony Eluding Convictions, FY06-FY10



Source: Virginia Criminal Sentencing Commission, Court Automated Information System, Circuit and General District Courts.

**Note: Figures account for convictions where eluding is the primary offense. Also, circuit court data is not complete as there is limited data from the cities of Alexandria and Virginia Beach and the counties of Fairfax and Prince William.*

Eluding/Fleeing Penalties from Other States

Nearly every state penalizes eluding or fleeing from police, similar to Va. Code § 46.2-817, with graduated penalties for more serious or dangerous acts.[92] There are eight states where the initial penalty is a felony.[93] Additionally, four states specifically link a conviction of eluding (or fleeing) with vehicle forfeiture.[94]

Va. Code §§ 19.2-77 and 46.2-921.1

Law enforcement officers in Virginia are permitted to cross jurisdictional lines to make warrantless arrests. More specifically, if an officer is in pursuit of a suspect he may "pursue such person anywhere in the Commonwealth and, when actually in close pursuit, may arrest him wherever he is found."[95] Motorists also have a duty to yield the right of way to emergency vehicles; failure to do so may be punished as a Class 1 misdemeanor.[96]

50 State Surveys

Staff also surveyed the other 49 states' laws for statutory mandates concerning emergency responses and vehicular pursuits. Specifically, staff searched other states' laws concerning pursuit policies. There are 16 states that have at least some requirements, in statute, concerning pursuits/emergency responses. Georgia, Maine, Mississippi, New Hampshire, Ohio, and Wisconsin require that all law enforcement agencies must have a written pursuit policy, but not mandate specific policies.[97] Connecticut, Minnesota, Nebraska, New Mexico, Pennsylvania, Rhode Island, Utah, and Washington all require law enforcement agencies to adopt written pursuit policies, with specified minimum standards.[98] California has minimum standards for pursuit policies that are discretionary; if adopted, the locality is provided civil immunity.[99] There are eight states that require either introductory academy or in-service training on pursuits.[100] And California, Pennsylvania, and Wisconsin all have statewide mandatory reporting and collection systems for pursuits.[101]

Law Enforcement Work Group and Survey Findings

Law Enforcement Work Group

In order for Crime Commission staff to obtain a full understanding of the issues surrounding pursuits, staff requested help from practitioners and individuals familiar with the subject. Specifically, staff invited representatives from the following areas to participate in the Law Enforcement Work Group: representatives from both police departments and sheriff's offices, Virginia State Police, legislators, DCJS staff, regional criminal justice academy personnel, and Commonwealth's Attorneys.[102] One meeting was held in June of 2010, and as a

result of the meeting, the following informal suggestions were made:

- The Work Group did not endorse changing Va. Code § 46.2-920 to require either stopping at a controlled intersections or using both lights and sirens.
- The Work Group endorsed the concept of requiring vehicle forfeiture for a felony violation of the eluding law enforcement statute, Va. Code § 46.2-817.
- The Work Group also endorsed the concept of having DCJS promulgate a pursuit policy.
- It was observed by many law enforcement participants that there was an overall lack of training on vehicular pursuits and emergency responses for law enforcement beyond initial driving training.

Additionally, staff distributed a draft copy of the law enforcement emergency response survey to all Law Enforcement Work Group members for them to review and provide feedback.

Law Enforcement Emergency Response and Pursuit Survey

Recognizing that a pursuit may occur in any given locality, Crime Commission staff distributed surveys to all Virginia law enforcement agencies listed in the DCJS directory. The surveys gathered information on agency demographics, policies and procedures for emergency response to calls for service and vehicular pursuits, relevant training provided to officers and deputies, and data for all pursuits reported in CY09.[103]

Historically, Crime Commission staff only surveys the 134 agencies representing the Virginia State Police, Sheriff's Offices with primary law enforcement, and City/County Police Departments. These are the agencies that serve the vast majority of Virginia's population. With this figure in mind, there was an 81% (109 of 134 agencies) response rate. However, as previously mentioned, since pursuits may occur all over the state, staff also surveyed other agencies such as town police departments, college/university police departments and other law enforcement agencies not typically sampled. Therefore, a total of 156 agencies responded to the survey and, as such, this total serves as the base response number.

The diversity of Virginia's law enforcement agencies and the populations they serve must be emphasized. For instance, the total number of sworn law enforcement officers in an agency can range from 1 to over 1,800; the jurisdictions and populations served can range from very small to state-wide; and, the total number of calls for service can range from under 100 per year to over 400,000 per year.

Emergency Response to Calls for Service

The first section of the survey specifically dealt with law enforcement emergency response to calls for service. These are calls that are <u>not</u> pursuit-related. Ninety-one percent (139 of 153) of agencies reported having a written policy for when officers should activate emergency vehicle equipment.[104] When examining who is primarily responsible for assignment of response codes to calls for service, 59% (91 of 153) of agencies indicated that patrol officers are *primarily* responsible for the initial assignment of response codes to calls for service.[105] Other agencies indicated dispatchers, supervisors or a combination of all of the above are, or can be, responsible. Specifically, 30% (46 of 153) indicated dispatchers were primarily responsible, 3% (5 of 153) indicated supervisors were primarily responsible, and 7% (11 of 153) indicated a combination of patrol officers, dispatchers, and/or supervisors were primarily responsible.

The survey also attempted to determine how many traffic accidents resulted from an officer or deputy responding to a call for service or officer-initiated activity (not pursuit-related) in CY09. A total of 149 agencies responded to this request with 75 agencies reporting that there were no accidents occurring as a result of responding to calls for service or officer-initiated activity. Based on the data submitted by the remaining 74 agencies, a total of 1,972 traffic accidents were reported that occurred as a result of an officer or deputy responding to a call for service or self-initiated activity. Of the 1,972 traffic accidents reported, 1,182 accidents involved property damage only; 158 involved injuries to law enforcement personnel; 96 resulted in injuries to uninvolved persons; 1 resulted in the death of a police officer; and 6 resulted in the death of uninvolved persons in CY09. The remaining reported traffic accidents were not broken into categories and therefore it was not possible to determine whether any property damage, injuries or deaths resulted.

Finally, involvement of agencies in litigation resulting from an officer's or deputy's response to a call for service was examined. Such litigation was specifically directed at responses to calls for service as opposed to being pursuit-related or related to actions occurring after an officer or deputy has arrived on the scene. Very few agencies reported being involved in litigation, with 8% (13 of 156) reporting involvement in new or continuing lawsuits resulting from an officer's response to a call for service. These agencies reported having anywhere from 1 to 10 new or continuing lawsuits during CY09. Three agencies indicated that they had lost or settled litigation resulting from an officer's response to a call for service during CY09.

Vehicular Pursuit Policies

The survey helped to identify various elements of existing vehicular pursuit policies across Virginia's law enforcement agencies. The vast majority of agencies, 95% (148 of 156), reported having a written policy for vehicular pursuits. Many agencies, 71% (110 of 154), had a formal definition of a vehicular pursuit. Although the definitions varied from agency-to-agency, most of the definitions adhered closely to the IACP definition described earlier.

The types of offenses for which pursuits are permitted varied amongst the agencies. In general, there are three types of general policies an agency can fall under: Very restrictive, restrictive, or less restrictive.[106] Based on survey responses:

- 15% (23 of 156) of agencies had a very restrictive policy;
- 43% (67 of 156) of agencies had a restrictive policy; and,
- 42% (66 of 156) of agencies had a less restrictive policy.

Most agencies, 86% (130 of 151), indicated that they have specific criteria for when pursuits must be terminated. Criteria are fairly consistent across all agencies. For example, policies may include a very general clause calling for termination when the risks of the pursuit outweigh the benefits of suspect apprehension or may include very specific factors such as weather, traffic, pedestrians, road conditions, presence of a supervisor, equipment or mechanical failure of officer's vehicle, or when an officer/deputy is not in full control of his emotions. Sixty-four percent (96 of 151) of responding agencies' policies reference the advisability, in some instances, of terminating a pursuit once the suspect is identified. Fifteen of these 96 agencies call for such termination in all cases. Many agencies, 87% (131 of 151), permit unmarked patrol units to be involved in pursuits; however, 98 of these agencies permit

such involvement only until that unit is relieved by a marked unit.

Most agencies, 89% (132 of 149), also permit officers or deputies to pursue violators who elude on motorcycles. Some agencies will specify certain restriction though. For instance, some policies prohibit the use of tire deflators on motorcycles. Finally, only 10% (15 of 151) of agencies reported routinely utilizing helicopters or fixed winged aircraft to assist in pursuits.

Pursuit Interventions and Alternatives

There are many different types of interventions permitted by agencies to terminate a pursuit. Tire deflators are by far the most popular, with 67% (104 of 156) of agencies permitting their use. Figure 2 illustrates the types of interventions that agencies reported were permitted.[107]

Figure 2: Type of Interventions Permitted to Terminate Vehicular Pursuits

Type of Intervention	Number	Percent
Tire deflators	104	67%
Running/rolling roadblock	67	43%
Roadblocks*	62	40%
Plate identification	36	23%
Channelization	27	17%
PIT maneuver	21	13%
Ramming*	14	9%
Use of firearms*	14	9%
Caravanning	10	6%
Electrical system deactivation	3	2%
Remote engine disabler	2	1%
GPS technology	1	1%

Source: Virginia State Crime Commission, Law Enforcement Emergency Response Survey, 2010

**Note: These agencies indicated that this intervention must be authorized by a shift commander and/or are only to be used when deadly force is justified.*

Multi-jurisdictional Vehicular Pursuits

The vast majority of agencies, 95% (144 of 151), reported having some ability to communicate with other jurisdictions during a pursuit. However, many also reported that such communication was limited. Limitations included the ability to only communicate with immediate surrounding jurisdictions, dispatchers having to complete a time-consuming radio "patch" in order for communication to take place, and interoperability issues arising between different radio systems and frequencies. Some agencies reported difficulty in even ensuring consistent communication *within* their jurisdiction due to variables such as terrain (e.g., mountainous regions). There were some reported improvements in radio communications, however, with some agencies or clusters of jurisdictions having the ability to be assigned to a mutual aid channel or a regional pursuit network.

Seventy percent (106 of 151) of agencies reported having a written policy addressing communication with other jurisdictions during a pursuit. At least 14 agencies adhere to a multi-jurisdictional or regional pursuit policy. The vast majority of agencies reported having a written policy addressing pursuits that originate in their jurisdiction that go into another jurisdiction and vice-versa. Specifically, 89% (132 of 149) of agencies have a written policy that addresses pursuits originating in *their* jurisdiction going into another jurisdiction, and 77% (115 of 149) of agencies have a written policy that addresses pursuits originating in *another* jurisdiction that come into their jurisdiction. However, very few agencies, 13% (20 of 149), reported having a formal memorandum of understanding with another jurisdiction regarding pursuit protocol between the two agencies.

Pursuit Investigation and Litigation

Most agencies conduct some type of follow-up after a vehicular pursuit occurs, with 91% (135 of 149) of agencies conducting some type of evaluation to determine adherence to agency pursuit policy. The type of follow-up evaluation varies widely, with agencies often utilizing multiple follow-up mechanisms, for example:

- Informal supervisory review (n=46);
- Formal report required by pursuing officers addressing pursuit (n=117);
- Formal supervisory review (n=108);
- Internal investigation initiated in all pursuits (n=15);
- Internal investigation initiated only in pursuits resulting from inappropriate action or resulting in accident or injury (n=39);
- Evaluation program in place, separate from internal affairs process (n=33); and,
- Internal Review Board (n=16).

Only three agencies reported being involved in litigation resulting from a vehicular pursuit. Two of these agencies reported having one new or continuing lawsuit during CY09. No agencies reported that they had lost or settled litigation resulting from a vehicular pursuit in CY09.

Training

The significant amount of time law enforcement officers spend driving during their shift must be emphasized. Based on 104 agencies with useable data, officers and deputies logged a median of approximately 18,300 miles per year on patrol vehicles. The distances logged ranged from 100 to 55,000 miles per officer, per year. With this in mind, the survey specifically sought to determine the amount and type of continuing classroom and practical (hands-on) training provided to officers and deputies beyond what is provided in the basic academy.

Around half of all agencies, 52% (79 of 152), reported that officers or deputies received some type of continuing classroom education related to vehicular pursuits during CY09. This type of training is typically an "in-house" review of pursuit policy during roll call. Other agencies reported having all sworn personnel complete a course offered by a risk management group or insurance company, with some training provided on-line.

Even fewer agencies, 36% (54 of 151), reported that officers or deputies received some type of practical emergency vehicle handling during CY09. For agencies that did report such training, some reported that officers completed a general advanced skills and technical driving course. Other agencies reported that officers completed more specific courses focusing on handling 4-wheel drive vehicles or high performance vehicles (e.g., Dodge Chargers) or administering the PIT maneuver. Less than one-quarter of agencies, 22% (27 of 124), reported that they *required* their officers or deputies to complete practical driving courses above and beyond basic training requirements. However, for these agencies, such requirements are typically only for officers or deputies who are found "at fault" for a preventable accident.

Vehicular Pursuit Data Findings

As mentioned earlier, Virginia does not have a state-wide vehicular pursuit database. As such, staff requested records on all reported pursuits from all law enforcement agencies for CY09. Agencies were asked to either submit their inter-agency pursuit report forms or complete a standardized form created by Crime Commission staff.[108] Due to this approach, there was a vast difference in the amount and type of information collected by each agency. However, to the best of staff's knowledge, this is the first time a state-wide study on this data has been attempted. As such, a far better preliminary understanding of

vehicular pursuits occurring across the Commonwealth was achieved.

Survey findings indicated that 59% (89 of 151) of responding agencies formally maintained data on vehicular pursuits. Ninety-one percent (142 of 156) of agencies responded to the request for CY09 pursuit data. Of the 142 agencies, 63% (89 of 142) reported having *at least* one vehicular pursuit initiated by their agency in CY09. The remaining 37% (53 of 142) reported having zero pursuits initiated by their agency.

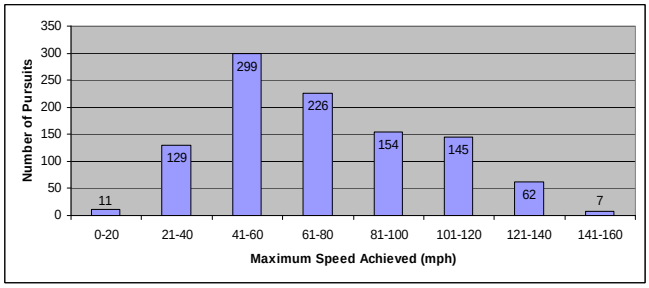
Total Number of Pursuits Reports (CY09)

A total of 1,227 pursuits were reported by the 89 agencies in CY09.[109] The number of pursuits per year varied widely across the 89 agencies, ranging from 1 to 241 vehicular pursuits. Although there were 1,227 pursuits reported, the number of base pursuits will vary throughout the report due to the fact that not all agencies completed or collected information on each question. For instance, some agencies only indicated the date a pursuit occurred, while others were extremely thorough in the amounts and quality of information collected. Since not all agencies replied and other agencies may have replied, but provided incomplete data, the 1,227 figure should be viewed as the *minimum* number of pursuits that occurred in Virginia during CY09.

Length, Distance, and Speed of Pursuits

The median length of pursuits based on 1,008 useable pursuit data rows/responses was 3 minutes.[110] The average length was 5 minutes. The length of pursuits ranged from less than 1 minute to almost 1 hour in duration. The median distance of pursuits based on 961 useable pursuit data rows/responses was 1.9 miles. The average distance travelled was 4 miles. The distance of pursuits ranged from less than 1 mile to over 50 miles. The median maximum speed achieved based on 1,033 useable pursuit data rows/responses was 67 miles per hour. The average maximum speed achieved was 72 miles per hour. The maximum speed achieved ranged from 10 miles per hour to 156 miles per hour. The figure below illustrates the total number of vehicular pursuit broken into various categories of speed.

Figure 3: Vehicular Pursuits and Maximum Speed Achieved



Source: Virginia State Crime Commission, Vehicular Pursuit Data Analysis, CY09
n=1,033 vehicular pursuits

Time of Day

Over half of all reported pursuits occurred at night. Based on 968 useable pursuit data rows/responses, 52% (504 of 968) of reported pursuits occurred at night, 30% (297 of 968) occurred during the daytime, and 17% (167 of 968) occurred at dusk.

Traffic Conditions

Over 75% of reported pursuits were initiated in light traffic conditions. Based on 565 useable pursuit data rows/responses, 77% (436 of 565) of reported pursuits were initiated in light traffic conditions, 20% (112 of 565) of reported pursuits were initiated in moderate traffic conditions, and 3% (17 of 565) were initiated in heavy traffic conditions.

Road/Weather Conditions

The vast majority of reported pursuits occurred on dry roadways. Based on 647 useable pursuit data rows/responses, 88% (569 of 647) of pursuits occurred on dry roadways, 11% (73 of 647) of pursuits occurred on wet roadways, and 1% (5 of 647) occurred on icy, snowy or foggy roadways.

Type of Roadway/Area

Staff attempted to gain an understanding of the types of roadways where most pursuits occur. However, as illustrated in the figure below, pursuits occur everywhere with a somewhat even distribution between suburban, rural, interstate and urban environments.

Figure 4: Type of Roadway/Area of Pursuit

Roadway/Area Type	Number of Pursuits	Percent
Suburban	176	20%
Interstate	155	17%
Rural	137	15%
Urban	127	14%
Residential	107	12%
Highway (not interstate)	89	10%
Commercial	64	7%
Combination of Areas	38	4%

Source: Virginia State Crime Commission, Vehicular Pursuit Data Analysis, CY09
n=893 vehicular pursuits

Type of Vehicle Driven by Violator

Examining the type of vehicle driven by violators in reported pursuits, 64% (622 of 972) of pursuits involved automobiles, 23% (219 of 972) involved vans, pick-ups, or SUVs, 12% (121 of 972) involved motorcycles, and 1% involved other vehicles such as ATVs, mopeds, or tractor trailers.

Involvement of Supervisors and Additional Units or Agencies

Some agencies collect information on whether vehicular pursuits were monitored by a supervisor and whether any additional units or outside agencies were involved in a pursuit. Ninety-five percent (806 of 847) of reported pursuits were monitored by a supervisor. Sixty-one percent (576 of 950) of reported pursuits did not involve any additional units from the same agency and 83% (657 of 795) did not involve any additional outside agencies.

Violator Arrests and Initial Violation

The vast majority of violators were arrested. Specifically, 78% (868 of 1,114) of pursuits resulted in the arrest of the violator. When examining the initial violation of violators, 47% (531 of 1,132) of pursuits involved a traffic violation, 40% (457 of 1,132) of pursuits involved a criminal misdemeanor, and 13% (144 of 1,132) of pursuits involved a criminal felony. The most common traffic violations included non-reckless speeding or some form of defective equipment. The vast majority of criminal misdemeanors included reckless driving or suspected DUI offenses. The most common criminal felony offense was for stolen automobiles.

However, many violators received additional charges, above and beyond the initial violation, once apprehended. In other words, there is often a reason for why suspects eluded officers in the first place. As such, once the violator is apprehended officers often discover, for instance, that the violator has a suspended or revoked license, they are in possession of illicit drugs, they are intoxicated, the vehicle is stolen, or they have outstanding warrants.

Violator Impairment

At least 22% (275 of 1,227), or 1 in 5 pursuits, involved a violator who was impaired. Many agencies did not capture or submit information on this question so it is stressed that this figure is the minimum number of pursuits involving an impaired violator. Of the pursuits involving violator impairment:

- 81% (224 of 275) involved alcohol impairment;
- 7% (20 of 275) involved drug impairment;
- 7% (18 of 275) involved alcohol and drug impairment;
- 2% (5 of 275) involved mental illness/impairment; and,
- 1% (3 of 275) involved alcohol/drugs and mental illness or medical condition.

Manner of Pursuit Termination or Intervention

One-third of pursuits ended with the violator stopping voluntarily. Violators crashing vehicles with no outside interference, pursuits discontinued by officers or supervisor, violators stopping/wrecking vehicles and bailing on foot (subsequently caught) and violators successfully eluding accounted for 13-15% of all pursuits each. One percent of all reported pursuits resulted in an officer crashing his vehicle in some manner. Figure 5 illustrates the reported manner in which pursuits were terminated:

Figure 5: Manner of Pursuit Termination

Manner of Pursuit Termination	Number of Pursuits	Percent
Violator stopped voluntarily	338	33%
Violator crashed (no outside interference)	149	15%
Discontinued by officer or supervisor	140	14%
Violator stopped/wrecked vehicle, bailed on foot, subsequently caught	132	13%
Violator eluded	129	13%
Vehicle crashed (not specified who was involved)	56	5%
Violator vehicle stopped by police action	47	5%
Other (exited jurisdiction or vehicle disabled)	17	2%
Officer and violator both crashed	9	1%
Officer crashed	2	<1%
Total	1,019	100%

Source: Virginia State Crime Commission, Vehicular Pursuit Data Analysis, CY09
n=1,019 vehicular pursuits

Injuries and Deaths

A minimum of 19 pursuits resulted in a minor injury to an officer or deputy. There were no reported serious injuries or fatalities to law enforcement officers in CY09. A minimum of 90 pursuits resulted in a minor injury to the violator. Eight pursuits resulted in a serious injury to the violator and 11 pursuits resulted in a fatality to the violator. A minimum of 14 pursuits resulted in a minor injury to a third (uninvolved) party. One pursuit resulted in serious injury to a third person; however, there were no fatalities of uninvolved persons reported in CY09. It must be stressed that many agencies did not collect or submit information on these fields. Therefore, the numbers presented are indicative of the *minimum* number of injuries and deaths resulting from pursuits in CY09.

Vehicle and Property Damage

A minimum of 66 pursuits resulted in damage to a law enforcement vehicle and a minimum of 283 pursuits resulted in damage to a violator vehicle. A minimum of 138 pursuits resulted in damage to an uninvolved vehicle or property. Similar to the information collected on injuries and deaths, most agencies did not collect or submit information relating to vehicle and property damage. As such, the numbers presented are indicative of the *minimum* number of vehicle and amount of property damage resulting from pursuits in CY09.

Summary of Pursuit Data Findings

There are a number of findings that resulted from the analysis of vehicular pursuit data in Virginia. These findings are very consistent with other existing academic and government studies.[111] Based on the data submitted from 89 agencies, most pursuits:

- Last a median of 3 minutes;
- Travel a median of 1.9 miles;
- Involve automobiles (as opposed to trucks, SUVs, or motorcycles);
- Occur at night;
- Are initiated on dry road conditions;
- Are initiated in light traffic conditions;
- Are monitored by a supervisor;
- Do not involve any additional patrol units or outside agencies;
- Are initiated due to a traffic violation or criminal misdemeanor;
- Result in the arrest of the violator(s);
- Result in additional subsequent charges for the violator; and,
- Rarely result in injury or death to officers and violators.

Conclusion

Law enforcement vehicular pursuits have gained increased attention since the 1990's; Virginia is no exception. The foremost problem facing policymakers with regard to emergency response and pursuit driving is the availability of studies or data upon which to make informed decisions. Some of data and information available is limited in depth and geographic area, but there are enough studies for policymakers to make empirical decisions regarding pursuits. Only 16 states regulate pursuits in statute, while over 40 states provide some requirement for use of emergency warning devices when law enforcement is responding to a call or in pursuit.

The survey provided a snapshot of law enforcement vehicular pursuits in Virginia from CY09, reviewing information from 156 agencies. Information was obtained concerning response to emergency calls and engaging in pursuits, including statistics on over 1,200 pursuits from 89 agencies. Considering the liability and safety risks posed by pursuits and emergency response driving, it is surprising that only 52% of agencies indicated that their officers engaged in training related to emergency/pursuit driving, beyond initial EVOC training.

Based on the limited nature of pursuit and emergency response training, concern for the safety of others from vehicular pursuits, and the need to punish those who flee law enforcement, the Crime Commission made three recommendations:

Recommendation 1: Amend Va. Code § 46.2-920 of the Virginia Code to require emergency vehicles to come to a complete stop at a "steady or flashing red signal, traffic light, stop sign, or device indicating moving traffic shall stop" or run their siren, and their lights as reasonably necessary and proceed through the stop.

Senator Toddy Puller introduced Senate Bill 762 during the 2011 General Session of the Virginia General Assembly, based on the Crime Commission recommendation. The bill was passed by the Virginia Senate as introduced, and amended by the Virginia House of Delegates,[112] and signed by the Governor.[113]

Recommendation 2: Require DCJS to establish pursuit and emergency response driver training for law enforcement officers assigned to vehicle patrol duties.

Senator Janet Howell introduced Senate Bill 944,[114] based on the Crime Commission recommendation. The bill passed the Senate of Virginia as introduced. In the Virginia House of Delegates the bill was amended[115] and signed by the Governor.[116]

Recommendation 3: Increase penalties for Va. Code § 46.2-817, felony eluding police, to include vehicle forfeiture.

Delegate Manoli Loupassi introduced House Bill 1403,[117] which was replaced by the recommendation of the Crime Commission in a substitute to his original bill. The bill passed the Virginia House of Delegates, but was passed by indefinitely by the Senate Courts of Justice Committee.

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[1] S.B. 847 Va. General Assemb. (2009).
[2] Geoffrey P. Alpert William C. Smith, Police Pursuits after Scott v. Harris, Far From Ideal?, Ideas in Policing p. 22008 available at, http://www.deadlyforce.com/Scott%20v%20Harris%20-%20Police%20Foundation.pdf.
[3] Id. at 3.
[4] Pursuit Management Task Force Report, U.S. Department of Justice, Office of Justice Programs (1998).
[5] Id.
[6] Id. at 5.
[7] Id. Please note that the agencies surveyed were from the western half of the U.S.
[8] Id. at 5. Severely restrictive; polices allow for only "pursuing only felons, serious or assaultive misdemeanants, and those whose conduct was such a danger to the public that the anticipated hazards of pursuit were outweighed by the danger posed by allowing the conduct to continue," officer discretion; are policies that generally focus on "criteria that officers must consider in initiating or continuing a pursuit, but do not restrict pursuits to specific types or classifications of crime," and minimum standards; these types of polices provide minimum/no guidance or no restrictions at all, and functionally give the officer complete discretion.
[9] Id.
[10] Id. at 7.
[11] Id. at 62-5.
[12] Id. at 10.
[13] F P Rivara and C D Mack, Motor vehicle crash deaths related to police pursuits in the United States, Injury Prevention, 10, 93–95 (2004) available at http://injuryprevention.bmj.com/content/10/2/93.full.html#related-urls.
[14] Id.
[15] This number is broken down as follows: 946 were persons "uninvolved" in the pursuit, 102 were " non motorists," and 40 were law enforcement officers involved in the pursuit.
[16] Id.
[17] The FARS Analytical Reference Guide states "If at least one driver in a crash has a "Driver-Related Factor" of high speed chase with police in pursuit (37) then that crash is considered a police pursuit crash and all fatalities in that crash are considered "fatalities in crashes involving police in pursuit."
18 Pursuit is defined as "an event that is initiated when a law enforcement officer, operating an authorized emergency vehicle, gives notice to stop (either through the use of visual or audible emergency signals or a combination of emergency devices) to a motorist who the officer is attempting to apprehend and that motorist fails to comply with the signal by either maintaining speed, increasing speed or taking other evasive action to elude the officer's continued attempts to stop the motorist."
19 John Hill, High-speed police pursuits: dangers, dynamics, and risk reduction, The FBI Bulletin, July 2002, available at http://findarticles.com/p/articles/mi_m2194/is_7_71/ai_89973554/?tag=content;col1.
[20] Id.
[21] MANAGING POLICE PURSUITS: FINDINGS FOR THE IACP'S POLICE PURSUIT DATABASE, Winter (2004).
[22] Id. at 4.

[23] Id.
[24] Id. at 5. The list of data elements also includes: report/tracing number, average speed above limit, initiating officer age, supervisor monitored, officer years service, additional units, officer ID number, additional agencies, maximum pursuit speed, suspect sex, suspect race, suspect age, police intervention method, suspect licensed, road type, distance trailed, suspect impairment, light conditions, arrest/charges filed, injury (minor, serious, fatal), sex of initiating officer, property damage.
[25] Id. at 11.
[26] Id. at 2-10.
[27] Cynthia Lum and George Fachner, *Police Pursuits in an Age of Innovation and Reform: The IACP Police Pursuit Database*, September (2008).
[28] Id. at 44.
[29] Id. at 56.
[30] Id. at 57.
[31] Id. at 62.
[32] Id. at 65.
[33] The Pursuit Immobilization Technique or "PIT Maneuver" is described as "a driving technique designed to stop a fleeing motorist safely and quickly by hitting the fleeing car at a specific point on the vehicle, which throws the car into a spin and brings it to a stop." Scott v. Harris, 550 U.S. 372 (2007).
[34] Id. at 66.
[35] Id. at 74.
[36] Alpert, G.P., Questioning police pursuits in urban areas. *Journal of Police Science and Administration, 15(4)*, 298 (1987); Alpert, G.P. & Dunham, R.G., Research on police pursuits: Applications for law enforcement. *American Journal of Police, 7(2),* 123-133 (1988); Alpert, G.P., Policing hot pursuits: The discovery of aleatory elements. *Journal of Criminal Law and Criminology, 80(2),* 521-539 (1989); Auten, J., *Police pursuit driving operations in Illinois: 1990.* Champaign, IL: Police Training Institute, University of Illinois (1991); California Highway Patrol., *California Highway Patrol Pursuit Study.* Sacramento, CA: California Highway Patrol (1983); Charles, M.T., Falcone, D.N., & Wells, E., *Police pursuit in pursuit of policy: The pursuit issue, legal and literature review, and an empirical study*. Washington, D.C.: AAA Foundation for Traffic Safety (1992); Oechsli, S, *Kentucky State Police Pursuit Study: 1989-1992.* Kentucky State Police, Frankfort, KY (1992); O'Keefe, J. J., *An empirical analysis of high speed police pursuits: the Houston Police Department experience.* Ann Arbor, MI: University of Michigan (1989).
[37] Alpert, G.P. & Dunham, R.G., Research on police pursuits: Applications for law enforcement. *American Journal of Police, 7(2),* 123- 133 (1988); American Civil Liberties Union Foundation of Southern California, *Not just isolated incidents: The epidemic of police pursuits in southern California.* Los Angeles, CA: American Civil Liberties Foundation of Southern California (1996); Bayless, K. and Osborne, R., *Pursuit Management Task Force Report.* Report supported by the National Law Enforcement and Corrections Technology Center for the National Institute of Justice (1998); California Highway Patrol., *California Highway Patrol Pursuit Study.* Sacramento, CA: California Highway Patrol (1983);Charles, M.T., Falcone, D.N., & Wells, E., *Police pursuit in pursuit of policy: The pursuit issue, legal and literature review, and an empirical study*. Washington, D.C.: AAA Foundation for Traffic Safety (1992); Crew, R. & Hart Jr., R. A., Assessing the value of police pursuit. *Policing: An International Journal of Police Strategies and Management, 22(1),* 58-73 (1999); Wells. E., & Falcone, D. N., Research on police pursuits: advantages of multiple data collection strategies, *Policing: An International Journal of Police Strategies and Management, 20(4),* 729-748 (1997).
[38] Payne, D. M., & Fenske, J.C., An analysis of the rates of accidents, injuries and fatalities under different light conditions: A Michigan emergency response study of state police pursuits. *Policing: An International Journal of Police Strategies and Management, 20(2),* 357- 373 (1997); Rivara, F. P., & Mack, C. D., Motor vehicle crash deaths related to police pursuits in the United States. *Injury Prevention, 10(2),* 93-95 (2004).
[39] California Highway Patrol., *California Highway Patrol Pursuit Study.* Sacramento, CA: California Highway Patrol (1983).
[40] Lucadamo, T, *Identifying the dimension of police pursuit.* Master's Thesis, University of Maryland (1994); Wells. E., & Falcone, D. N., Research on police pursuits: advantages of multiple data collection strategies, *Policing: An International Journal of Police Strategies and Management, 20(4),* 729-748 (1997).
[41] Charles, M.T., Falcone, D.N., & Wells, E., *Police pursuit in pursuit of policy: The pursuit issue, legal and literature review, and an empirical study*. Washington, D.C.: AAA Foundation for Traffic Safety (1992); O'Keefe, J. J., *An empirical analysis of high speed police pursuits: the Houston Police Department experience.* Ann Arbor, MI: University of Michigan (1989).

[42] Alpert, G.P. & Dunham, R.G., Research on police pursuits: Applications for law enforcement. *American Journal of Police, 7(2),* 123- 133 (1988); Alpert, G.P., Policing hot pursuits: The discovery of aleatory elements. *Journal of Criminal Law and Criminology, 80(2),* 521-539 (1989); Auten, J., *Police pursuit driving operations in Illinois: 1990.* Champaign, IL: Police Training Institute, University of Illinois (1991); California Highway Patrol., *California Highway Patrol Pursuit Study.* Sacramento, CA: California Highway Patrol (1983); O'Keefe, J. J., *An empirical analysis of high speed police pursuits: the Houston Police Department experience.* Ann Arbor, MI: University of Michigan (1989).

[43] Alpert, G.P., Questioning police pursuits in urban areas. *Journal of Police Science and Administration, 15(4)*, 298 (19870; Alpert, G.P. & Dunham, R.G., Research on police pursuits: Applications for law enforcement. *American Journal of Police, 7(2),* 123-133 (1988); American Civil Liberties Union Foundation of Southern California, *Not just isolated incidents: The epidemic of police pursuits in southern California.* Los Angeles, CA: American Civil Liberties Foundation of Southern California (1996); Auten, J., *Police pursuit driving operations in Illinois: 1990.* Champaign, IL: Police Training Institute, University of Illinois (1991); Charles, M.T., Falcone, D.N., & Wells, E., *Police pursuit in pursuit of policy: The pursuit issue, legal and literature review, and an empirical study*. Washington, D.C.: AAA Foundation for Traffic Safety (1992); Fennessy, E.F., Hamilton, T., Joscelyn, K.B. & Merrit, J.S., *A study of the problem of hot pursuit*. Washington, D.C.: U.S. Department of Transportation (1970); Hannigan, M. J., Commissioner, *The evaluation of risk: Initial cause vs. final outcome in police pursuits.* California Highway Patrol (1995); Nugent, H, *Restrictive policies for high speed police pursuits.* Washington, D.C.: U.S. Department of Justice, National Institute of Justice (1990); Oechsli, S, *Kentucky State Police Pursuit Study: 1989-1992.* Kentucky State Police, Frankfort, KY(1992); O'Keefe, J. J., *An empirical analysis of high speed police pursuits: the Houston Police Department experience.* Ann Arbor, MI: University of Michigan (1989).

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[46] *See* Lum and Fachner at note 28, p. 25.

[47] IACP Vehicular Pursuit policy, *available at* http://www.theiacp.org/LinkClick.aspx?fileticket=pnMib083hyU%3d&tabid=392.

[48]Additionally, the officer must consider: road and weather conditions, population density and traffic, capabilities of both the suspect's and pursuit car, and the seriousness of the offense. Id.

[49] Id. at 2-5.

[50] DCJS General Directive 2-9, *available at* http://www.dcjs.virginia.gov/cple/sampleDirectives/index.cfm.

[51] Id. at 10.

[52] Id.

[53] "When, in the opinion of the officer, an emergency is imminent or exists, or that activation of emergency warning devices is necessary to protect life or render the necessary enforcement, the department authorizes an emergency response." Id.

[54] There is a more complete discussion of the requirements in Va. Code § 46.2-920 in the proceeding section, starting at page 12.

[55] "Restrictive" allows pursuits when an officer may pursue a vehicle only when he has probable cause to believe the suspect has committed or is attempting to commit a crime involving violence or the display or use of a firearm. Id. at 12.

[56] Permits a pursuit when the officer has a reasonable belief that either; "suspect presents an immediate threat to the safety of officers or citizens, suspect has committed or is attempting to commit a felony involving actual or threatened violence which may result in injury or death, or the necessity of immediate apprehension supersedes the danger created by the pursuit." Id.

[57] Requires an officer during a pursuit to continuously evaluate the risk to the pursuing officers, the suspect, and the public, and be prepared to end a pursuit when the risk factors so require. These factors include density of intersecting streets, weather, pedestrians, emotions of pursuing officer, and supervisory oversight. Id. at 13.

[58] In the PTMF report, the three general types of polices were identified as either severely restrictive, officer discretion, or minimum standards. Directive 2-9's three types of policies are not that different, although there is nothing comparable to minimum standards.
[59] CALEA Standard 41.2.1. The policy should at minimum a "classify calls for service as routine or emergency, "should designate when emergency lights and siren should be used and when traffic laws should be observed," and "should also address the responsibility of responding officers, dispatchers, and supervisors while responding to emergency calls."
[60] CALEA Standard 41.2.2. Vehicle Pursuit.
[61] There are 83 Virginia enforcement agencies with VLEPSC accreditation. *See* http://www.dcjs.virginia.gov/accred/agencies.cfm
[62] Virginia Law Enforcement Accreditation Program Manual, OPR.01.01 6th Edition, 2010, *available at* http://www.dcjs.virginia.gov/accred/documents/6th-EditionProgramManual-V4.pdf.
[63] Id.
[64]Performance Outcomes, Training Objectives, Criteria and Lesson Plan Guides for Compulsory Minimum Training for Law Enforcement Officers, Section 8, Virginia Department of Criminal Justice Services, (last updated January 2011), *available at*: http://www.dcjs.virginia.gov/standardsTraining/documents/performanceOutcomes/section8.pdf.
[65] http://www.nvcja.org/BasicTraining/EmergencyVehicleOperation.aspx.
[66] *Supra* at note 3.
[67] Id.
[68] J. Michael McGuinness, A Primer on North Carolina and Federal Use of Force Law: Trends in Fourth Amendment Doctrine, Qualified Immunity, and State Law Issues, 31 Campbell L. Rev. 431, 471 (2009).
[69] Tennessee v. Garner, 471 U.S. 1, 11-12 (1985).
[70] *Supra* at note 42. p 477.
[71] Scott v. Harris, 550 U.S. 372, 375 (2007).
[72] Id. at 386.
[73] Erwin Chemerinsky, A Troubling Take on Excessive-Force Claims, *Trial*, July 2007, at 74, 76.
[74] VA. CODE ANN. § 46.2-920 (West 2010).
[75] Id.
[76] Id.
[77] Id.
[78] Id. A recent legal opinion by the Virginia Attorney General has interpreted this section to indicate that emergency vehicles are not required to have both lights and sirens on, but only when they deem it "reasonably necessary." 2010 WL 4791593 (Va. A.G. Nov. 15, 2010).
[79] Id.
[80] Id.
[81] Id.
[82] Colby v. Boyden, 241 Va. 125, 132, 400 S.E.2d 184, 188 (1991).
[83] ALA. CODE § 32-5A-7 (1975); ARIZ. REV. STAT. ANN. § 28-624 (2010); ARK. CODE ANN. § 27-37-202 (2010 West); CAL. VEH. CODE § 21055 (2010 West); COLO. REV. STAT. ANN. § 42-4-108 (2010 West); CONN. GEN. STAT. ANN. § 14-283 (2010 West); DEL. CODE ANN. tit. 21, § 4106 (2010 West); FLA. STAT. ANN. § 316.271 (West 2010); GA. CODE ANN. § 40-6-6 (2010 West); HAW. REV. STAT. ANN. § 291C-26 (2010 LexisNexis); IDAHO CODE ANN. § 49-623 (2010 West); 625 ILCS 5/11-205 (2010); IND. CODE ANN. § 9-19-5-3 (2010 West); KY. REV. STAT. ANN. § 189.940 (2010 West); LA. REV. STAT. ANN. § 32:24 (2010); ME. REV. STAT. ANN. tit. 29-A, § 2054 (2010); MD. CODE ANN., TRANSP. § 21-106 (2010 West); MASS. GEN. LAWS ANN. ch. 89, § 7B (West 2010); MICH. COMP. LAWS ANN. § 257.603 (2010 West); MINN. STAT. ANN. § 169.17 (West 2010); MISS. CODE. ANN. § 63-3-517 (West 2010); MO. ANN. STAT. § 300.100 (2010 West); MONT. CODE ANN. § 61-9-401 (2010); NEB. REV. STAT. § 60-6,114 (2010); NEV. REV. STAT. ANN. § 484D.400 (2010 West); N.H. REV. STAT. ANN. § 265:8 (2010); N.J. STAT. ANN. § 39:3-69 (2010 West); N.M. STAT. ANN. § 66-3-843 (West 1978); N.Y. VEH. & TRAF. LAW § 1104 (McKinney 2010); N.C. GEN. STAT. ANN. § 20-156 (West 2010); N.D. CENT. CODE § 39-21-36 (2010); OHIO REV. CODE ANN. § 4511.24 (West 2010); OKLA. STAT. ANN. tit. 47, § 12-401 (West 2010): OR. REV. STAT. ANN. § 820.320 (West 2010); 75 PA. CONS. STAT. ANN. § 3105 (West 2010); R.I. GEN. LAWS § 31-12-7 (West 2010) and R.I. GEN. LAWS § 31-12-8 (West 2010); S.C. CODE ANN. § 56-5-760 (Law. Co-op. 2010); S.D. CODIFIED LAWS § 32-31-4 (Michie 2010); TENN. CODE ANN. § 55-8-108 (West 2010); TEX. TRANSP. CODE ANN. § 547.702 (Vernon 2010); UTAH CODE ANN. § 41-6a-212 (West 2010); VT. STAT. ANN. tit. 23, § 1015 (West 2010); WASH. REV. CODE ANN. § 46.61.035 (West 2010); W. VA. CODE ANN. § 17C-2-5 (West 2010); WIS. STAT. ANN. § 346.03 (West 2010); and, WYO. STAT. ANN. § 31-5-952 (West 2010).
[84] ALA. CODE § 32-5A-7 (1975); ARK. CODE ANN. § 27-37-202 (West 2010); COLO. REV. STAT. ANN. § 42-4-108 (West 2010); CONN. GEN. STAT. ANN. § 14-283 (West 2010); GA. CODE ANN. § 40-6-6 (West 2010); KY. REV. STAT. ANN. § 189.940 (2010 West); MINN. STAT. ANN. §

169.17 (West); MO. ANN. STAT. § 300.100 (West 2010); OHIO REV. CODE ANN. § 4511.24 (West 2010); 75 PA. CONS. STAT. ANN. § 3105 (West 2010); S.C. CODE ANN. § 56-5-760 (Law. Co-op. 2010); TENN. CODE ANN. § 55-8-108 (West 2010); UTAH CODE ANN. § 41-6a-212 (West 2010); WYO. STAT. ANN. § 31-5-952 (West 2010).

[85] ARIZ. REV. STAT. ANN. § 28-624 (2010); CAL. VEH. CODE § 21055 (2010 West); DEL. CODE ANN. tit. 21, § 4106 (West 2010); FLA. STAT. ANN. § 316.271 (West 2010); HAW. REV. STAT. ANN. § 291C-26 (LexisNexis 2010); IDAHO CODE ANN. § 49-623 (West 2010); 625 ILCS 5/11-205 (2010); IND. CODE ANN. § 9-19-5-3 (West 2010); LA. REV. STAT. ANN. § 32:24 (2010); ME. REV. STAT. ANN. tit. 29-A, § 2054 (2010); MD. CODE ANN., TRANSP. § 21-106 (West 2010); MASS. GEN. LAWS ANN. ch. 89, § 7B (West 2010); MICH. COMP. LAWS ANN. § 257.603 (West 2010); MISS. CODE. ANN. § 63-3-517 (West 2010); MONT. CODE ANN. § 61-9-401 (2010); NEB. REV. STAT. § 60-6,114 (2010); NEV. REV. STAT. ANN. § 484D.400 (West 2010); N.H. REV. STAT. ANN. § 265:8 (2010); N.J. STAT. ANN. § 39:3-69 (West 2010); N.M. STAT. ANN. § 66-3-843 (West 1978); N.Y. VEH. & TRAF. LAW § 1104 (McKinney 2010); N.C. GEN. STAT. ANN. § 20-156 (West 2010); N.D. CENT. CODE § 39-21-36 (2010); OKLA. STAT. ANN. tit. 47, § 12-401 (West 2010); OR. REV. STAT. ANN. § 820.320 (West 2010); R.I. GEN. LAWS § 31-12-7 (West 2010) and R.I. GEN. LAWS § 31-12-8 (West 2010); S.D. CODIFIED LAWS § 32-31-4 (Michie 2010); TEX. TRANSP. CODE ANN. § 547.702 (Vernon 2010); VT. STAT. ANN. tit. 23, § 1015 (West 2010); WASH. REV. CODE ANN. § 46.61.035 (West 2010); W. VA. CODE ANN. § 17C-2-5 (West 2010); WIS. STAT. ANN. § 346.03 (West 2010).

[86] MASS. GEN. LAWS ANN. ch. 89, § 7B (West 2010).

[87] ALA. CODE § 32-5A-7 (1975); ARIZ. REV. STAT. ANN. § 28-624 (2010); ARK. CODE ANN. § 27-37-202 (West 2010); COLO. REV. STAT. ANN. § 42-4-108 (West 2010); CONN. GEN. STAT. ANN. § 14-283 (West 2010); DEL. CODE ANN. tit. 21, § 4106 (West 2010); GA. CODE ANN. § 40-6-6 (West 2010); HAW. REV. STAT. ANN. § 291C-26 (LexisNexis 2010); IDAHO CODE ANN. § 49-623 (West 2010); 625 ILCS 5/11-205 (2010); KY. REV. STAT. ANN. § 189.940 (West 2010); LA. REV. STAT. ANN. § 32:24 (2010); ME. REV. STAT. ANN. tit. 29-A, § 2054 (2010); MD. CODE ANN., TRANSP. § 21-106 (West 2010); MICH. COMP. LAWS ANN. § 257.603 (2010 West); MINN. STAT. ANN. § 169.17 (West); MISS. CODE. ANN. § 63-3-517 (West); MO. ANN. STAT. § 300.100 (West 2010); NEB. REV. STAT. § 60-6,114 (2010) N.Y. VEH. & TRAF. LAW § 1104 (McKinney 2010); OR. REV. STAT. ANN. § 820.320 (West 2010); 75 PA. CONS. STAT. ANN. § 3105 (West 2010); S.C. CODE ANN. § 56-5-760 (Law. Co-op. 2010); TENN. CODE ANN. § 55-8-108 (West 2010); UTAH CODE ANN. § 41-6a-212 (West 2010); VT. STAT. ANN. tit. 23, § 1015 (West 2010); WASH. REV. CODE ANN. § 46.61.035 (West 2010); W. VA. CODE ANN. § 17C-2-5 (West 2010); WIS. STAT. ANN. § 346.03 (West 2010).

[88] VA. CODE ANN. § 46.2-817 (West 2010). There is an affirmative defense available "if the defendant shows he reasonably believed he was being pursued by a person other than a law-enforcement officer." Id.

[89] Id.

[90] Id.

[91] Id.

[92] ALA. CODE § 13A-10-52 (1975); ALASKA STAT. § 28.35.182 (Michie 2010); ARIZ. REV. STATE. ANN. § 28-622.01 (West 2010); ARK. CODE ANN. § 5-54-125 (Michie 2010); CAL. [VEHICLE] CODE § 2800.2 (West 2010); COLO. REV. STAT. ANN. § 18-9-116.5 and § 42-4-1413 (West 2010); CONN. GEN. STAT. ANN. § 14-223 (West 2010); DEL. CODE. ANN. tit. X, § 1257 (2010); FLA. STAT. ANN. § 316.1935 (West 2010); GA. CODE ANN. § 40-6-395 (2010); IDAHO CODE § 49-1404 (Michie 2010); 625 ILL. COMP. STAT. ANN 5/11-204 (West 2010); IND. CODE ANN § 35-44-3-3 (West 2010); IOWA CODE ANN. § 321.279 (West 2010); KAN. U.C.C. ANN. 8-1568 (West 2010); KY. REV. STAT. ANN. § 520.095 (Michie 2010); KY. REV. STAT. ANN. § 520.100 (Michie 2010); ME. REV. STAT. ANN. TIT. X, § 2414 (West 2010); MD. CODE ANN., [TRANSPORTATION] § 21-904 (2010); MICH. STAT. ANN. § 750.479a (Michie 2010); MINN. STAT. ANN. § 609.487 (West 2010); MISS. CODE. ANN. § 97-9-72 (2010); MISS CODE ANN. § 575.150 (West 2010) MONT. CODE ANN. § 61-8-316 (2010); NEB. REV. STAT. ANN. § 28-905 (Michie 2010); NEV. REV. STAT. ANN. 484B.550 (Michie 2010); N.H. REV. STAT. ANN. §2C:29-2 265:4 (2010); N.J. STAT. ANN. § 2C:29-2 (West 2010); N.M. STAT. ANN. § 30-22-1 (Michie 1978); N.Y.PENAL LAW § 270.35 (McKinney 2010), N.Y. PENAL LAW § 270.30 (McKinney 2010), N.Y. PENAL LAW § 270.25 (McKinney 2010); N.C. GEN. STATE. § 20-141.5 (2010); N.D. CENT. CODE. § 39-10-71 (2010); OHIO. REV. CODE. ANN. § 2921.331 (West 2010); OKLA. STAT. ANN. tit. X, § 540A (West 2010); OR. REV. STAT. § 811.540 (2010); PA. STAT. ANN. tit. X, § 3733 (West 2010); R.I. GEN. LAWS § 31-27-4 (1956) and R.I. GEN. LAWS § 31-27-4.1 (1956); S.C. CODE ANN. § 16-9-320 (Law. Co-op. 1976); S.D. CODIFIED LAWS § 32-33-18 (Michie 2010); TENN. CODE. ANN. § 39-16-603 (2010); TEX. TRANSPORTATION CODE ANN. § 545.421 (Vernon 2010) and TEX. PENAL CODE ANN § 38.04 (Vernon 2010); UTAH CODE ANN. § 23-20-24 (1953) and UTAH

CODE ANN. § 41-6a-210 (1953); VT. STAT. ANN. tit. X, § 1133 (2010); WASH. REV. CODE ANN. § 46.61.024 (West 2010); W. VA. CODE ANN. § 61-5-17 (Michie 2010); WIS. STAT. ANN. § 346.04 (West 2010); WYO. STAT. ANN. § 31-5-225 (Michie 1977).

[93] ARIZ. REV. STATE. ANN. § 28-622.01 (West 2010); FLA. STAT.ANN. § 316.1935 (West 2010); IND. CODE ANN § 35-44-3-3 (West 2010); MICH. STAT. ANN. § 750.479a (Michie 2010); MINN. STAT. ANN. § 609.487 (West 2010); OR. REV. STAT. § 811.540 (2010); TENN. CODE. ANN. § 39-16-603 (2010); WASH. REV. CODE ANN. § 46.61.024 (West 2010).

[94] FLA. STAT. ANN. § 316.1935 (West 2010); 625 ILL. COMP. STAT. ANN 5/11-204 (West 2010); R.I. GEN. LAWS § 31-27-4 (2010); UTAH CODE ANN. § 41-6a-210 (1953).

[95] VA. CODE ANN. § 19.2-77 (West 2010).

[96] VA. CODE ANN. § 46.2-921.1 (West 2010).

[97] GA. CODE ANN. § 35-1-14 (West 2010); ME. REV. STAT. ANN. tit. 25, § 2803-B (2010) (minimum standards are promulgated by their criminal justice board, and compliance is monitored); MISS. CODE. ANN. § 45-1-43 (West 2010); N.H. REV. STAT. ANN. § 265:8-a (2010), pursuit policy should conform to "accreditation" standards; OHIO REV. CODE ANN. § 2935.031 (2010); and WIS. STAT. ANN. § 346.03(4)(6) (West). Illinois requires its Training Standards Board to develop a model pursuit policy for agencies to use. 50 ILCS 705/7.5 (West 2010).

[98] CONN. GEN. STAT. ANN. § 14-283a (West 2010); MINN. STAT. ANN. § 626.8458 (West 2010); NEB. REV. STAT. § 29-211 (2010); N.M. STAT. ANN. § 29-20-4 (West 1978); 75 PA. CONS. STAT. ANN. § 6342 (West); R.I. GEN. LAWS § 31-27-4.2 (West); UTAH CODE ANN. § 41-6a-212(5) (West 2010), each agency to follow the administrative regulations found in Utah Admin. Code r. R728-503 which establishes minimum standards for pursuits; and, WASH. REV. CODE ANN. § 43.101.226 (West 2010).

[99] CAL.VEHICLE CODE § 17004.7 (West 2010).

[100] CAL. PENAL CODE § 13519.8 (West 2010); CONN. GEN. STAT. ANN. § 14-283a (West 2010); MINN. STAT. ANN. § 626.8458 (West 2010); NEB. REV. STAT. § 29-211 (2010); N.M. STAT. ANN. § 29-20-3 (West 1978); OR. REV. STAT. ANN. § 181.641 (West); and, UTAH CODE ANN. § 41-6a-212(5) (West 2010).

[101] CAL. VEH. CODE § 14602.1 (West); 75 PA. CONS. STAT. ANN. § 6344 (West), 75 PA. CONS. STAT. ANN. § 6343 (West); and, WIS. STAT. ANN. § 85.07(8) (West). Both Rhode Island and New Mexico require police to create a report for each pursuit.

[102] *See* page xi for the membership of the Law Enforcement Work Group.

[103] Survey available by request to the Crime Commission.

[104] While the total sample size for the overall survey is 156, each survey question is likely to have missing responses. Missing responses are excluded from the total (denominator) when calculating percentages, which allows the percentage of responses to sum to 100.

[105] Response codes vary from agency to agency. For purposes of this survey, a "Code 1" response is where a patrol unit activates emergency vehicle equipment in responding to a call for service; whereas, a "Code 2" response is where emergency vehicle equipment is not activated in responding to a call for service.

[106] *Supra* at note 9.

[107] Definitions for some of the interventions listed in table are as follows: (1) Plate identification refers to the termination of a pursuit after officer obtains the license plate number; (2) Channelization refers to controlling the point of access or egress by blocking alternative paths of travel; (3) Use of firearms can refer to an officer discharging a firearm at the vehicle's tires or driver.

[108] Crime Commission Pursuit Data Form available by request to the Crime Commission.

[109] Since there is no state-wide definition of vehicular pursuits, one cannot be certain that all agencies are defining pursuits the same. However, when reading through the submitted reports and narratives, it appears that agencies are defining pursuits consistently.

[110] Median is often a better measure of central tendency when the data includes extreme outliers.

[111] *Supra* at notes 22, 37, 38, 42, 43, and 44.

[112] The House substitute altered the original requirement that the emergency vehicle must either stop at the controlled interaction or proceed though the intersection with the siren in operation to the following: "*The exemption granted under subdivision A 2 shall apply only when the operator of such emergency vehicle displays a flashing, blinking, or alternating emergency light or lights as provided in §§ 46.2-1022 and 46.2-1023 and either (a) sounds a siren, exhaust whistle, or air horn designed to give automatically intermittent signals or (b) slows the vehicle down to a speed reasonable for the existing conditions, yields right-of-way to the driver of another vehicle approaching or entering the intersection from another direction or, if required for safety, brings the vehicle to*

a complete stop before proceeding with due regard for the safety of persons and property."

[113] 2011 Va. Acts ch. 629.

[114] Delegate Delores McQuinn also introduced House Bill 2213, which was rolled into Senate Bill 944 in the Senate of Virginia.

[115] In the House the phrase "comply with" best practices was replaced with "embody current" best practices.

[116] 2011 Va. Acts ch. 635.

[117] Delegate Delores McQuinn also introduced House Bill 2211, which was rolled into House Bill 1403 in the Virginia House of Delegates.

Law Enforcement Lineups

Executive Summary

There has been considerable attention paid to lineup procedures, since study of DNA exonerations revealed that eyewitness mistaken identification was the leading cause of these wrongful convictions.[1] Research and study on the problem of mistaken identification determined the use of the "sequential method" and "blind administration" in conducting lineups reduced mistakes and strengthened eyewitness identification. These two methods help reduce mistakes by encouraging eyewitnesses to make identifications based on their own memories and limits inadvertent influence by lineup administrators, which could give an eyewitness a false sense of confidence about their identification.

There are only nine states, including Virginia, that regulate lineup procedures by statute. Based on the 2004 Crime Commission mistaken identification study, law enforcement agencies were statutorily required to have a written lineup policy. Only two states, Ohio and North Carolina, have gone so far as adopting comprehensive lineup procedures in code. House Bill 207 (HB 207) is similar to the North Carolina and Ohio statutes, essentially making specific lineup procedures required in Code. The Department of Criminal Justice Services (DCJS) created a general directive for lineup procedures, General Directive 2-39, that is very similar to HB 207 in most respects, with the only significant difference being that HB 207 requires blind administration of lineups, whereas General Directive 2-39 only suggests the use of blind administration.

To assist with this study the Crime Commission formed the Law Enforcement Work Group.[2] Specifically, staff invited representatives from the following areas to participate in the Law Enforcement Work Group: representatives from police departments, sheriff's offices, the Virginia State Police, legislators, DCJS staff, regional criminal justice academy personnel, and Commonwealth's Attorneys.

As part of the study, a survey was distributed to 134 law enforcement agencies. The primary purpose of the survey was to determine if the agencies had a written lineup policy, were using the "sequential method" or "blind administration," and the extent and availability of training in conducting lineups. There was a 95% (127 of 134) response rate to the survey. There were two significant findings based on the survey results:

- Only 75% (95 of 127) of agencies responded that they have a written lineup policy as required by Code; and,
- 52% (59 of 114) of agencies reported requiring training associated with conducting lineups.

Based on the study results, the Crime Commission made three recommendations:

- Require DCJS to develop training for law enforcement officers routinely involved in conducting lineups;
- Request that DCJS conduct an audit and report findings to the Crime Commission by fall of 2011 on the status of law enforcement agencies' adoption of lineup policies; and,
- Request the Virginia Law Enforcement Professional Standards Commission (VLEPSC) to consider revising the accreditation standard for lineups.

Additionally, during the spring of 2011, Crime Commission staff gave presentations to both the Virginia Sheriff's Association (VSA) and the

Virginia Association of Chiefs of Police (VACP) the results of the study and on best practices for lineup procedures.

Background

Lineup procedures gained significant attention in recent years when close examination of DNA exonerations cases revealed that eyewitness misidentification was involved in a high percentage of wrongful convictions. Currently, there have been 271 DNA exonerations nationally.[3] Seventy-five percent of these cases involve eyewitness misidentification, which is the leading cause of wrongful convictions.[4] There have been 13 DNA exonerations in Virginia,[5] with 10 of those cases involving an eyewitness misidentification.[6]

Lineups generally follow a standard procedure: approximately six individuals are brought before a witness to a crime.[7] One of the individuals is a suspect, while the other five are "fillers" that match the physical characteristics of either the suspect or the eyewitness' description of the perpetrator.[8] Once the lineup is assembled, the witness is then asked if any of the lineup participants match their recollections of the perpetrator of the crime, and is instructed to identify those participants.[9] The standard, traditional lineup consists of showing the eyewitness six persons at the same time; this is referred to as a "simultaneous" lineup. Psychological research began identifying a problem with simultaneous lineups, referred to as "relative judgment," where an individual chooses the person in the lineup that *most* resembles the description of the suspect/perpetrator in the lineup, instead of identifying the actual suspect/perpetrator based on the witnesses' memory.[10] Researchers introduced an alternative that reduces "relative judgment" by developing the "sequential method," where a witness is shown one person or photograph at a time.[11] Essentially the sequential method prevents the eyewitness from comparing persons or pictures side-by-side and encourages them to base their decision on each person's appearance individually against their memory of the perpetrator.[12] Research has indicated that using the sequential method instead of the simultaneous procedure "produces fewer mistaken identifications."[13]

Another significant discovery by researchers includes instances where lineup administrators could inadvertently reinforce an eyewitnesses' confidence or even influence their decision.[14] During a lineup procedure, eyewitnesses can receive unintentional feedback, either verbal or nonverbal, from the lineup administrator, which can influence their decision or give the eyewitness false confidence that they correctly identified the perpetrator.[15] The problem of inadvertent influence can be avoided by using "single-blind" or "double-blind" administration of lineup procedures. Both single-blind and double-blind police lineup procedures are adapted from the scientific concepts of single- and double-blind studies.[16] The typical version of a police lineup is a single-blind administration. In a single-blind administration, the witness does not know in advance which individuals in the lineup are suspects, but the officers conducting the lineup know.[17] In a double-blind administration, however, neither the witness *nor* the officer conducting the lineup knows which lineup participants are suspects in the crime.[18] Double-blind lineup procedures can be administered *in lieu* of photo arrays. For example, in the "folder system" method, an eyewitness is shown photos one at a time; the photos are kept in numbered file folders that prevent the administrator from knowing which photo is in which folder.[19] Another method that lowers the chances of mistakenly influencing an eyewitness is giving an instruction, prior to the lineup procedure, that the administrator is not aware of the suspect's identity in the lineup.[20]

A double-blind administration has several advantages over the single-blind

technique. Most importantly, the officers in a double-blind administration are unable to suggestively influence the witness' choices, as they themselves do not know which lineup participants are suspects.[21] This forecloses the possibility of police inadvertently influencing a witness, which can occur during a single-blind lineup.[22] Additionally, the percentage of correct eyewitness identifications and the rate of confidence in those identifications are higher in double-blind lineups than in single-blind lineups.[23]

Professor Brandon Garrett of the University of Virginia School of Law presented at the September 8, 2010, Crime Commission meeting about his research on DNA exoneration cases.[24] In particular, his research concluded that mistaken identification, just as the Innocence Project has indicated, was involved in over 75% of the cases. One of the problems he identified, by review of actual trial transcripts, was the high percentage of eyewitnesses who were absolutely confident at trial that the accused was the perpetrator, even though the accused was later found innocent of the crime. He suggested that the way to avoid situations where eyewitnesses become falsely confident was to use both the sequential method and blind administration.

House Joint Resolution 79 (2004)

In 2004, the Crime Commission studied mistaken identification as a result of Delegate Harry Purkey's House Joint Resolution 79 (HJR 79).[25] The study resolution specifically requested the Crime Commission to:

- Review the cases in the United States in which DNA profiling was used to exonerate persons convicted of a crime;
- Examine the procedures used in traditional police lineups or photographic review; and,
- Consider the sequential method as a procedure for identifying suspects.[26]

As a final result of the HJR 79 study, the Crime Commission adopted six formal recommendations:

Recommendation 1: Amend the Virginia Code to require the Virginia State Police and local police and sheriff's departments to have a written policy for conducting in-person and photographic lineups.

- Implementation - This recommendation was accomplished with the addition of Va. Code § 19.2-390.02 which reads "The Department of State Police and each local police department and sheriff's office shall establish a written policy and procedure for conducting in-person and photographic lineups."

Recommendation 2: Request DCJS, in cooperation with the Crime Commission, to establish a workgroup to develop a model policy for conducting in-person and photographic lineups.

- Implementation - DCJS adopted General Directive 2-39, which is a policy directive for agencies to use when creating their lineup policy.[27]

Recommendation 3: Request DCJS, through regulation, to amend the entry level and in-service training academy requirements regarding lineups to include only use of the sequential method, by October 1, 2005.

- Implementation - There is an entry level training standard for conducting show-ups or field identifications, but not for formal photographic or in-person lineups, or using the sequential method.[28] There is no

mandatory in-service training for conducting lineups or use of the sequential method.

Recommendation 4: Request DCJS to work with VLEPSC to include the sequential method for conducting lineups as part of the accreditation process for law enforcement agencies.

- Implementation – The VLEPSC did adopt a lineup standard for accreditation; however it is limited to the statutory requirement that each agency shall have a written lineup policy.[29] It did not adopt a standard that included the sequential method.

Recommendation 5: Require DCJS, in conjunction with the Crime Commission, to work with VSA and VACP to assist members in using and understanding the benefits of the sequential method of lineups; presentations to each association's annual meeting will occur.

- Implementation – Crime Commission staff presented to the VSA, VACP, and the Virginia Commonwealth's Attorneys Association in 2005.

Recommendation 6: Amend the Virginia Code to designate the Virginia State Police, through their oversight of the Central Criminal Records Exchange (CCRE), as a repository for all mug shots and queries for photographic lineups.

- Implementation – Va. Code § 19.2-390 was amended to require the addition of arrest pictures to the CCRE.

DCJS General Directive 2-39

The purpose of HB 207 was to codify lineup procedures in a far more meaningful way than is currently required in Va. Code § 19.2-390.2. Essentially, this bill would require very specific procedures to be followed by every law enforcement agency in the Commonwealth. As discussed in the previous section, DCJS created General Directive 2-39 as a lineup policy guideline for agencies to adopt in order to meet the requirement to have a written policy. House Bill 207 and General Directive 2-39 have several similarities:

- Require the use of the sequential method for presenting lineups;
- Have formal instructions for witnesses;[30]
- Have requirements for types of photos and lineup composition;[31] and,
- Require the results of the procedure to be recorded.[32]

However, there are also some significant differences. The first and most significant difference between the two is that General Directive 2-39 is a policy directive, and is intended as a guideline for law enforcement agencies in drafting their own policies.[33] House Bill 207, on the other hand, creates a statutory mandate for all law enforcement agencies to follow.[34] The other significant difference is that HB 207 requires "blind administration" of the lineup procedure.[35]

While HB 207 requires the use of blind administration, there are substitutes permitted to achieve neutral administration that are self administered.[36] On the other hand, General Directive 2-39 recommends the use of neutral administration, but it does not require its use in every circumstance.[37] Additionally, HB 207 specifies three statutory remedies that are available if the requirements are not followed by law enforcement.[38] There are no remedies available for lack of compliance with General Directive 2-39.

Model Polices and Accreditation

CALEA

The Committee of Law Enforcement Accreditation (CALEA) is a "credentialing authority" as part of a joint effort between four major law enforcement organizations.[39] The Committee of Law Enforcement Accreditation's stated purpose is to "improve the delivery of public safety services, primarily by: maintaining a body of standards, developed by public safety practitioners, covering a wide range of up-to-date public safety initiatives; establishing and administering an accreditation process; and recognizing professional excellence."[40] One of the standards required as part of their accreditation program is a requirement that each agency seeking accreditation must adopt a lineup policy that addresses the following topics:

- Lineup composition;
- Video or audio recording;
- Witness instructions;
- Witness confidence statements;
- Prohibition of feedback to the witness; and,
- Documentation of lineup results. [41]

IACP

The International Association of Chief's of Police (IACP) is a professional organization made up of members representing law enforcement agencies from around the globe. Generally, this organization supports law enforcement with professional training, educational conferences, and the development of model policies. The IACP has developed a model policy for lineups,[42] which recommends the following:

- Use of a blind administrator;
- Use of the sequential method;
- Preference for video recording of procedure;
- One suspect per lineup;
- Fillers that are similar;
- Avoid influencing the witness; and,
- Formal witness instructions.

VLEPSC

The Virginia equivalent of CALEA, VLEPSC, is an organization that is part of DCJS, dedicated to improving the "effectiveness and efficiency" of law enforcement, cooperation within the criminal justice system, and to "ensure the appropriate level of training for law enforcement." The primary means for accomplishing these goals is by managing a system of agency accreditation. Agencies apply for accreditation and are approved based on compliance with accreditation standards found in the Virginia Law Enforcement Accreditation Program Manual.[43] The program manual has a requirement for agencies to have a "written directive" that establishes procedures for conducting in-person and photographic lineups.[44]

Training

Currently, there is no statutory or regulatory requirement for training in conducting lineups. During the study, it was brought to the attention of Crime Commission staff that Crater Regional Training Academy was working on a one hour lineup training class. In December of 2010, Crime Commission staff attended this training class at the Crater Regional Training Academy. The training was a lecture for current law enforcement officers covering the problems with eyewitness testimony, and using the sequential method and blind administration to help reduce error and strengthen eyewitness identification evidence.

Other State Laws

There are only nine states, including Virginia, that have statutory or regulatory requirements for lineup procedures. Most of

these states have passed requirements within the past ten years, as there has been a growing understanding, based on DNA exonerations, of the problems that can occur with eyewitness identification.

Illinois

Illinois had numerous perceived problems with their system of capital prosecution. Governor Ryan put a temporary moratorium on the death penalty.[45] Additionally, the Illinois legislature passed requirements for lineup procedures. These changes in procedure included:

- All lineups should be recorded;
- Witnesses should be instructed that the perpetrator may not be in the lineup;
- The eyewitness should not expect the administrator to know the suspects identity; and,
- The suspect should not stand out from the fillers.[46]

Additionally, the prosecution is required to disclose the lineup results "to the accused and his or her defense counsel during discovery proceedings as provided in Illinois Supreme Court Rules."[47]

Maryland

In 2007, Maryland added a statute[48] that requires all law enforcement agencies to adopt a written eyewitness identification policy that complies with the U.S. Department of Justice guidelines on eyewitness identification.[49]

New Jersey

New Jersey was the first state to address lineup procedures and in 2001 adopted, through regulation by the New Jersey Attorney General, mandatory lineup procedures.[50] These procedures include preference for the use of blind administration, the sequential method, and witness confidence statements.[51]

North Carolina and Ohio

Both North Carolina[52] and Ohio[53] passed comprehensive statutory lineup procedures, nearly identical to HB 207, in 2008. Both statutes require blind administration or the equivalent, use of the sequential method, and remedies for non- compliance.[54]

Utah

In 1980, the Utah legislature adopted a simple requirement for lineups, mandating that all lineups must be recorded, including any conversations between the witnesses and law enforcement.[55]

West Virginia

In 2007, the West Virginia legislature passed, in statute, requirements that must be addressed in every law enforcement lineup policy.[56] At a minimum, the policies must include that the agency provide formal witness instructions, recordation requirements, and confidence statements.[57] Additionally, the legislature statutorily created a committee to study blind administration and the sequential method,[58] and a requirement for mandatory training in lineups.[59]

Wisconsin

In 2009, the Wisconsin General Assembly adopted a bifurcated approach to lineup reform.[60] The statute requires that law

enforcement agencies shall adopt policies that contain best practices to be developed by the Wisconsin Attorney General. The statute further requires that the best practices must include the following: blind administration, sequential method, witness instructions, and witness confidence statements.[61]

Law Enforcement Work Group

In order for Crime Commission staff to obtain a full understanding of the issues surrounding lineups, staff requested help from practitioners and individuals familiar with the subject. Specifically, staff invited representatives from the following areas to participate in the Law Enforcement Work Group: representatives from both police departments and sheriff's offices, Virginia State Police, legislators, representatives from DCJS, regional criminal justice academy personnel, and Commonwealth's Attorneys.[62] One meeting was held in June of 2010. Commission staff requested feedback from Work Group members on a draft copy of the survey. There was a general reluctance among the Work Group members to endorse any policy changes concerning HB 207 until the Crime Commission survey had been disseminated and analyzed.

Crime Commission Lineup Survey and Findings

Staff disseminated a survey to all 134 law enforcement agencies with primary law enforcement responsibility to determine:

- How many agencies have a written lineup policy;
- How many agencies use the sequential method;
- How many agencies use an independent lineup administrator;
- Approximately how many lineups were carried out in Calendar Year (CY) 2009;
- If any lineup training is required;
- Steps taken to ensure compliance to policy; and,
- Any other issues or problems encountered with lineups.[63]

There was a 95% (127 of 134 agencies) response rate to the survey request. Of the responding agencies, 75% (95 of 127) indicated that they had a written lineup policy. The total number of lineups conducted in CY09 varied widely from agency to agency, ranging from 0 to 750 lineups. Further, at least 20 agencies indicated that they did not keep a formal record of how many lineups are carried out each year.

Agencies Utilizing the Sequential Method

- 56% (63 of 113) of responding agencies always use the sequential method for lineups;
- 24% (27 of 113) use the sequential method whenever possible;
- 20% (23 of 113) do not use the sequential method; and,
- 14 agencies left this question blank.

Agencies Utilizing an Independent Lineup Administrator

- 7% (7 of 95) of responding agencies always use an independent administrator for lineups;
- 25% (24 of 95) use an independent administrator whenever possible;
- 67% (64 of 95) do not use independent administrators; and,
- 32 agencies left this question blank.

Training and Compliance

About half, 52% (59 of 114) of responding agencies indicated that they require training in lineups; 48% (55 of 114) indicated that they did not require training. It appears that most agencies determine lineup policy

compliance primarily by supervisor oversight. However, some agencies did report consulting with their local Commonwealth's Attorney's Offices. Finally, the most commonly identified problem by responding agencies, roughly a third of those who commented, were difficulties associated with obtaining photos for lineups.

Lineup Policy Analysis

As discussed above, of the responding agencies, 75% (95 of 127) indicated that they had a written lineup policy. Eighty-six percent (82 of 95) of agencies that indicated they had a written policy submitted their policy for review. Staff conducted an analysis of the agency lineup policies that were submitted as part of the study. Figure 1 below illustrates the findings of this analysis:

Figure 1: Lineup Policy Analysis Findings

Type of Requirement or Preference	Total Agencies	%
Require that fillers similar to the suspect be used	77	94%
Use the sequential method	54	66%
Require the use of a current picture of the suspect	51	62%
Require administrators to refrain from influencing the witness	48	59%
Provide formal instructions for witnesses	47	57%
Mandate only one suspect per lineup	45	55%
Require documented results of the lineup	45	55%
Separate the witnesses if there are more than one	38	46%
Preference for a video or audio recording of the lineup	17	21%
Have policies that are substantially similar to DCJS Order 2-39	17	21%
Require independent administrators	5	6%

Source: Virginia State Crime Commission Lineup Survey, 2010.
n=82

Conclusion

Lineups have received considerable attention due to the high incidence of eyewitness mistaken identification associated with DNA exoneration cases. Only nine states, including Virginia, have addressed lineup procedures in statutes and only two of these states have implemented comprehensive, statutory lineup procedures. Research has shown that implementing improved lineup procedures, such as the sequential method and blind administration, will decrease the chances of mistaken identification.

The Crime Commission made the following recommendations based on the study:

Recommendation 1: Require DCJS to develop mandatory training for law enforcement officers who regularly perform lineups.

- Senator Janet Howell introduced Senate Bill 944 during the 2011 Session of the General Assembly based on this recommendation. The bill passed the Senate of Virginia as introduced. In the Virginia House of Delegates, the bill was slightly amended,[64] and was signed by the Governor on May 2, 2011.[65]

Recommendation 2: Request DCJS to conduct a policy compliance audit and report findings to the Crime Commission by fall of 2011 on the status of law enforcement agencies' adoption of lineup policies in accordance with Va. Code § 19.2-390.02.

- In December of 2010, Crime Commission staff sent a letter to DCJS to inform them of the Crime Commission's recommendation. The Crime Commission plans to hear an update on this issue at a fall 2011 Commission meeting.

Recommendation 3: Request the VLEPSC to consider revising the accreditation standard for lineups.

- Crime Commission staff sent a letter to DCJS[66] in December 2010, concerning the recommendation. Staff recently made a presentation to the VLEPSC Executive Board meeting on June 16, 2011.

Study Follow-up Activities

In an effort to inform Virginia law enforcement agencies of the Crime Commission recommendations, staff was requested to make presentations concerning the study results and recommendations that will affect law enforcement. In April of 2011, Crime Commission staff made presentations to both the VACP and the Virginia Sheriff's Association, on the 2004 study, DNA exonerations, survey results, and best practices for lineup procedures.[67]

[1] Innocence Project, "Facts on Post-Conviction DNA Exonerations," *available at* facthttp://www.innocenceproject.org/Content/Facts_on_PostConviction_DNA_Exonerations.php.
[2] *See* page xi for the membership of the Law Enforcement Work Group.
[3] As of June 6, 2011.
[4] Innocence Project, "Facts on Post-Conviction DNA Exonerations," *available at* facthttp://www.innocenceproject.org/Content/Facts_on_PostConviction_DNA_Exonerations.php.
[5] As of April 2011, there have been two other exonerations not included in the Innocence Project's nationwide tally. The cases of Calvin Cunningham and Thomas Haynesworth are both from Virginia and involve at least one eyewitness misidentification. It is expected that their cases will join the nationwide total within the next few months. In Haynesworth's case, he has already been exonerated of two of his rape convictions, based on DNA samples. There is a petition for a writ of actual innocence before the Virginia Court of Appeals for his other three convictions, which had no biological evidence to test. It is expected that he will be exonerated by the petition or the Governor will grant him a full pardon.
[6] Id. at note 5.
[7] Gary L. Wells, *Eyewitness Identification: Systematic Reforms*, 2006 WIS. L. REV. 615, 617-18 (2006).
[8] Id. at 618.
[9] Id.
[10] H.D. 40, REPORT ON MISTAKEN EYEWITNESS IDENTIFICATION, Virginia State Crime Commission, 9-10 (2005), *available at* http://leg2.state.va.us/DLS/H&SDocs.NSF/4d54200d7e28716385256ec1004f3130/cece4e476d79218985256ec500553c3b?OpenDocument.
[11] Id. at 10.
[12] Id.
[13] Wells, *supra* at note 7, 626.
[14] Id. at 629.
[15] Id. at 630-31.
[16] A single-blind study is one in which test participants do not know whether they are in an experimental or control group. In a double-blind study, neither the test participants, nor the researchers performing the experiment know which participants are in the experimental group. Without the knowledge of which subjects are in which experimental group, the researchers' "blindness" prevents them from improperly suggesting results to subjects. Therefore, while both single- and double-blind studies control for *participant* bias, only the double-blind study additionally controls for *researcher*-induced bias. *See* U.S. Nat'l Inst. of Health, *Glossary of Clinical Trial Terms*, Clinicaltrials.gov, http://clinicaltrials.gov/ct2/info/glossary (last updated Mar. 18, 2008) (select definitions of "single-blind" and "double-blind").
[17] Gary L. Wells, *The Double-Blind Lineup. General Comments and Observations*, GARY WELLS,

http://www.psychology.iastate.edu/~glwells/Meet_the_Double-Blind_Lineup.doc (last visited Feb. 18, 2011).

[18] Id.

[19] INNOCENCE PROJECT, "THE FOLDER SYSTEM": A RECOMMENDED PRACTICE FOR THE 'BLIND' ADMINISTRATION OF EYEWITNESS PROCEDURES FOR SMALL POLICE DEPARTMENTS WITH LIMITED RESOURCES (2006), *available at* http://www.nacdl.org/sl_docs.nsf/freeform/eyeID_attachments/$FILE/IP_Folder.pdf.

[20] Wells, *supra* note 5. "This instruction promotes a situation where "the eyewitness will not be monitoring the lineup administrator for verbal and nonverbal cues that could affect their selection or affect the confidence the eyewitness expresses in that selection." Id.

[21] Id.

[22] Id. (noting that in single-blind lineup administrations, the potential for an administrator to unintentionally influence a witness' perception and memory through unconscious cues is high).

[23] Memorandum from Brandon L. Garrett, Associate Professor of Law, University of Virginia School of Law, and Steven Sun, Second-Year Student, University of Virginia School of Law, to Thomas E. Cleator, Senior Staff Attorney, Virginia State Crime Commission 2-3 (July 23, 2010) (on file with the Virginia State Crime Commission); *see also* Susan Gaertner & John Harrington, *Successful Eyewitness Identification Reform: Ramsey County's Blind Sequential Lineup Protocol*, 76 THE POLICE CHIEF 130 (2009), *available at* http://policechiefmagazine.org/magazine/index.cfm?fuseaction=display&article_id=1776&issue_id=42009 (noting that after the completion of a double-blind lineup pilot program in Ramsey County, Minnesota, participating police officers found that their confidence in the eyewitness identifications increased, without any concurrent increase in additional costs or administrative burdens).

[24] Brandon Garrett, CONVICTING THE INNOCENT: WHERE CRIMINAL PROSECUTION GO WRONG, Harvard University Press (2011).

[25] H.J.Res. 79 Va. General Assemb (2004).

[26] Id.

[27] DCJS, GENERAL ORDER 2-39, SUSPECT LINEUP PROCEDURE (2005) *available at* http://www.dcjs.virginia.gov/cple/sampleDirectives/index.cfm.

[28] DCJS, "Performance Outcomes, Training Objectives, Criteria and Lesson Plan Guides for Compulsory Minimum Training for Law Enforcement Officers" Section 5 (Investigations), *available at* http://www.dcjs.virginia.gov/standardsTraining/documents/performanceOutcomes/section5.pdf.

[29] Virginia Law Enforcement Accreditation Program Manual, OPR.02.03 (e), 6th Edition, 2010, *available at* http://www.dcjs.virginia.gov/accred/documents/6th-EditionProgramManual-V4.pdf.

[30] These instructions are: the perpetrator may not be in the lineup, witness shouldn't feel compelled to make identification, and the investigation will continue regardless if identification is made.

[31] These requirements are as follows: photo should resemble suspect at time of the offense, fillers should match witnesses description of perpetrator, suspect should not "unduly" stick out, and five fillers per lineup.

[32] HB 207 requires video or audio, if practical; 2-39 has a preference of video or audio recording of the lineup procedure.

[33] DCJS General Directive 2-39 *available at* http://www.dcjs.virginia.gov/cple/sampleDirectives/index.cfm.

[34] H.B. 207 Va. General Assemb. (2010).

[35] Blind administration simply requires that the administrator of the lineup procedure is not involved in the investigation or does not know the identity of the suspect in the lineup.

[36] H.B. 207 Va. General Assemb. (2010), Section C, lines 96-104.

[37] General Directive 2-39 at page 2.

[38] The remedies allow that evidence of noncompliance "shall be considered by the court in adjudicating motions to suppress," "shall be admissible in support of claims of eyewitness misidentification," and for the jury to consider the "reliability of eyewitness identifications."

[39] *Available at* http://www.calea.org/content/commission. The four organizations include the International Association of Chiefs of Police, National Organization of Black Law Enforcement Executives, National Sheriffs' Association, and the Police Executive Research Forum. Id.

[40] Id.

[41] *Available at* http://www.calea.org/content/law-enforcement-program-standards.

[42] *Available at* http://www.theiacp.org/PublicationsGuides/ModelPolicy/tabid/135/Default.aspx.

[43] *Available at* http://www.dcjs.virginia.gov/accred/documents/6th-EditionProgramManual-V5.pdf.
[44] OPR.02.03 (e) (f), *available at* http://www.dcjs.virginia.gov/accred/documents/6th-EditionProgramManual-V5.pdf.
[45]James S. Liebman, The New Death Penalty Debate: What's DNA Got to Do with It?, 33 Colum. Hum. Rts.L. Rev. 527 (2002).

[46] 725 Ill. Comp. Stat. 5/107A-5 (2003).
[47] Id.
[48] MD. CODE ANN., PUB. SAFETY § 3-506 (West).
[49] These guidelines are *available at* http://www.ncjrs.gov/pdffiles1/nij/178240.pdf.
[50] The Attorney General in NJ has authority over all law enforcement and prosecutors, and can create rules and regulation on all aspects of operation and procedure.
[51] See NJ Reg. *available at* http://www.state.nj.us/lps/dcj/agguide/photoid.pdf.
[52] § 15A-284.52 (2008).
[53] OHIO REV. CODE ANN. § 2933.83 (2008).
[54] The remedies are virtually the same as available to HB 207 and include that noncompliance with the provisions of the statute can be considered at a suppression hearing, a claim of misidentification, and as an instruction to the jury.
[55] U.C.A. 1953 § 77-8-3.
[56] W. VA. CODE ANN. § 62-1E- 1 (2010).
[57] Id.
[58] Id.
[59] W. VA. CODE ANN. § 62-1E-3 (2010).
[60] WIS. STAT. ANN. § 175.50 (West 2010).
[61] Id.
[62] *See* page xi for the membership of the Law Enforcement Work Group
[63] Survey available by request to the Crime Commission.
[64] In the House the phrase "comply with" best practices was replaced with "embody current" best practices.
[65] 2011 Va. Acts ch. 635.
[66] DCJS is the state government agency that oversees and staffs VLEPSC.
[67] Specifically, the sequential method, blind administration, and eyewitness instructions were presented to each group.

Law Enforcement Officers Procedural Guarantee Act

Executive Summary

Senate Bill 287 (SB 287) was introduced by Senator Creigh Deeds in the 2010 Regular Session of the General Assembly. It was referred to the Senate Courts of Justice Committee, where it was carried over, by unanimous vote, until 2011. The subject matter of the bill was referred to the Crime Commission by letter pursuant to Senate Rule 20(L). The bill proposes to include deputy sheriffs in the Law Enforcement Officers Procedural Guarantee Act (sometimes referred to as the Police Officers Bill of Rights); currently, sheriffs' deputies are explicitly excluded from coverage under the Act's provisions.

The subject matter of SB 287 is identical to two bills that were introduced in 1992, and which were carried over for a year, pending a study by the Crime Commission. Senate Bill 309 (SB 309), patroned by Senator Stolle and House Bill 291 (HB 291), patroned by Delegate Cooper, both proposed to modify the Law Enforcement Officers Procedural Guarantee Act, by including deputy sheriffs within its provisions. Additionally, House Joint Resolution 166 (HJR 166), introduced during the 1992 Regular Session, directed the Crime Commission to study "the feasibility of extending the 'Police Officers Bill of Rights' to deputy sheriffs in Virginia." In response to HJR 166, a special subcommittee of the Crime Commission was formed to examine this issue. The special subcommittee, and then the full Crime Commission, both recommended that deputy sheriffs not be included in the Police Officers Bill of Rights. The Crime Commission issued a report of this study, which was published as House Document No. 25 (1993). Ultimately, neither SB 309 nor HB 291 were passed.

A close reading of House Document 25 reveals practically no changes in the law, either statutory or by court decision, since that time. While the relevant Code sections have been renumbered, due to Title recodifications, their substance is nearly identical. All of the court opinions referenced in the Crime Commission's report are still valid and binding today; none have been reversed or substantially modified. As part of the 1992 study, Crime Commission staff surveyed law enforcement agencies and received testimony from various representatives of the law enforcement community, such as the Virginia State Police, deputy sheriffs, and police officers. Appendix F of the report, which contains summaries of the official positions of various agencies and organizations, demonstrates that each entity's position is exactly what one would expect. For instance, the Virginia State Sheriffs Association was completely opposed to the idea of expanding the Police Officers Bill of Rights to include deputy sheriffs, while the Fraternal Order of Police, VA State Lodge, was completely in favor of this.

In essence, as this question is a political one, in that it is inextricably tied in with the role of constitutional officers in Virginia and their relationships with their employees, there was currently no need for staff of the Crime Commission to replicate any of the surveys or solicitations for opinions that were carried out in 1992. Unless some objective metric can be proposed that might have some useful bearing on this question, it should be recognized that there is nothing further to be done in regards to studying this particular issue. Ultimately, this question can only be decided by the Virginia legislature. Therefore, it would be entirely appropriate, if the Crime Commission so decided, to simply refer HB 287 back to the Virginia General Assembly with no recommendation.

Analysis of Senate Bill 287

Senate Bill 287 proposes to modify Va. Code § 9.1-500, which is the first section of the Law Enforcement Officers Procedural Guarantee Act, by including deputy sheriffs within the Act's provisions. Currently, deputy sheriffs are not covered by the Act, and have no recourse to any of its protections. Instead, deputy sheriffs are deemed to be "employees at will," who serve at the discretion of the elected sheriff.[1] This is both a long standing feature of Virginia's system of elected constitutional officers, and is specifically codified in Va. Code § 15.2-1603, which states that "Any such deputy may be removed from office by his principal [i.e., the sheriff]."[2]

The idea of giving deputy sheriffs the same employment protections as other law enforcement officers, by including them within the Law Enforcement Officers Procedural Guarantee Act, has been proposed before. In 1992, SB 309 and HB 291 were introduced, each of them nearly identical to SB 287, and were held over for a year, pending a study of the issue by the Crime Commission. Also in 1992, HJR 166 was passed, specifically directing the Crime Commission to study the topic. In response to HJR 166, the Crime Commission formed a subcommittee to examine the issue. The subcommittee conferred with and received testimony from members of the law enforcement community, including sheriffs, deputy sheriffs, chiefs of police, employees of police departments, and the Virginia State Police. Crime Commission staff conducted an extensive legal review of the topic to determine what the implications would be if deputy sheriffs were to be covered by the Law Enforcement Officers Procedural Guarantee Act. Based upon all of the information before it, the subcommittee recommended that the law not be changed. The full Crime Commission concurred with the subcommittee's recommendation. Ultimately, neither SB 309 nor HB 291 were passed.

The Crime Commission's report of the study was published as House Document 25 in 1993. Read today, the report is still valid in terms of its legal findings. None of the court cases referred to in the report have been overturned or substantially modified in the intervening years. The main statutes that are referred to in the report are essentially the same today.[3]

The report quotes the case of U.S. v. Gregory, which states, "[A] deputy is under the control and supervision of the sheriff and has no civil service protection but serves at the pleasure of the sheriff. Thus, deputies have no expectations of continued employment nor are they covered by the 'Police Officers' Bill of Rights'….Deputy sheriffs, therefore, have no property interest in their positions as deputies and are not entitled to any due process rights as a result of state law."[4]

The report notes that this state of affairs could be changed by the Virginia legislature, by amending the Law Enforcement Officers Procedural Guarantee Act to include deputy sheriffs, while simultaneously modifying the Virginia Code provision which explicitly states that "deputies may be removed from office by their principal."[5] To do this, the report comments, would change the unique relationship between sheriffs and their deputies that has historically existed in Virginia. No longer would the following description of this relationship necessarily be the law:

> In Virginia…the relationship between the sheriff and his deputy is such that he is not simply the 'alter ego' of the sheriff, but he is one and the same as the sheriff. The public policy of Virginia with regard to the relationship between the sheriff and his deputy is grounded upon common law and is stated in Miller v. Jones, 50 Va. (9 Gratt.) 584 (1853). Not only is the sheriff civilly liable for the acts of his

> deputy in Virginia, but he is also liable criminally and can be fined for the conduct of his deputy. The most significant parts of the foregoing law which is today the public policy of Virginia are the words that as between a sheriff and his deputy they are as 'one person.' There can be no doubt that the statute regarding the appointment of deputies in Virginia is grounded upon a very good foundation. Since the sheriff is liable absolutely for all the acts of his deputies, the sheriff should have complete and unfettered control over who his deputies are….[6]

The report concludes by stating:

> A simple answer to the question of whether or not to extend the "Police Officers' Bill of Rights" to sheriffs' deputies does not exist. Those on both sides of the issue raised strong and valid arguments for their positions. (See, Appendix F.) [Notably, and somewhat predictably, the Virginia State Sheriffs Association was categorically opposed to the idea, while the Fraternal Order of Police, VA State Lodge, completely supported it].
>
> On the one hand, "if it ain't broke; [sic] don't fix it" is compelling….On the other hand, a hard-working law enforcement officer (who happens to be a deputy rather than a police officer) can be left without recourse whatsoever in the face of a complaint against him. He can be summarily dismissed without any opportunity to defend his position.
>
> Ultimately, the subcommittee concluded that the bond of loyalty and trust is an invaluable asset in a political arena and that a sheriff's deputy is, indeed, a political appointee. Despite the acknowledged possibility of a wrongful discharge of a deputy in some circumstances, the subcommittee considered that the integrity of the constitutional office of sheriff is better protected in Virginia by maintaining the existing hiring and firing procedure and, therefore, made the following recommendation, [not to change the law in this manner], with which the full Commission concurred.[7]

Conclusion

Nothing has changed, in regards to these basic facts, since 1993. As the previous Crime Commission report indirectly states, the question posed by the current SB 287 is not so much a public policy question, as a political one. Allowing deputy sheriffs to be protected by the Law Enforcement Officers Procedural Guarantee Act would modify, in a not insignificant way, the hiring authority of sheriffs, and thus would diminish the ability of these constitutional officers to run their offices as they see fit. It would also create an inconsistency between sheriffs and the other constitutional officers in Virginia in this regard. Because SB 287 proposes to modify, at least slightly, the authority of this group of elected officials, it would represent a change in political governance in the Commonwealth.

Barring any claim that the current system of at will employment for deputy sheriffs somehow impacts public safety, SB 287 does not represent a true policy decision; it remains a political one, and therefore, there is little for staff to study on this issue.[8] Surveys, opinion polls, and solicitation of comments might prove illuminating, from a political perspective, but would not provide a "conclusive" answer or recommendation either for or against this proposal.

While the Crime Commission could take a position on this question, as it did back in

1992, it would also be appropriate to simply refer SB 287 back to the General Assembly without any recommendation, thereby recognizing this issue as one that is political, and thus intrinsically impossible to "answer" correctly in any meaningful way.

The Crime Commission did not take any action on this bill.

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[1] It should be noted, though, that both Title VII of the federal Civil Rights Act of 1964 and Va. Code § 15.2-1604 prohibit employment decisions by sheriffs that are made on the basis of race, color, religion, sex or national origin.

[2] This Code section also applies to the deputies for treasurers, commissioners of the revenue, and clerks of circuit courts.

[3] They are numbered differently, due to the recodifications of Title 2.1 to Title 2.2 and Title 15.1 to Title 15.2, but otherwise they are almost identical, word for word.

[4] U.S. v. Gregory, 582 F. Supp. 1319, 1321 (W.D. Va. 1984).

[5] As noted above, this statutory language is currently found in Va. Code § 15.2-1603; at the time of the Crime Commission's report, it was found in Va. Code § 15.1-48.

[6] Whited v. Fields, 581 F. Supp. 1444, 1444-1445 (W.D. Va. 1984).

[7] Va. House of Delegates, H. Doc. No. 25, at 11-12 (1993).

[8] At the current time, staff is unaware of any claim that the at will employment of deputy sheriffs has a negative impact on public safety. Even if such claim were made, there would not seem to be any valid methodological process to evaluate this claim in isolation from any number of other factors that might account for differences between counties in such measures as crime rate, emergency response time, etc.

Protective Orders

Executive Summary

During the 2010 Session of the Virginia General Assembly, seven bills dealing with protective orders had their subject matters referred to the Crime Commission for review: Senate Bill 208, introduced by Senator George Barker;[1] House Bill 453, introduced by Delegate Charniele Herring;[2] House Bill 164, introduced by Delegate Brenda Pogge;[3] House Bill 656, introduced by Delegate Ward Armstrong;[4] House Bill 1156, introduced by Delegate G. Glenn Oder;[5] House Bill 216, introduced by Delegate Jennifer McClellan;[6] and House Bill 285, introduced by Delegate James Scott.[7] The Crime Commission decided to expand the scope of these reviews, to address any other ways in which Virginia's existing protective order statutes and procedures might be improved.

To assist the Crime Commission in this task, a Protective Order Work Group was formed.[8] Representatives from local law enforcement, the Virginia State Police, victim and witness advocates, prosecutors, defense attorneys, clerks of juvenile and domestic relations district courts, magistrates, and the Virginia Sexual and Domestic Violence Action Alliance were invited to participate. In addition to reviewing the seven referred bills, the Protective Order Work Group also deliberated on a number of other topics related to protective orders in Virginia. Problems with the current system were discussed, and a number of proposed legislative solutions were offered. Members of the Work Group were encouraged to meet with Crime Commission staff, and offer specific ideas on how, legislatively, Virginia's protective order statutes might be improved. A general literature review, as well as a review of the other states' statutes, was conducted on the issue of dating violence and protective orders, as well as on utilizing GPS tracking devices for people who are subject to a protective order. Finally, to ascertain the number of protective orders in existence during the course of a year, data requests were made to the Virginia State Police and the Virginia Supreme Court.

Based upon all of this information, a number of legislative proposals were submitted to the full Crime Commission for their consideration. The Crime Commission decided to recommend a number of changes to Virginia's protective order statutes:

- The existing stalking protective order statutes, authorized under Virginia Code §§ 19.2-152.8, 19.2-152.9, and 19.2-152.10, should be expanded to encompass all types of threatening conduct, not just actual crimes involving stalking, sexual battery, aggravated sexual battery, or serious bodily injury.

- The requirement that a criminal warrant must be issued in order to obtain a protective order from a general district court should be eliminated.

- With the significant expansion of these protective orders, they should be referred to simply as "protective orders," rather than as "stalking protective orders."

- The penalties for violating these protective orders should be made identical to the penalties for violating family abuse protective orders.

- As with family abuse emergency protective orders, law enforcement should be able to request an extension of an emergency protective order if a victim is incapacitated and unable to apply for an extension on her own.

- To assist law enforcement in serving emergency protective orders, the Supreme Court of Virginia should create notification forms that can be issued to respondents,

receipt of which would constitute valid service.

- Judges should be given the authority to require defendants to wear a GPS unit as a condition of bond, if released prior to trial, and as a condition of probation.

- Judges should be given the explicit authorization to prohibit the respondent of a protective order from damaging items of personal property, including harming a pet or companion animal.

- Judges, upon finding a defendant guilty of domestic assault, should be given the authority to issue a family abuse protective order, in addition to any sentence they might impose.

Background

There are two general types of protective orders that exist in Virginia: family abuse protective orders, and stalking protective orders.[9] Family abuse protective orders typically originate in juvenile and domestic relations district courts, and are governed by Va. Code §§ 16.1-253.4, 16.1-253.1, and 16.1-279.1. Stalking protective orders typically originate in general district courts, and are governed by Va. Code §§ 19.2-152.8, 19.2-152.9, and 19.2-152.10.

Family abuse protective orders are available when the parties involved meet the definition of a "family or household member," as that term is defined by Va. Code § 16.1-228:

> (i) the person's spouse, whether or not he or she resides in the same home with the person, (ii) the person's former spouse, whether or not he or she resides in the same home with the person, (iii) the person's parents, stepparents, children, stepchildren, brothers, sisters, half-brothers, half-sisters, grandparents and grandchildren, regardless of whether such persons reside in the same home with the person, (iv) the person's mother-in-law, father-in-law, sons-in-law, daughters-in-law, brothers-in-law and sisters-in-law who reside in the same home with the person, (v) any individual who has a child in common with the person, whether or not the person and that individual have been married or have resided together at any time, or (vi) any individual who cohabits or who, within the previous 12 months, cohabited with the person, and any children of either of them then residing in the same home with the person.

The person petitioning for the protective order must have been the victim of "family abuse," which is defined by Va. Code § 16.1-228 as "any act involving violence, force, or threat including, but not limited to, any forceful detention, which results in bodily injury or places one in reasonable apprehension of bodily injury and which is committed by a person against such person's family or household member." There is no requirement that a criminal warrant have been issued in order to obtain a family abuse protective order.

Stalking protective orders are available to any person who has been the victim of stalking, sexual battery, aggravated sexual battery, or any criminal offense that resulted in a serious bodily injury. In order for a stalking protective order to be issued, a criminal warrant must have been taken out for the underlying crime which led to the need for a protective order.[10]

Both family abuse protective orders and stalking protective orders can be issued in three different forms, depending upon the extent of the hearing that was granted before issuance. Emergency protective orders, which can be issued *ex parte*, last for three days, expiring at 11:59 p.m. on the third day following issuance.[11] If the court that issued the emergency protective

order is not in session on that third day, the emergency protective order is continued until 11:59 p.m. of the day that the court is next in session.[12] For family abuse emergency protective orders, one additional three day extension may be applied for on behalf of a victim, by a law enforcement officer, if the victim is physically or mentally incapable of filing a petition for a preliminary protective order.[13]

Preliminary protective orders may also be issued *ex parte*, upon good cause shown.[14] They are preliminary, in that the order itself will provide a date upon which a full hearing shall occur. The date of this future hearing must be within fifteen days.[15] However, if the respondent to the petition is not served with the preliminary protective order, the full hearing may be continued for a period of time, not to exceed six months.[16]

After a full hearing, a "final" protective order may be issued.[17] These hearings may not be *ex parte*, although they may proceed if the respondent was properly served and notified of the hearing date, and elected not to attend. A protective order issued after a full hearing may last for up to two years.[18] The victim may petition the court to extend the protective order for an additional two year period, and may do so any number of times, so that the order is continued indefinitely.[19]

According to data obtained from the Virginia Supreme Court, in 2009, there were approximately 35,000 emergency family abuse protective orders and 1,200 emergency stalking protective orders issued, as well as approximately 32,700 preliminary family abuse protective orders and 570 preliminary stalking protective orders. And, there were approximately 15,000 "final" family abuse protective orders and 400 "final" stalking protective orders issued. At any one time, according to data obtained from the Virginia State Police, there are approximately 520 emergency protective orders, 1,900 preliminary, and 15,000 "final" protective orders in existence. Despite these large numbers, their data indicates that roughly 92% of all protective orders are successfully served upon the respondent.

Review of Bill Referrals

Senate Bill 208

Senate Bill 208 (SB 208), as originally introduced, would have expanded the definition of "family or household member," as that term is defined by Va. Code § 16.1-228, by inserting the phrase:

> any individual who is currently or was formerly involved in a substantive, intimate dating relationship with the person; the existence of such a substantive relationship shall be determined based on the following considerations: (a) the length of the relationship, (b) the nature of the relationship and (c) the frequency of interaction between the persons involved in the relationship. A casual relationship or ordinary fraternization in a business or social context does not constitute a dating relationship.[20]

The intent of this modification was to allow a person in a dating relationship to seek a "family abuse" protective order if he or she needed one. However, by modifying a key jurisdictional term, the unintended consequence of the bill would be that all criminal matters involving a current, or former, dating couple would be heard in juvenile and domestic relations district courts, not general district courts. After SB 208 was referred to the Senate Courts of Justice Committee, a substitute version of the bill was introduced that took a very different approach to expanding the scope of protective orders. Rather than modify the family abuse protective order statutes, the substitute modified the stalking protective order statutes, by allowing

the victim of any assault, or any crime that resulted in bodily injury, to apply for a stalking protective order.

To determine how many states currently allow a person in a dating relationship to seek a protective order, based specifically upon their status as part of a dating couple as well as a threat of future danger, a review of the other forty-nine states was conducted. Forty-three states currently have the phrase "dating relationship," or its equivalent, in their protective order statutes, and allow persons in a dating relationship to apply for a protective order.[21] The only states, besides Virginia, which do not currently allow for dating relationship protective orders are Georgia, Kentucky, Maryland,[22] South Carolina, South Dakota, and Utah.

There are a number of advantages to having "dating relationship" protective orders made available in Virginia. Doing so would allow victims of dating violence, who do not meet the definition of a "family or household member," and who do not qualify for, or meet the requirements of a stalking protective order, to obtain protection from the courts. The disadvantages to having "dating relationship" protective orders is that victims may be subject to cross-examination on intimate and personal details of their relationship with their aggressor during the protective order hearing. Also, some victims, including those in same sex relationships, may not wish their relationship to be made public, or become a subject of inquiry during a hearing. Finally, determining if a relationship meets the standard of a "dating relationship" might be difficult in particular cases, and if a judge rules that such a relationship does not meet the standard, the victim will be unable to obtain protection. For those victims, an approach similar to that contemplated by the substitute version of Senate Bill 208 would be preferable.

If the legislature were to adopt dating relationship protective orders, a number of practical questions would still need to be addressed. Should these protective orders be issued by juvenile and domestic relations district courts, like family abuse protective orders, or should they be issued by general district courts, like stalking protective orders? There are advantages to having dating relationship protective orders heard in juvenile and domestic relations district courts. The judges have extensive experience with protective orders, as most protective orders today are family abuse protective orders. These judges also are very familiar with the interactions and social dynamics of couples in volatile relationships, and have experience recognizing the signs and circumstances of abused victims.

There are also some disadvantages to situating dating relationship protective orders in juvenile and domestic relations district courts. If the jurisdiction of these courts is expanded, the already crowded dockets in some locales could become much worse. The wait times for protective order hearings might become a major inconvenience for all of the parties involved, including court personnel. In the event the protective order is violated, there could likely be concurrent criminal charges, which would be heard in the general district court for that locale. Having two different judges hear essentially the same facts as to what occurred during the incident in question would be a lack of judicial efficiency and might lead to inconsistent results between the two courts. If the concurrent criminal charges were to be heard in the juvenile and domestic relations district court, though, this would be an enormous expansion of those courts' basic jurisdictional limits. Up until now, juvenile and domestic relations district courts have been occupied solely with matters relating to children, and people who are in a family or household relationship.

House Bill 453

House Bill 453 (HB 453) would deem a protective order to have been personally served on the respondent if law enforcement either provided him with a copy of the order, or a notice of the issuance of the order on a pre-approved form, to be created by the Virginia Supreme Court.[23] While the ability to effectuate service by simply providing a notice form to the respondent might make the process easier for law enforcement, serious concerns arise in situations where the protective order is very lengthy, with many specific details regarding what the respondent is and is not allowed to do. Simply giving such a respondent a generic notice form might not fully alert him as to the full extent of the constraints placed upon him by the actual order. To then hold him in contempt for violating the protective order might well run afoul of due process requirements, depending on the circumstances. However, if all of the necessary information was provided on a notice form, this could be a useful tool for law enforcement in situations where the respondent is unexpectedly encountered, such as during a traffic stop. Under current law, the officer either must have another officer meet him at the scene with a copy of the protective order, or the officer must ask the respondent to follow him to the police station so a copy can be served on him there.

While in theory, a police car could be equipped with a computer and printer, so that the protective order could be printed and then served during the course of the stop, at this time most law enforcement vehicles do not have such devices installed. A Crime Commission law enforcement agency survey found that most police cars do not have laptops; almost none have printers. The survey, which was distributed to 134 law enforcement agencies, received responses from 109 agencies (81% response rate). Fifty-six agencies (51%) reported having MDTs (mobile data terminals) or MDCs (mobile data computers) in all of their patrol vehicles. Another 20 agencies (18%) reported having MDTs or MDCs in only some of their vehicles. The remaining 31 agencies (28%) did not have any MDTs or MDCs in their vehicles. Therefore, printing out a copy of a protective order on the roadside is not a practical approach to the problem of effecting service when a respondent is unexpectedly stopped. As an alternative, the use of a pre-approved form might prove helpful in these situations, provided the order did not contain extensive requirements and prohibitions, such that filling out the form would be too time consuming for the officer. The officer could radio into dispatch, receive the necessary information to completely fill out the pre-printed form, and then deliver the form to the respondent. As this method would work best with simple order forms, it might be limited in application to only emergency protective orders, which tend to be much shorter than preliminary and final protective orders.

House Bills 164 and 656

Both House Bills 164 (HB 164) and 656 (HB 656) would allow judges, in placing conditions upon the respondent of a protective order, to require him to wear a Global Positioning System (GPS) tracking device, or other similar device.[24] The decision to order this would be discretionary with the judge. Judges would also be allowed to order the wearing of a GPS device if a defendant were convicted of stalking, or pursuant to an order to vacate a marital home, pursuant to Va. Code § 20-103. The two bills are identical, though HB 656 includes additional language that the respondent must pay for the cost of the device, and the device must be capable of sending a signal to law enforcement and the petitioner if the respondent approaches a prohibited location.

The intersection of GPS technology and the criminal justice system's efforts to prevent ongoing domestic violence is a relatively new development. As technologies are improving,

the use of such devices for purposes of monitoring abusers, and providing an additional measure of safety for victims, is a slowly growing trend, nationwide.[25]

A general statutory search was conducted to determine how many states specifically allow, by statute, the judicial imposition of a GPS tracking device on a person who is the subject of a protective order. Ten states were found that specifically mention protective orders in connection with GPS devices: Connecticut,[26] Hawaii,[27] Illinois,[28] Indiana,[29] Massachusetts,[30] Michigan,[31] North Dakota,[32] Ohio,[33] Oklahoma,[34] and Washington.[35] Of these ten states, only Ohio allows a judge to require a GPS device as an initial requirement of the protective order, in a manner similar to HB 164 and HB 656. The other nine states mention GPS devices and protective orders in the same statute, but the requirement is only available when the respondent is on bond while facing criminal charges, or as a condition of probation when the conviction was for violating a protective order.

It should be pointed out that in these two contexts, pre-trial bond conditions and probation, many other localities and states may allow judges or probation officers to impose the use of GPS devices on a defendant who is currently subject to a protective order. The authority to do this is found in either the general statutes authorizing the judge to impose whatever requirements are necessary to ensure public safety and the defendant's compliance with the rules of bond or probation, or is simply assumed as a matter of local practice. For example, while North Carolina does not have any statutes explicitly linking the use of GPS monitoring to a person who is subject to a protective order, individuals who are out on bond pending trial for violent felonies in Mecklenburg County are sometimes required to wear a GPS ankle bracelet.[36] This requirement could be applied to a defendant facing charges for violating a protective order in the course of a violent attack upon the protected party. On the other hand, while a number of states have authorized the use of GPS tracking as part of the criminal justice process, a lack of funding has meant that these programs have not yet been initiated, or are only running on a pilot program basis.[37]

Additional problems arise when the respondent to a protective order refuses to wear, or refuses to pay for, a GPS device. If he is not facing criminal charges, or is not on probation, it becomes problematic for a court to incarcerate the respondent for contempt of court, especially under circumstances where he is indigent. For that reason, any scheme that would permit a judge to impose a GPS tracking device requirement upon a person subject to a protective order would work best if it was limited to instances where that person was also subject to the criminal justice system.

House Bill 1156

House Bill 1156 (HB 1156) would allow a minor to petition for a protective order, without the consent of a parent.[38] The court receiving the petition would be required to provide a guardian ad litem for the juvenile. While allowing this could provide some juveniles with a means of relief in situations where the source of their abuse is a parent, there is also the possibility that without some adult supervision prior to the initiation of the case, completely frivolous petitions could be filed, resulting in needless costs to the parties and the court system. Additionally, a strong argument could be made that if a juvenile is being subjected to family abuse, child protective services should be involved and should investigate the situation as soon as possible. If they are by-passed due to an initial filing by the juvenile on his or her own, their later investigation may be compromised.

House Bill 216

House Bill 216 (HB 216) would make the respondent of a family abuse protective order, or a preliminary protective order issued pursuant to Va. Code § 16.1-253, who assaults the protected party, guilty of domestic assault under Va. Code § 18.2-57.2.[39] In most situations, such an assault would already be domestic assault, as domestic assault is defined as an assault on a family or household member, and family abuse protective orders and protective orders issued under Va. Code § 16.1-253 can only be issued when family or household members are involved. In a few cases, a family abuse protective order is issued, and some time later, the protected person no longer meets the definition of a family or household member; for example, the protected person had cohabitated with the respondent within twelve months at the time of the initial order, but more than twelve months had passed at the time of the subsequent assault. In these instances, the respondent would not be guilty of domestic assault. The penalties for assault and domestic assault are usually the same, a Class 1 misdemeanor; however, a third violation of domestic assault within twenty years is a Class 6 felony.[40] The practical effect of this bill, therefore, would be to increase the possibility, in a small number of cases, that a respondent to a family abuse protective order would be guilty of a Class 6 felony if he assaulted, or had assaulted in the past, a protected person.

House Bill 285

House Bill 285 (HB 285) would allow a court to include in a protective order specific provisions enjoining the respondent from harming a companion animal or pet belonging to the petitioner or a family or household member.[41] In order for any such harm to the animal to be considered a violation, however, it would have to be done with the intent to threaten, coerce, intimidate or harm the petitioner or family or household member. Already, judges have enormous latitude in crafting protective orders and can tailor them to fit the circumstances of particular cases. The family abuse protective order statute allows judges to prohibit the respondent from "such contacts…with the petitioner or family or household members of the petitioner as the court deems necessary for the health or safety of such persons," and allows them to order "any other relief necessary for the protection of the petitioner and family or household members..."[42] The stalking protective order statute similarly allows judges to prohibit "such contacts by the respondent with the petitioner or family or household members of the petitioner as the court deems necessary for the health or safety of such persons," and allows them to order "any other relief necessary to prevent criminal offenses that may result in injury to person or property…communication or other contact of any kind by the respondent."[43] Therefore, it is arguable that HB 285 is not needed, and in fact could have an unintended consequence—if the legislature inserts this language into the protective order statutes, there is a chance judges will view this as granting them the authority to enjoin the harming of companion animals, but their authority is non-existent when it comes to other types of personal property.[44] Therefore, if the legislature wished to make clear that protective orders could include protections for companion animals, the statue should also be expanded to include all types of personal property.

Additional Policy Issues

Stalking protective orders

While the stalking protective order statutes closely mirror the family abuse protective order statutes, they are not identical.[45] It has been proposed that the stalking protective order statutes should be

modified to make them more similar. For example, there are heightened penalties for second or subsequent violations of a family abuse protective order; the same heightened penalties should apply for second or subsequent violations of a stalking abuse protective order.[46] Also, there is no requirement that a criminal warrant be taken out in order to apply for a family abuse protective order. It has been suggested that the criminal warrant requirement in applying for a stalking protective order should be eliminated. A victim of stalking might wish to seek the protection of a court order, but not become involved in a lengthy criminal trial process.

Similarly, while a conviction for domestic assault can lead to the issuance of a family abuse protective order on behalf of the victim, it does not do so automatically, while a conviction for stalking leads to an automatic order prohibiting contact between the parties.[47] This difference could be eliminated, so that a stalking conviction would no longer result in a mandatory "no contact" order. For those victims who fear the issuance of this kind of order will aggravate the defendant, making a volatile situation even worse, it would be better if such orders were optional, or would only be issued upon the request of the victim.

Another difference that could be eliminated involves extensions of emergency protective orders. Law enforcement officers have the ability to seek the extension of an emergency family abuse protective order, if the victim is incapacitated and unable to apply for another protective order on her own.[48] They do not have this ability in situations involving emergency stalking protective orders, which is a deficiency that should be removed. Lastly, it has been suggested that stalking protective orders could be renamed as restraining orders, as this is the term many laypeople use.

Generic "no contact" orders

Frequently, upon a finding of guilt in a criminal case, the judge will order as a condition of the sentence that the defendant have "no contact" with the victim. These "no contact" orders do not have the same legal significance as a formal protective order. They are not entered into the Virginia State Police's Virginia Crime Information Network (VCIN) system,[49] a violation is not an immediately arrestable offense as a Class 1 misdemeanor,[50] there are no resulting firearms restrictions,[51] and subsequent violations do not result in enhanced penalties, as with family abuse protective orders.[52] This practice of issuing generic "no contact" orders, in lieu of formal protective orders, could be prohibited by the legislature. While it would not be practical, nor appropriate, to mandate the issuance of formal protective orders in all categories of criminal cases, this proposal makes sense and easily could be implemented for the crime of domestic assault. Language could be inserted into Va. Code § 18.2-57.2, the domestic assault statute, prohibiting judges from making general "no contact" orders between the parties; if the circumstances of the case necessitate an order prohibiting future contact between the parties, such an order must come in the form of a formal family abuse protective order, issued pursuant to Va. Code § 16.1-279.1. Similarly, this prohibition could be inserted into the stalking statute, Va. Code § 18.2-60.3, which currently requires a judge to "issue an order prohibiting contact between the defendant and the victim or the victim's family or household member." Instead, the judge could be mandated, if a "no contact" order were to be issued, that it be in the form of a formal stalking protective order, as defined by Va. Code § 19.2-152.10.

Broadening the definition of "family abuse"

During the course of the study, some members of the Protective Order Work Group suggested that the current definition of "family abuse"[53] is not sufficiently broad, in that it fails to include activities that, while not strictly constituting a threat or placing the victim "in reasonable apprehension of bodily injury," still can be used by an aggressive partner to intimidate and control, e.g., severe verbal abuse. As a victim must demonstrate "family abuse" in order to petition for a family abuse protective order, someone who is subject to repeated emotional abuse is not able to apply for one. One solution would be to add to the definition of "family abuse" and incorporate those behaviors which are included in the definition of "domestic violence," as provided for in Virginia's Insurance Code, under Va. Code § 38.2-508:

> a. Attempting to cause or causing or threatening another person physical harm, severe emotional distress, psychological trauma, rape or sexual assault;
>
> b. Engaging in a course of conduct or repeatedly committing acts toward another person, including following the person without proper authority, under circumstances that place the person in reasonable fear of bodily injury or physical harm;
>
> c. Subjecting another person to false imprisonment; or,
>
> d. Attempting to cause or causing damage to property so as to intimidate or attempt to control the behavior of another person.

If the definition of "family abuse" were to be expanded in this manner, it would also make sense to change the name of "family abuse protective orders" to "domestic violence protective orders," as the latter name would be a more apt description. Additionally, this definition could be included in the stalking protective order statutes, so that these kinds of emotionally abusive behaviors could also lead to a protective order in situations where the aggressor is not a family or household member.

However, increasing the scope of "family abuse" to include behaviors that do not involve physical violence, or the threat to commit violence, could lead to many more protective order petitions being filed, some of which might border on the frivolous, as there is no precise definition of what constitutes "severe emotional distress." Also, increasing the scope of protective orders in this way would be a significant change in what activities are deemed serious enough to merit the imposition of a protective order. While there can be no doubt that behaviors that involve a threat of bodily harm are serious enough to warrant an intervention by the law, the policy justification to allow the same remedies and sanctions for behaviors that are mean-spirited, but not physically threatening, is not as clear or compelling.

Family abuse emergency protective orders

Under current law, both law enforcement officers and victims of family abuse can petition for the issuance of an emergency family abuse protective order, lasting for three days, or, if the third day is one when the court is not in session, lasting until the end of the next day when the court is in session.[54] There is no requirement that an arrest warrant be requested, or issued, for an emergency family abuse protective order to be issued. During the course of the study, some members of the Protective Order Work Group proposed that when law enforcement requests an emergency family abuse protective order on the behalf of a victim, a criminal arrest

warrant must also be, or have been, issued. This would prevent law enforcement from having emergency family abuse protective orders issued, without the victim's knowledge or consent, when the circumstances surrounding the alleged family abuse are not serious enough to merit a criminal arrest. This new prohibition would not apply to victims, though, who would still be able to seek emergency relief without the necessity of a criminal arrest warrant being issued.

A slightly different proposal, related to the length of time for family abuse emergency protective orders, was to eliminate their automatic extension if the third day is one in which the court is not in session.[55] Instead, all family abuse emergency protective orders would definitely end after three days, regardless of whether or not the issuing court was in session. There would be an exception, though. For the sake of protection, a victim could specifically request, at the time of the initial petition, that the emergency protective order not end after three days, but be continued until the court was next in session. The ability to request an extension would not be available to law enforcement, however. The purpose behind this change would be to prevent law enforcement from having a domestic couple separated for more than three days, without the victim's knowledge and consent.

It should be noted, though, that both of these proposals curtail some of the authority law enforcement currently has when they petition magistrates for family abuse protective orders.

Subsequent protective orders

When a person is convicted of violating a protective order, it is mandatory for the judge to issue a new protective order, in addition to any criminal sentence imposed.[56] During the course of the study, some members of the Protective Order Work Group suggested that to prevent the confusion that can arise when multiple protective orders are in effect, any new protective order issued under these circumstances should automatically supersede the previous protective order, provided the new protective order is issued by a court of equal or superior authority. However, a major flaw with this idea is that it could involve separate courts, of equal authority, "revoking" each other's orders, which is not the normal practice in Virginia. Also, if a new order failed to include provisions from the previous order, and was deemed to supersede it, a victim might lose essential protections or benefits, such as temporary housing provided by the defendant.

Reorganization of the family abuse protective order statutes

Currently, the family abuse protective order statutes are scattered throughout Title 16.1 of the Code of Virginia.[57] During the course of the study, some members of the Protective Order Work Group suggested that these statutes should be reorganized, placing them into their own Article. In this way, they could be more easily referenced, as the statutes would proceed numerically, as is the case with the stalking protective orders.[58] To do this would require the Virginia Supreme Court to modify all of their forms, though, as the statute numbers referred to on the existing forms would no longer be correct. There would be a fiscal cost to implement this change.

Conclusion

Protective orders play an important role in both the civil and criminal justice systems in Virginia. They provide specific protection to victims, by placing restrictions on the movements and activities of the respondents, and by placing the respondents on notice that any subsequent threatening activities will result in a criminal conviction. Each year in Virginia

over 15,000 "final" protective orders are issued, and at any one time, there are approximately 17,000 protective orders in existence. At present, however, only victims of family abuse perpetrated by a family or household member, or victims of stalking, sexual battery, aggravated sexual battery, or a crime resulting in serious bodily injury, may apply for a protective order.

To extend the benefits of protective orders to other victims, the Crime Commission formally recommended that the requirements for obtaining a protective order should be broadened, so that any person who has been subjected to conduct that creates a reasonable fear of sexual assault or bodily injury may petition for a protective order. In this way, victims of dating violence, as well as other victims who are not able to obtain a protective order under the current laws, will be able to seek formal protection, issued by a general district court or a circuit court. To further accomplish this policy objective, the Crime Commission recommended eliminating the existing requirement that a criminal warrant be issued in order to obtain a protective order from a district court. Reflecting these changes, the Crime Commission recommended that these protective orders be referred to as "protective orders," rather than the existing terminology of "stalking protective orders." The Crime Commission also recommended that the penalties for violating a protective order should be the same, regardless of whether the order was a family abuse protective order, issued by a juvenile and domestic relations district court, or a protective order, issued by a general district court. To help the two kinds of protective orders have even more parity, the Crime Commission recommended that law enforcement be given the authority to request an extension of an emergency protective order if the victim is incapacitated and unable to apply for an extension; law enforcement currently has this authority for family abuse emergency protective orders.

All of these recommendations were incorporated into HB 2063, which was introduced by Delegate Rob Bell during the Regular Session of the 2011 General Assembly. After amendments, this bill was enacted into law by the Governor on March 24, 2011. A separate bill, SB 1222, was introduced by Senator George Barker. This bill was conformed to HB 2063; after amendments both bills were identical when they were enrolled. SB1222 was also enacted into law by the Governor on March 24, 2011.

The authority of courts should be expanded to assist them in their task of providing appropriate protection to victims. To help accomplish this, the Crime Commission made three specific recommendations. First, judges should be authorized to require the wearing of a GPS tracking device for defendants who are out on bond awaiting trial, or as a condition of probation after sentencing. By doing this, future acts of harassment or violence by the defendant might be prevented in certain cases. Second, the Crime Commission recommended that courts should be given the authority to order the subject of a protective order to refrain from damaging items of personal property, or harming pets or companion animals. Third, it was recommended that upon finding a defendant guilty of domestic assault, courts should be given the ability to issue a family abuse protective order, in addition to any criminal sentence.

The GPS recommendation was presented to the 2011 General Assembly in HB 2106, which was introduced by Delegate Ward Armstrong. After being amended in the House of Delegates to include the requirements that if a person released before trial is required to wear a GPS device, he must be placed on a secure bond, and that pre-trial defendants and defendants on probation may be required by the court to pay for the cost of their GPS devices, this bill was enacted into law by the Governor on April 6, 2011. SB 925, which was introduced by Senator Ryan McDougle and dealt with the same issue,

was amended to be identical to HB 2106, and was also enacted by the Governor on the same day.

The recommendation that courts be given the authority to include in the terms of a protective order the requirement that the respondent refrain from damaging items of personal property, or harming pets or companion animals, was presented to the 2011 General Assembly in HB 1716, which was introduced by Delegate James Scott. After being amended to exclude specific mention of companion animals, as they are covered by the term "personal property," the bill was incorporated into HB 2063, which, as mentioned above, was subsequently passed by the legislature and enacted into law on March 24, 2011.

The recommendation that upon finding a defendant guilty of domestic assault, courts should be given the ability to issue a family abuse protective order, in addition to a criminal sentence, was presented to the 2011 General Assembly in HB 1936, which was introduced by Delegate Onzlee Ware. This bill was tabled in the House Courts of Justice Committee.

Finally, the Crime Commission recommended that, in order to assist law enforcement in the service of processing emergency protective orders, the Supreme Court of Virginia should create special notification forms. Provided that all of the necessary information in the original protective order is included on the form, the respondent will be deemed to have been served with the emergency protective order upon receiving the completed form. This recommendation was presented to the 2011 General Assembly in HB 2089, which was introduced by Delegate Charniele Herring. HB 2089 was enacted into law by the Governor on March 24, 2011.

[1] S.B. 208, 2010 Gen. Assem., Reg. Sess. (Va. 2010).
[2] H.B. 453, 2010 Gen. Assem., Reg. Sess. (Va. 2010).
[3] H.B. 164, 2010 Gen. Assem., Reg. Sess. (Va. 2010).
[4] H.B. 656, 2010 Gen. Assem., Reg. Sess. (Va. 2010).
[5] H.B. 1156, 2010 Gen. Assem., Reg. Sess. (Va. 2010).
[6] H.B. 216, 2010 Gen. Assem., Reg. Sess. (Va. 2010).
[7] H.B. 285, 2010 Gen. Assem., Reg. Sess. (Va. 2010).
[8] *See* page ix for the membership of the Protective Order Work Group.
[9] There are also the preliminary protective orders that are issued pursuant to Va. Code § 16.1-253. However, these are issued when there are allegations of child abuse or neglect, and are a precursor to a child removal hearing. While the words "protective order" are in the title of these court orders, they are very different in scope, and are issued for different reasons, than the protective orders that are granted to a victim of family abuse or stalking.
[10] VA. CODE ANN. §§ 19.2-152.8(B), 19.2-152.9(A), 19.2-152.10(A) (Michie 2010).
[11] VA. CODE ANN. §§ 16.1-253.4(C), 19.2-152.8(C) (Michie 2010).
[12] Id.
[13] VA. CODE ANN. § 16.1-253.4(D) (Michie 2010).
[14] VA. CODE ANN. §§ 16.1-253.1(A), 19.2-152.8(A) (Michie 2010).
[15] VA. CODE ANN. §§ 16.1-253.1(B), 19.2-152.9(B) (Michie 2010).
[16] Id.
[17] VA. CODE ANN. §§ 16.1-279.1, 19.2-152.10 (Michie 2010).
[18] VA. CODE ANN. §§ 16.1-279.1(B), 19.2-152.10(B) (Michie 2010).
[19] Id.
[20] S.B. 208, 2010 Gen. Assem., Reg. Sess. (Va. 2010).
[21] The states that permit dating relationship protective orders are: ALA. CODE § 30-5-2(5)(d) (2010); ALASKA STAT. §§ 18.66.100(a), 18.66.990(5) (Mitchie 2010); *see also* ALASKA STAT. §§ 11.41.260 & 11.41.270 (Michie 2010); ARIZ. REV. STAT. §§ 13-3601(A)(6), 13-3602; ARK. CODE. ANN. §§ 9-15-103, 9-15-201 (Michie 2010); CAL. FAM. CODE §§ 6210, 6211 & 6320 (West 2010); COLO. REV. STAT. §§ 13-14-101(2) & 13-14-102(1.5)(b) (2010); CONN. GEN. STAT. §§ 46b-15(a) & 46b-38a(2); DEL. CODE ANN. tit. 10, §§ 1041(2) & 1042; FLA. STAT. § 784.046(1)(d) & (2)(b) (2010); HAW. REV. STAT. §§ 586-1 & 586-3 (2010); IDAHO CODE §§ 39-6303 & 39-6304 (Michie 2010); 750 ILL. COMP. STAT. 60/103 & 60/201 (2010); IND. CODE §§ 31-9-2-44.5 & 34-26-5-2 (2010); IOWA CODE § 236.2(1)(e)(1),

(1)(e)(5) & 263.3(1) (2010); KAN. STAT. ANN. §§ 60-3102(b) & 60-3104 (2010); LA. REV. STAT. ANN. §§ 46:2151 & 46:2136 (West 2010); ME. REV. STAT. ANN. tit. 19-A, § 4005 (West 2010); MASS. GEN. LAWS ch. 209A §§ 1 & 3 (2010); MICH. COMP. LAWS § 600.2950(1) (2010); MINN. STAT. ANN. § 518B.01, subd. 2 & 3 (2010); MISS. CODE ANN. § 93-21-3(a) & 93-21-7(1) (2010); MO. REV. STAT. §§ 455.010 & 455.020 (2010); MONT. CODE ANN. §§ 40-15-102 & 45-5-206 (2009); NEB. REV. STAT. § 42-903(3) & 42-924(1) (2010); NEV. REV. STAT. §§ 33.018 & 33.020 (2010); N.H. REV. STAT. ANN. §173-B:1 & 173-B:3 (2010); N.J. STAT. ANN. § 2C:25-19(d) & 2C:25-28 (2010); N.M. STAT. ANN. § 40-13-2(D) & 40-13-3 (Michie 2010); N.Y. FAM. CT. ACT § 812(1)(e) (McKinney 2010); N.C. Gen. Stat. §§ 50B-1(b) & 50B-2 (2010); N.D. CENT. CODE §§ 14-07.1-01(4) & 14-07.1-02 (2010); Ohio; OHIO REV. CODE ANN. § 3113.31 (West 2010); OKLA. STAT. tit. 22 §§ 60.1 & 60.2A (2010); OR. REV. STAT. §§ 107.705(3) & 107.710 (2010); 23 PA. CONS. STAT. ANN. §§ 6102(a) & 6106 (West 2010); R.I. GEN. LAWS §§ 15-15-1 & 15-15-2 (2010); TENN. CODE ANN. §§ 36-3-601 & 36-3-602 (2010); TEX. FAM. CODE ANN. §§ 71.0021 to 006 & 82.002 (Vernon 2010); VT. STAT. ANN. tit. 15 §§ 1101 & 1103(a) (2010); WASH. REV. CODE ANN. §§ 26.50.010 & 26.50.020(2) (West 2010); W. VA. CODE, §§ 48-27-204 & 48-27-305 (2010); WIS. STAT. §§ 813.12(am) (2009); WYO. STAT. ANN. §§ 35-21-102 & 35-21-103 (Michie 2010).

[22] Maryland does allow persons in a dating relationship to apply for a peace order, but strictly speaking, such an order is not identical to a protective order. MD. CODE ANN., CTS. & JUD. PROD. §§ 3-8A-03(A)(2), 3-1502(B)(1) (2010).

[23] H.B. 453, 2010 Gen. Assem., Reg. Sess. (Va. 2010).

[24] H.B. 164, 2010 Gen. Assem., Reg. Sess. (Va. 2010); H.B. 656, 2010 Gen. Assem., Reg. Sess. (Va. 2010).

[25] *See, e.g.,* Ariana Green, *More States Use GPS to Track Abusers*, N.Y. TIMES, May 9, 2009, http://www.nytimes.com/2009/05/09/us/09gps.html?_r=1&scp=1&sq=ariana+green+gps&st=nyt.

[26] CONN. GEN. STAT. § 46b-38c(f) (2010). This statute provides for up to three judicial districts, one of which must be in an urban area, to begin a pilot program in which individuals charged with violation of a protective order may be subject to electronic monitoring. Connecticut's statute does not allow for state-wide use of GPS monitoring.

[27] Haw. Rev. Stat. §§ 586-4(e)(3) (2010). Between the time of the Crime Commission's consideration of this subject in November, and the drafting of this report in January, this statue was repealed by the Hawaii legislature. Hawaii no longer has a provision allowing for the use of a GPS tracking device to monitor a person subject to a protective order.

[28] 730 ILL. COMP. STAT. 5/5-8A-7 (2010).

[29] IND. CODE § 34-26-5-9(i)(1) (West 2010).

[30] MASS. GEN. LAWS ch. 209A § 7 (West 2010).

[31] MICH. COMP. LAWS § 765.6b(6) (2010).

[32] N.D. CENT. CODE § 14-07.1-19 (2010).

[33] OHIO REV. CODE ANN. §§ 2903.214(E)(1)(b) & 2929.01(UU) (2010).

[34] OKLA. STAT. tit. 22 § 60.17 (West 2010).

[35] WASH. REV. CODE § 26.50.110(1)(b) (West 2010).

[36] Christopher D. Kirkpatrick, *Tracking Crime by the Ankle,* CHARLOTTE OBSERVER, May 4, 2009, http://www.charlotteobserver.com/local/story/703601.html.

[37] *See, e.g.,* Jim Hannah, *Kenton Won't Pay for Stalker GPS, August 16, 2010,* available at http://pqasb.pqarchiver.com/enquirer/access/2111189301.html?FMT=ABS&FMTS=ABS:FT&type=current&date=Aug+16%2C+2010&author=Jim+Hannah&pub=Cincinnati+Enquirer&edition=&startpage=n%2Fa&desc=Kenton+won%27t+pay+for+stalker+GPS.

[38] H.B. 1156, 2010 Gen. Assem., Reg. Sess. (Va. 2010).

[39] H.B. 216, 2010 Gen. Assem., Reg. Sess. (Va. 2010).

[40] VA. CODE ANN. §§ 18.2-57(A), 18.2-57.2(B) (Michie 2010).

[41] H.B. 285, 2010 Gen. Assem., Reg. Sess. (Va. 2010).

[42] VA. CODE ANN. §16.1-279.1(A)(2) & (8) (Michie 2010).

[43] VA. CODE ANN. §19.2-152.10(A)(1) & (3) (Michie 2010).

[44] This is a principle of construing the words of a legislative statute that is known as *expressio unius est exclusio alterius;* i.e., the specific referral of something in positive terms implies that all other things are not included. "Mention of one thing implies exclusion of another. When certain persons or things are specified in a law, contract, or will, an intention to exclude all others from its operation may be inferred." BLACK'S LAW DICTIONARY 521 (5th ed. 1979).

[45] VA. CODE ANN. §§ 19.2-152.8, 19.2-152.9, 19.2-152.10 (Michie 2010); *cf.* VA. CODE ANN. §§ 16.1-253.4, 16.1-253.1, 16.1-279.1 (Michie 2010).

[46] VA. CODE ANN. § 16.1-253.2 (Michie 2010); *cf.* VA. CODE ANN. § 18.2-60.4 (Michie 2010), where there are no heightened penalties for subsequent offenses.

[47] VA. CODE ANN. §§ 18.2-60.3(D) (Michie 2010). The order that is required is not specifically identified as a stalking protective order, as defined by Va. Code

§ 19.2-152.10. Another consideration for the legislature might be to clarify that such an order is, in fact, a stalking protective order.

[48] VA. CODE ANN. §16.1-253.4(D) (Michie 2010).

[49] VA. CODE ANN. §§ 16.1-279.1(C), 19.2-152.10(C) (Michie 2010).

[50] VA. CODE ANN. §§ 16.1- 253.2, 18.2-60.4 (Michie 2010).

[51] VA. CODE ANN. §§ 18.2-308.1:4 (Michie 2010).

[52] VA. CODE ANN. §§ 16.1- 253.2 (Michie 2010).

[53] VA. CODE ANN. § 16.1- 228 (Michie 2010).

[54] VA. CODE ANN. § 16.1- 253.4(C) (Michie 2010).

[55] VA. CODE ANN. §16.1-253.4(C) (Michie 2010).

[56] VA. CODE ANN. §§ 16.1-253.2, 18.2-60.4 (Michie 2010).

[57] VA. CODE ANN. §§ 16.1-253.1, 16.1-253.2, 16.1-253.4, 16.1-279.1 (Michie 2010).

[58] VA. CODE ANN. §§ 19.2-152.8, 19.2-152.9, 19.2-152.10 (Michie 2010).

Synthetic Marijuana "Spice"

Executive Summary

A number of Virginia newspaper articles published in 2010 highlighted the growing problem of synthetic marijuana, more commonly known by the street names of "spice" or "K2." Staff reviewed the topic, utilizing Virginia and national newspaper articles, phone interviews with the Virginia Department of Forensic Science and the Virginia Board of Pharmacy, and a review of recently enacted legislation in other states.

Synthetic marijuana refers to any of over one hundred artificial cannabinoids that were first synthesized in laboratories in the late 1980's and throughout the 1990's. A recent trend has developed where one or more of these chemicals, usually JWH-018, are sprayed or infused with some type of innocuous plant material, such as ground-up catnip. The resulting mixture is typically marketed as an "incense, not for human consumption," though clearly intended to be smoked as a cannabis substitute. Because there have not been any studies on the safety of these chemicals in humans, and their long term toxicity is unknown, these chemicals may prove to be extremely dangerous.

During 2010, ten states criminalized a number of these synthetic cannabinoid drugs: Alabama, Georgia, Illinois, Kansas, Kentucky, Louisiana, Michigan, Mississippi, Missouri, and Tennessee. There is pending legislation in at least seven other states: Florida, New Jersey, New York, North Dakota, Ohio, Pennsylvania, and Utah. The Federal Drug Enforcement Agency (DEA) began the process of placing some of these chemicals in the list of scheduled drugs under the federal Controlled Substances Act in 2010; a federal ban on these chemicals went into effect on March 2, 2011. Similarly, the Crime Commission officially recommended in 2010 that the possession, distribution, or manufacture of synthetic marijuana be made a criminal offense in Virginia; on March 23, 2011, the Governor signed into law a bill with an emergency enactment clause accomplishing this.

Background

A number of recent newspaper articles have brought public attention to the subject of synthetic marijuana, which is popularly known as "spice," or "K2," amongst other street names. Sold under the guise of incense, people are smoking these herbal mixtures as a substitute for marijuana.[1]

The active ingredient in these mixtures, which are sold under popular names such as "Orange Dragon," "Voodoo," or "Starry Night," is a manufactured chemical, typically JWH-018. Typically, this chemical is sprayed upon innocuous, legal plant material, such as catnip or mugwort, and is packaged as an incense, "not for human consumption." The attraction of these synthetic marijuana mixtures is that they are currently legal, and they do not show up in the standard urine tests for marijuana. (There are drug tests that can detect the use of at least some of these chemicals, but these tests are not in common use at the present time).[2]

JWH-018 is one of a number of synthetic cannabinoids that were synthesized for the first time in the late 1980's and early 1990's. These chemicals were developed by researchers that were interested in studying the effects of cannabinoid type chemicals, which mimic the effects of the active ingredient in marijuana, THC. The purpose of this work was to learn more about how cannabinoids affect biological activity generally, and specifically to study how they interact with cannabinoid receptors in the brains of mice.[3] These chemicals were never synthesized for the purpose of creating a marijuana substitute, let alone developing a new, recreational drug. The inventor of JWH-018, Dr.

John W. Huffman (the chemical is named after his initials), has been quoted in the press as warning that "there are no valid, peer-reviewed studies of the effects of this compound in humans, nor are there any data regarding its toxicity,"[4] and that smoking JWH is "dangerous and anyone who uses them is stupid."[5]

This is confirmed both by anecodotal evidence of the strong reactions experienced by some users of "spice,"[6] and by the number of telephone calls received by Poison Control Centers concerning this drug. Nationwide, the American Association of Poison Control Centers reported more than 1,800 calls about synthetic marijuana in 2010.[7] The three Poison Control Centers that administer to Virginia have reported 70 calls as of November 10, 2010, where use of synthetic marijuana was admitted.[8]

Almost all of these synthetic cannabinoids were legal in Virginia up until March of 2011. They were not listed in either Virginia's or the federal government's list of scheduled substances.[9] The very first of these synthetic cannabinoids, HU-210, was the only one that was covered under the federal Controlled Substances Act as a Schedule I drug, and thus was illegal under federal law prior to 2011.[10] After the DEA used its emergency powers to begin the process of adding five of these chemicals to the list of Schedule I drugs, their names were printed in the Federal Register on March 2, 2011, making them illegal in the United States for at least a year, pending the administrative process to add them permanently.[11]

Although Virginia does have a designer drug statute, which criminalizes any substance that is compounded with the intent to circumvent Virginia's drug laws, it only applies to those substances which simulate the effects of a listed Schedule I or II drug through "chemical changes such as the addition, subtraction or rearranging of a radical or the addition, subtraction or rearranging of a substituent."[12] According to informal discussions with staff at the Virginia Board of Pharmacy, it is not clear if, in a court of law, the common synthetic marijuana chemicals could be proven to be designer drugs, as their chemical structure is distinctly different from that of THC, the active ingredient in marijuana. Therefore, the specific chemicals used to make synthetic marijuana would need to be named with specificity in the Code of Virginia in order for them to be illegal under Virginia law.

In 2010, at least ten states added certain synthetic cannabinoids to their list of controlled substances, making them illegal: Alabama, Georgia, Illinois, Kansas, Kentucky, Louisiana, Michigan, Mississippi, Missouri, and Tennessee.[13] Three other states had previously enacted administrative regulations targeting synthetic cannabinoids: Arkansas, Iowa, and North Dakota.[14] Another seven states have synthetic cannabinoid legislation pending: Florida, New Jersey, New York, North Dakota, Ohio, Pennsylvania, and Utah.[15]

Conclusion

Due to increased press coverage of this topic, evidence that recreational use of these substances is increasing, and the health dangers that such substances pose, it is the recommendation of the Crime Commission that Virginia should add JWH-018 to the list of Schedule I drugs in the Drug Control Act, as well as any other synthetic cannabinoid chemicals that might be recommended by either the Virginia Board of Pharmacy or the Virginia Department of Forensic Science. The Crime Commission does not have any formal recommendations as to the appropriate criminal penalty that should be imposed for the crimes of possession, distribution, possession with the intent to distribute, or manufacture of these chemicals. During the 2011 Regular Session of the Virginia General Assembly, House Bill 1434 and Senate Bill 745 were introduced, making it

illegal to possess, distribute, possess with the intent to distribute, or manufacture these chemicals. After amendments, the two bills were identical to each other, and were enacted into law by the Governor on March 23, 2011, with emergency enactment clauses, going into effect on that day. The possession of these chemicals is now a Class 1 misdemeanor; the distribution or possession with the intent to distribute these chemicals is a Class 6 felony; and the manufacture of these chemicals is an unclassified felony carrying a penalty of 5 to 30 years incarceration.

[1] *Spice incense product used to get high, Norfolk officials are investigating ingredients*, WAVY.COM (Wavy News 10, Portsmouth), May 4, 2010, *at* http://www.wavy.com/dpp/news/local_news/spice-incense-porduct-used-to-get-high.

[2] Niki D'Andrea, *High Science: Synthetic Marijuana Is Legal, and It Might Get You High – But Is It Safe?,* PHOENIX NEW TIMES, August 19, 2010, *available at* http://www.phoenixnewtimes.com/2010-08-19/news/high-science-synthetic-marijuana-is-legal-and-it-might-get-you-high-but-is-it-safe/.

[3] Id.

[4] Id.

[5] Alicia A. Caldwell, *US cracks down on fake pot as public health hazard,* ASSOCIATED PRESS, November 26, 2010, *available at* http://www.timesfreepress.com/news/2010/nov/26/us-cracks-down-fake-pot-public-health-hazard/.

[6] Niki D'Andrea, *High Science: Synthetic Marijuana Is Legal, and It Might Get You High – But Is It Safe?,* PHOENIX NEW TIMES, August 19, 2010, *available at* http://www.phoenixnewtimes.com/2010-08-19/news/high-science-synthetic-marijuana-is-legal-and-it-might-get-you-high-but-is-it-safe/; Donna Leinwand, *DEA bans K2, other 'fake pot' products,* USA TODAY, November 24, 2010, *available at* http://www.usatoday.com/news/washington/2010-11-24-k2-ban-dea_N.htm.

[7] There were more than 750 calls as of July, 2010. *State Sen. Ralph Smith files bill to ban synthetic marijuana,* RICHMOND TIMES DISPATCH, October 28, 2010, *available at* http://www2.timesdispatch.com/news/2010/oct/28/state-sen-ralph -smith-files-bill-bany-synthetic-mar-ar-613598/. By November 10, 2010, there were more than 1,800 calls for the year, according to information obtained from a phone interview with staff at the Virginia Poison Center. According to a news article, by the end of 2010, there had been 2,874 calls. Jim Salter and Jim Suhr, *Synthetic Drugs Send Thousands to ER,* ASSOCIATED PRESS, April 6, 2011, *available at* http://www.timesfreepress.com/news/2011/apr/07/synthetic-drugs-send-thousands-er/.

[8] These figures were obtained through phone interviews with staff at the Virginia Poison Center, the National Capital Poison Center, and the Blue Ridge Poison Center.

[9] VA. CODE ANN. § 54.1-3445 *et seq.* (Michie 2010); 21 U.S.C. § 812 (2010); 21 C.F.R. § 1308 (2010).

[10] 21 U.S.C. § 812 (2010); 21 C.F.R. § 1308 (2010); *see also Drugs and Chemicals of Concern: HU-210*, U.S. D.O.J., D.E.A., Office of Diversion Control, *at* http://www.deadiversion.usdoj.gov/drugs_concern/spice/spice_hu210.htm.

[11] Schedules of Controlled Substances: Temporary Placement of Five Synthetic Cannabinoids Into Schedule I, 76 Fed. Reg. 11,075 (March 2, 2011) (to be codified at 21 C.F.R. pt. 1308).

[12] VA. CODE ANN. § 54.1-3456 (Michie 2010).

[13] ALA. CODE § § 13A-12-214.1 (West 2010); GA. CODE ANN. § 16-13-25 (West 2010); 720 ILL. COMP. STAT. 570/204 (2010); KAN. STAT. ANN. 65-4105 (2010); LA. REV. STAT. ANN. § 40:964 (West 2010); MICH. COMP. LAWS § 333.7212 (2010); MISS. CODE ANN. 41-29-113 (West 2010); TEN. CODE ANN. § 39-17-438 (West 2010); KY. REV. STAT. ANN. 218A.010 (West 2010); MO. ANN. STAT. 195.017 (West 2010).

[14] ARK. ADMIN. CODE. § 007.15.8-I to VIII (2011); IOWA ADMIN. CODE. r. 657-10.41 (2011); N.D. ADMIN. CODE. § 61-13-01-01 to -03 (2011).

[15] H.B. 39, 113th Reg. Sess., 2011 Sess. (Fl. 2011); A. 2644, 214th Leg., 2d Ann. Sess. (N.J. 2011); S.B. 1834, 2011 Leg., 2011-2012 Leg. (N.Y. 2011); S.B. 2119, 62nd Leg. Assem., 2011 Sess. (N.D. 2011); H.B. 64, 129th Gen. Assem., 2011-2012 Sess. (Ohio 2011); S.B. 164, 2011 Leg., 2011-2012 Reg. Sess. (Pa. 2011); H.B. 23, 59th Leg., Gen. Sess. (Utah 2011).

Transfer and Certification of Juveniles

Executive Summary

During the 2006 Session of the Virginia General Assembly, Delegate Brian Moran introduced House Joint Resolution 136 (HJR 136),[1] which directed the Crime Commission to study the Virginia juvenile justice system over a two-year period. Crime Commission members extended the study in December 2008 and again in 2009 to specifically examine the many issues identified regarding the transfer and certification of juveniles.

The Crime Commission utilized several research methodologies to conduct this study including: (i) completing a national and state literature review; (ii) completing a 50 state survey on transfer laws and pending legislation; (iii) gathering relevant juvenile statistics; (iv) researching adolescent brain development; (v) attending statewide juvenile justice meetings, conferences, and trainings; (vi) observing Juvenile and Domestic Relations (JDR) Court proceedings; (vii) surveying professionals in the juvenile justice field and, (viii) meeting with key juvenile justice professionals.

As a result of an increase in violent juvenile crime that occurred in the 1980's, states across the country, including Virginia, began creating tougher penalties and sanctions for juvenile offenders, focusing primarily on juveniles between the ages of 11 and 17 years. Virginia Code § 16.1-269.1, allows a juvenile to be transferred to circuit court in three different ways: judicial discretion, automatic transfer, or prosecutorial discretion. A 50 state review revealed other states that utilize the same transfer mechanisms, as well as other methods including statutory exclusion, reverse waiver, and blended sentencing.

Staff examined academic literature which revealed that a number of states are once again reforming their juvenile justice laws, in an effort to repeal some of the harsher penalties aimed at juvenile offenders. The role of adolescent brain development was also examined including the correlation between juvenile delinquent behavior, brain development, and a juveniles' socioeconomic upbringing. A brief review of juvenile population and arrest trends showed the juvenile population has slightly declined in the past three years while the arrest rate has neither increased nor decreased over the same period of time. In addition to that, the total number of juveniles transferred to circuit court has decreased over the past three years which correlates with the decrease in the number of juveniles convicted in circuit court.

As a result of the study effort, Crime Commission members endorsed the following recommendations:

- Add offenses for which a juvenile is subject to transfer and certification as an adult; and,

- Allow a circuit court judge the ability to give a juvenile, after a transfer of the case to circuit court and a finding of guilt, a "delinquent" finding, after a supervised probation period was successfully completed.

Background

The Crime Commission was originally directed to study Virginia's juvenile justice system in 2006. Specifically, HJR 136 and HJR 113[2], both introduced by Delegate Brian Moran during the 2006 and 2008 General Assembly Sessions, directed the Crime Commission to conduct a study of Virginia's juvenile justice system. At the Crime Commission's December 9, 2008, meeting and its December 15, 2009, meeting, members voted to continue the juvenile justice study an additional year to specifically

focus on the many issues identified regarding the transfer and certification of juveniles. Additionally, during the 2010 General Assembly Session, Senate Bill 205 (SB 205)[3] and Senate Bill 389 (SB 389)[4] were both referred to the Crime Commission for study. This report highlights the past several years of research related to the transfer and certification of juveniles.

The last major reform to Virginia's juvenile justice system occurred 15 years ago. Legislators across the country began to react to the increase in violent juvenile crime rates seen during the 1980's by reforming their states' overall juvenile justice systems in the mid-to-late-1990's. With both the national and state juvenile crime rates on the rise, many elected officials and political leaders felt the need to create tougher penalties and sanctions for juvenile offenders, focusing primarily on juveniles between the ages of 11 and 17 years. Virginia was no exception. In 1994 and 1996, Virginia made its laws more punitive for transfer provisions, sentencing authority, and confidentiality of juvenile records. Following the findings from the 1994 Commission on Youth's (COY) serious juvenile offenders study and recommendations made by the Juvenile Justice Reform Commission, the Virginia General Assembly adopted many of these recommendations regarding juvenile justice laws.[5] Senate Bill 520[6] and House Bill 1243[7] made the following substantial changes in 1994:

- Lowered the age at which a juvenile may be tried as an adult in circuit court for felonies, from 15 to 14;

- Eliminated the requirement for a juvenile's transfer hearing to show the juvenile is not a proper person to stay in JDR court for the following offenses:

1. A Class 1 or 2 felony violation under Chapter 4 (§ 18.2-30 et seq.) of Title 18.2 or, if the juvenile is 16 years of age or older, a Class 3 felony violation of Chapter 4 (§ 18.2-30 et seq.) of Title 18.2 for: (i) murder under Article 1; (ii) mob-related felony under Article 2; (iii) kidnapping or abduction under Article 3; or (iv) assault or bodily wounding under Article 4; or,

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

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

- Established that only juveniles with felony or Class 1 misdemeanor convictions would be subject to commitment to the Department of Youth and Family Services (DYFS), now the Department of Juvenile Justice (DJJ);[8]

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

- Added the requirement that when a serious offender was to be released from DYFS, the Department notify the court, sheriff, chief of police, and the Commonwealth's Attorney from the locality where the juvenile was sentenced. The Department was also to notify any victim who submitted a written request for notification.[9]

In 1996, more reforms were added to the Code of Virginia. Senate Bill 44 and House Bill 251 made the following changes:

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

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

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

- Established that court proceedings involving a juvenile over the age of 14 would be open proceedings, unless otherwise determined. It also opened the court records of such proceedings, except for portions kept confidential to protect a witness or another juvenile;

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

- Provided for blood samples to be taken for the state's DNA bank. It also included taking fingerprints and photographs for the Central Criminal Records Exchange (CCRE) of juveniles 14 and older that have committed a felony, or Class 1 or Class 2 misdemeanor. These CCRE records no longer were to be automatically deleted at the age of 29, but kept in cases of firearm purchases, fingerprint comparison, sentencing purposes, and for Court Service Units (CSUs).[10]

Literature Review

Staff conducted an extensive literature review of existing academic, national and state juvenile justice studies. The following section includes a brief summary of findings.

Overall Population and Arrest Trends

Between 1990 and 2005, the population of juveniles between the ages of 10 to 17 in the United States, as well as Virginia, saw an overall increase. From 2005 to 2008, that same population slowly declined.[11] The juvenile population in Virginia, as well as in the United States, differs from the adult population in that the adult population experienced at least a slight growth every year, without any decline. The juvenile arrest rate remained fairly steady over the same period of years. Despite a slight increase in overall crime committed by juveniles in 2005 and 2006, the arrest rate has not experienced a significant increase or decrease.[12] According to the FBI's Uniform Crime Reports, violent crime arrests declined 2.3% in 2009 as compared with 2008 arrests, while property crime arrests increased 1.6% when compared with 2008 arrests. Arrests of juveniles for all offenses decreased 8.9% in 2009 when compared with the 2008 number; arrests of adults only declined 1.2%.[13]

Background and Impact of Transfer Laws on Juveniles

Following the increases in violent juvenile crime in the late 1980's and early 1990's, all states except Nebraska expanded their transfer provisions between 1992 and 1999 in order to facilitate prosecuting juveniles in the adult justice system.[14] According to the Center for Disease Control's "Morbidity and Mortality Weekly Report," the reduction of violence through transfer policies may be explained by two mechanisms: specific deterrence and general deterrence.[15] Specific deterrence refers to juveniles who have been subjected to the adult justice system and thus may be less likely to re-offend; whereas, general deterrence refers to all juveniles who might be deterred from offending if they are aware they may be subject to transfer provisions if charged with a crime.

Three other studies evaluated the general deterrence effect of transfer laws or policies.[16] These studies were similar to the specific deterrence studies in that they sought to determine if harsher transfer laws led to a reduced juvenile offense rate. The evidence from

these studies is insufficient to determine whether or not the transfer of juveniles to the adult criminal justice system is effective in preventing or reducing violence in the general juvenile population.

Among some of the growing concerns with juvenile transfer to adult courts is the idea that transferring juveniles to the adult justice system is counterproductive as a strategy for deterring subsequent violence. Strong evidence was found that youth who have been previously tried as adults were more likely to commit additional violent crimes.[17] The weight of evidence shows that youth who are transferred from the juvenile court system to the adult criminal system are approximately 34% more likely than youth retained in the juvenile court system to be re-arrested for violent or other crime.[18] This study suggests that there is insufficient evidence to prove that transferring youth to the adult criminal system prevents youth crime. In addition, there was insufficient evidence found to justify assertions that trying youth as adults prevents youth from committing crimes in the first place.[19] Other violent outcomes may result from the transfer of youth to the adult system. These violent outcomes include an increase in pretrial violence, victimization of juveniles in adult facilities, and elevated suicide rates for juveniles incarcerated in adult facilities.[20]

An Office of Juvenile Justice Delinquency Prevention Bulletin (OJJDP)[21] also addressed several possible explanations for the higher recidivism rates of violent juvenile offenders tried in adult court as compared to those adjudicated in juvenile court:

- The stigmatization and other negative effects of labeling juveniles as convicted felons;
- The sense of resentment and injustice juveniles feel about being tried and punished as adults;
- The learning of criminal mores and behavior while incarcerated with adult offenders;
- The decreased focus on rehabilitation and family support in the adult system; and,
- A felony conviction also results in the loss of a number of civil rights and privileges, further reducing the opportunities for employment and community reintegration.[22]

A report titled "From Time Out to Hard Time: Young Children in the Adult Criminal Justice System,"[23] released by the Lyndon B. Johnson School of Public Affairs at The University of Texas at Austin in 2009, touched on a number of issues regarding juveniles in the criminal justice system. One of the main topics included the notion that juveniles are considered to be different in nearly every [other] aspect of social life, except when it comes to criminal law. Scientific research shows that neurobiological, cognitive, and psychological development all factor into juveniles' competence and their possible amenability to rehabilitation. The report cited a number of problems associated with trying juveniles in the criminal justice system, including, but not limited to, courtroom issues, locking juveniles in adult jails and prisons, and the failure of the adult system to address public safety needs.[24]

One of the biggest concerns centered around problems encountered in the courtroom, such as juveniles being too young to actively participate in courtroom proceedings, criminal judges and attorneys often having little experience with young offenders, juveniles having the potential to change substantially as the trial progresses, and the fact that the juvenile could ultimately face a loss of privacy and privileges as a result of the proceedings.

The report stated that by placing juveniles in adult facilities another set of problems was presented, including the lack of

special programming and treatment geared towards juveniles and their rehabilitation. Additionally, the staff levels in the adult facilities are often inadequate and the staff may not be specially trained to handle juveniles. Housing juveniles in adult facilities also increases the risk of sexual and physical assault against a juvenile and can exacerbate mental health issues, which could increase the potential for suicide. The juvenile justice system has been shown to work in the problem areas discussed previously, as the system was formed to focus on rehabilitating the juvenile and providing access to education, vocational, and treatment programs.[25]

At least six studies were identified that examined the effects of juvenile transfer on subsequent violent offending.[26] The studies followed juveniles for periods ranging from 18 months to 6 years to assess rates of recidivism.[27] One of the studies determined that the transfer of juveniles to the adult system did, in fact, deter future recidivism.[28] Another study found that transfer had no effect,[29] and the other four studies determined that juveniles subjected to transfer were found to have a higher likelihood of recidivism than those who were retained in the juvenile system.[30] Some research concluded that transferring juveniles to the adult system is counterproductive as a strategy for preventing or reducing violence.[31]

The findings in the Center for Disease Control's "Morbidity and Mortality Weekly Report" indicate that transfer policies have generally resulted in increased arrest for subsequent crimes, including violent crime, among juveniles who were transferred compared with those retained in the juvenile justice system.[32] To the extent that transfer policies are implemented to reduce violent or other criminal behavior, available evidence indicates that they likely do more harm than good.[33] It was found that juveniles have the highest suicide rates of all inmates in jails and are 36 times more likely to commit suicide in an adult jail than in a juvenile detention facility.[34] It was also noted that placing youth in the adult criminal justice system increases their likelihood of re-offending. While former trends have shown that crimes against property were the most likely to be waived to criminal court, statistics now show that crimes against persons have a greater chance of being waived.[35]

Also, between 1985 and 2005, the proportion of waived cases involving youth of a younger age and females increased; however, the majority of waived cases still involve a male 16 years of age or older.[36] The report stated that juveniles held in adult correctional facilities are exposed and socialized by the criminal culture.[37] Violent juvenile offenders reported daily survival required finding ways to fit into the inmate culture, dealing with difficult and authoritarian relationships with adult inmates, and adjusting to the institution by accepting violence as a part of daily life, and thus, becoming even more violent.[38] Evidence shows that individual counseling, interpersonal skills, providing teaching in family homes, and behavioral programs have very positive effects.[39] The availability of multiple services, behavioral programs, and restitution with probation/parole also has the ability to have positive effects on a juvenile.[40]

The declining number of juvenile cases that are judicially transferred nationwide is not only a result of decreased violent crime committed by juveniles, but also due to the overall increase of nonjudicial transfer laws.[41] This indicates that instead of prosecutors filing for a waiver, many cases skip the juvenile court entirely and are filed directly in criminal court.[42] Recent research shows that 45 states have discretionary judicial waiver provisions, while 15 states have presumptive waiver laws and another 15 states provide for mandatory waiver. To meet the requirement of one of the aforementioned waivers, factors such as age, offense, and prior record are usually taken into account. Cases that qualify for mandatory waiver are initiated in juvenile court, but once the statutory

requirements are met they are sent to criminal court.[43]

The current national trend appears to be reverting away from harsh transfer laws. The idea of transfer being an effective measure of preventing juvenile crime is questionable and some practitioners have realized that they cannot treat juveniles as fully functioning adults. In the absence of a complete reform of the nation's transfer laws, more immediate reforms may be considered. Reforms that include built in "fail-safes" in order to avoid inadvertent consequences, more flexibility in sentencing, and mandated tracking and reporting of basic information would presumably improve state transfer laws.[44] One report's research indicates that Virginia either does not have enough fail-safe mechanisms available, or that the fail-safe mechanisms that are in place restrict a judges' control in making individual exceptions.[45]

A report by the OJJDP[46] listed a number of problems facing the juvenile justice system, as well as suggestions:

- Nationally, practitioners must juggle legal and policy inconsistencies both within individual states, at the county level, and between states;

- There are no consistent guidelines on criteria prosecutors should use in determining which children are to be waived to adult court;

- Courts, prosecutors and juvenile system personnel must take seriously brain studies and development issues when determining whether to waive a juvenile. They should not waive juveniles without extensive examination of whether the juvenile is capable and whether they are amenable to rehabilitation and they should not waive cases except in very rare and specific circumstances; and,

- If legislatures create punitive delinquency laws, courts still have powers through case law to establish set guidelines in determining who should not be waived:

    - First offenders;
    - Nonviolent offenders, such as drug users and offenders;
    - Juveniles who never had rehabilitative options in the past;
    - Juveniles who demonstrate incompetency via psychological tests and medical studies; and,
    - Juveniles who demonstrate potential for rehabilitation.[47]

Prosecutorial discretion greatly differs from judicial discretion in that few states take measures to guide or limit a prosecutor's decision on whether to transfer a juvenile.[48] The Crime Commission distributed and analyzed a brief informal survey in an effort to gauge the opinions of prosecutors regarding the functionality of the current system. Nearly all of the prosecutors opted against allowing judges the sole ability to determine whether a juvenile should be transferred, stating that the present system works well by keeping the judiciary and executive branch powers separated appropriately. Others argued that the judge is not in the best position to determine the strength of the evidence or the severity of the case, as they are not provided enough information. Some prosecutors believe that the transfer and certification procedures in place now allow the decision on the treatment of juveniles charged with violent crimes to be a law enforcement and community safety decision determined by an elected official. Additionally, prosecutors stated that giving JDR judges unfettered discretion with regard to serious charges such as those currently amenable to prosecutorial transfers would lead to sharply inconsistent handling of similar cases from courtroom to courtroom. Overall, the consensus with prosecutors tended to be that the current system is working well and there are enough

safeguards in place to ensure that only the appropriate juveniles are being transferred.

Finally, there has also been much discussion on how practitioners view the law in juvenile transfer cases. Juvenile maturity, competence, judgment, and perception as compared to the adult population must all be considered.[49] Recent research on adolescent brain development needs to be brought to transfer hearings, in addition to a competency review and the main focus should be placed on a juvenile's amenability to treatment and whether it is more probable than not that the juvenile is unfit for rehabilitation.[50] In some localities, judges must consider the accessibility of certain facilities in their decision to waive a juvenile to adult court.[51] A study of national juvenile transfer trends shows that an estimated 200,000 juveniles a year are prosecuted as adults and most youth are prosecuted in adult court for non-violent offenses.[52]

Crime Commission staff also reviewed a risk assessment tool that may be useful in determining the appropriate action for individual juveniles who may be subject to transfer. The Department of Juvenile Justice implemented the use of a risk assessment tool to assist in determining a juvenile's likelihood of recidivism known as the Youth Assessment and Screening Instrument (YASI).[53] It proved to be more advanced than previous assessment instruments in that it assesses the risk, needs and protective factors and helps develop case plans for youth. The YASI includes a brief "pre-screening" version that arrives at an overall risk level, as well as separate risk scores for legal history and social history (e.g., family, school and other adjustment domains). The pre-screen generates a risk score on a four-point scale from "No Risk" through "High Risk." The full YASI instrument examines and generates risk and protective scores for each of 10 domains, as well as overall risk classifications. These domains are legal history, family, school, community and peers, alcohol and drugs, mental health, aggression, (pro- and anti-social) attitudes, (social and cognitive) skills, employment, and free time. Once the YASI has been completed and the data entered into the computer software, the YASI generates several useful products. First, a complete risk and protective factor profile can be displayed in a graphic format, called "The Wheel." It includes ratings of both static (historic and unchangeable), dynamic (changeable) risks and protective factors in each of the 10 domains. Static variables (typically delinquent history) are necessary and efficient predictors of recidivism. Dynamic variables are predictors of recidivism that point to youth characteristics and behavior patterns that can and need to change in order to reduce future problems. The YASI generates a six level risk classification from "Low" through "Very High." The final product is a case (supervision) plan that builds on those areas identified by the YASI and allows the probation officer to prioritize areas to be addressed, establish short- and long-term goals, and specific interventions (with persons responsible and target dates) for those areas.[54]

Adolescent Brain Development

Medical research has recently focused attention on the transfer and certification of juveniles to the adult system. In most aspects, society recognizes the restrictions that need to be placed on adolescents, such as ineligibility to vote, consume alcohol and tobacco, and enter into marriage or form legal contracts. However, when the prospect of a juvenile committing a heinous crime emerges, society tends to treat them as a fully capable adult, despite them being a legal minor. Research shows that adolescent brains are constantly changing, with some adolescents not reaching full development until they have reached their mid-twenties.[55] Jay Giedd, a researcher at the National Institute of Mental Health, explained that during adolescence the "part of the brain that is helping organization, planning and strategizing is not done being built yet…It's sort of unfair to expect [adolescents] to have adult levels of organizational skills or

decision making before their brain is finished being built."[56]

Vincent Culotta, Ph.D., ABN, gave a presentation on adolescent brain development at the June 25, 2009, Crime Commission meeting. He briefed members on this issue, as well as brain maturation and criminal culpability. He also presented recent findings that address neurodevelopmental maturation and how it underlies and drives behavior and cognition. He noted that the prefrontal cortex, or the executive control, is the seat of reasoning and the last region of the brain to reach structural maturity. Juveniles' biological maturation of the brain is what controls their moral reasoning, judgment, impulse control, planning, character, and behavior.

Dr. Culotta noted that there are a number of early risk factors in brain development. A lack of early mother-infant interaction can be detrimental to the development of the orbitofrontal cortex during the first few months of life. In addition to that, stressful early life experiences may permanently damage the orbitofrontal cortex, predisposing the individual to later life neurobehavioral deficits. Severe, early stress induced by deprivation and abuse may also induce changes in the developing brain.[57] Research shows that volitional control over one's actions is not innate; it emerges gradually through development. The capacity for volitional behavior depends on the functional integrity of the frontal lobes. In addition, the capacity for volitional control over one's actions is important, perhaps the central ingredient of social maturity.[58] Neurodevelopemental immaturity is what mitigates criminal culpability.

A Harvard study examined at teenagers, aged 11 to 17, whose brains were scanned while they were asked to identify emotions on pictures of people's faces. It was found that the teens often misread facial expressions, observing sadness, anger, and confusion instead of fear. This study revealed that adolescents tend to be more reactionary and less reasoning, with a different perception of situations than adults.[59]

In Virginia, the transfer of a juvenile to circuit court cannot occur if a juvenile has been found incompetent; however, trial competency may be unrelated to the degree of culpability or amenability to change. The social, emotional, cognitive, and biological development of an adolescent brain could be taken into consideration when deciding whether a juvenile is competent and should be tried as an adult. Adolescence is a time of great transition when change can be dramatic and rapid, which may not always be uniform. Developmental influences are often missed or not considered, despite the magnitude of impact they may have on an adolescent brain.

Another factor that must be considered when taking into account juvenile delinquent behavior is the correlation between socioeconomic upbringing and brain development. Factors such as poverty, childhood abuse and neglect, social and emotional dysfunction, alcohol and drug abuse and crime can greatly stunt an adolescent's brain maturation, thus causing them to be more susceptible to making poor choices.[60] Discoveries have been made regarding adolescent brain development that support the idea that juveniles could be more apt to change if given the chance and the opportunity of rehabilitation. It has been mentioned that, unlike their adult counterparts, perhaps juveniles should not be held as blameworthy for their actions as they do not necessarily understand the ramifications of what they are doing. Juvenile practitioners must keep in mind that there is a reason we refer to individuals under the age of 18 as "minors."

The Transfer Process

Overview of Juvenile Transfer and Certification

There are a number of methods found across the country that can be used to transfer a juvenile to circuit court: prosecutorial discretion, statutory exclusion, reverse waiver, "once an adult/always an adult policy," and blended sentencing. Prosecutorial discretion is when a prosecutor, rather than a judge, decides whether to file charges in juvenile or criminal court. There is no hearing to determine which forum is appropriate, and usually no specific standards for deciding between them. There are 17 states that utilize prosecutorial discretion.[61] Statutory exclusion allows criminal courts exclusive original jurisdiction over certain classes of cases involving juveniles. If a youth is charged with a crime excluded from juvenile court jurisdiction, the case must originate in criminal court. There are 30 states that utilize statutory exclusion.[62] Virginia does not have statutory exclusion as all juvenile cases originate in the juvenile court; however, some cases are automatically transferred to circuit court. Reverse waivers allow juveniles whose cases are in criminal court to petition to have them transferred back to juvenile court. Twenty-six states allow for reverse waiver.[63]

"Once an adult/always an adult" laws require that juveniles who have previously been treated as adults be criminally prosecuted for all subsequent offenses in circuit court, regardless of their nature. Thirty-four states utilize the "once an adult/always an adult" provision.[64] However, it is important to note that 22 states, including Virginia, utilize this provision only if the juvenile was transferred and previously convicted.[65]

There are two types of blended sentencing, juvenile and criminal. Juvenile blended sentencing provides juvenile courts the authority to impose adult criminal sanctions on certain juvenile offenders; however, the criminal sentence is typically suspended. There are 15 states that use juvenile blended sentencing.[66] Criminal blended sentencing allows criminal courts to impose juvenile dispositions. There are 16 states that use criminal blended sentencing.[67] The practice of blended sentencing, adult sentencing and optional juvenile dispositions has the potential to be beneficial in that it can satisfy all stakeholders, is politically attractive in the community, provides return to the juvenile court when appropriate, and utilizes youthful offender services. It also returns decision-making to youth professionals including juvenile judges, juvenile social workers, lawyers trained in juvenile law, as well as juvenile therapists, educators, and counselors.[68]

Twenty-three states require no minimum age for juvenile transfer.[69] Kansas and Vermont both have a minimum age of 10. Colorado, Missouri, and Montana have their minimum age set at 12. Six states require a juvenile to be at least 13 years of age: Illinois, Mississippi, New Hampshire, New York, North Carolina, and Wyoming. Sixteen states have a required age of 14.[70] New Mexico is the only state to have a minimum age requirement of 15.

Overview of Virginia Juvenile Justice System and Transfer Laws

The DJJ annually publishes a Data Resource Guide which includes a variety of information on juveniles and explains how Virginia's juvenile legal system works.[71] The juvenile justice process begins in Virginia when a juvenile commits an offense, and there is either an arrest, or the offense is reported to a local CSU by a parent, agency, or the police. If the juvenile comes into contact with the police, the officer can decide to arrest the juvenile, release the juvenile back into the care of a parent or guardian, which usually ends the process, or release the juvenile, but still file a complaint to a CSU. If a complaint of criminal activity is made by a parent, another citizen, an agency, or by a police officer, the

juvenile proceeds to intake where an intake officer at the local CSU will then make a decision as to what action needs to be taken. The complaint may be dismissed with no action taken, there may be informal action taken, which may include counseling or outreach, or a formal petition may be filed.

A petition is the equivalent, for juveniles, of a criminal warrant for adults. After a petition is filed the CSU must then decide whether to release the juvenile to his parents or guardians, or if they pose a risk to themselves or others, the juvenile may be detained. If the juvenile is detained, a detention hearing must be held within 72 hours to examine the charges and determine whether the child should remain in detention. For a felony charge, if the prosecutor has indicated a desire to have the case transferred, there will be a preliminary hearing in JDR court that will determine if there is probable cause. The issue of transfer will then be addressed and the case may be certified to circuit court where a juvenile could face an adult sentence.

If the case remains in JDR court, (i.e. is not transferred), then there will be an adjudicatory hearing to determine innocence or guilt. If found "not guilty," then the case is dismissed; if the juvenile is adjudicated delinquent then a dispositional hearing is held. At the dispositional hearing a social history may be reviewed to help determine the appropriate sanctions. Sanctions may include fines, restitution, probation, or commitment to the DJJ. If the case is certified to circuit court, in the event the juvenile is found guilty, he may face an adult sentence.[72]

Currently, Va. Code § 16.1-269.1, which contains three subsections, A, B, and C, allows a juvenile to be transferred to circuit court in three different ways. A juvenile may be transferred under subsection A, which allows for judicial review for any crime that would be punishable as a felony if committed by an adult. Under subsection A, a judge considers many factors including the age of the offender, the seriousness of the offense, whether the juvenile would be amenable to treatment, the availability of services and dispositional alternatives, previous criminal record, previous legal custody, mental health and maturity, school record, as well as emotional and physical maturity. Subsection B requires automatic transfer of a juvenile if they are charged with murder or aggravated malicious wounding. Subsection C allows prosecutorial discretion as to whether the juvenile will be tried as an adult for the following twelve crimes: murder, felonious injury by mob, abduction, malicious wounding, malicious wounding of a law- enforcement officer, felonious poisoning, adulteration of products, robbery, carjacking, rape, forcible sodomy, or object sexual penetration.

Virginia law allows for a juvenile to be transferred to circuit court if the following conditions are met:

- The juvenile is 14 years of age or older;
- Notice has been given to parent or legal guardian;
- There is probable cause that the juvenile has committed a crime that would be considered a felony if committed by an adult;
- The juvenile is competent to stand trial; and,
- The court does not consider the juvenile a proper person to remain in the juvenile court system.[73]

Bill Referrals

Two bills were sent to the Crime Commission for study during the 2010 General Assembly Session: SB 205 and SB 389. Senate Bill 205, introduced by Senator John Edwards, would allow the juvenile or the Commonwealth's

Attorney to request an appeal from a discretionary certification under subsection C. If the appeal were successful, there would be a reverse waiver, and the circuit court would transfer the case back to the juvenile court for trial.[74] Currently, Va. Code § 16.1-269.6 allows for appeals of transfer decisions from juvenile court to circuit court only for subsection A transfers.[75] The request must be made within 45 days of "receipt of the case from juvenile court." The factors for the court to consider are those enumerated in subdivision A(4) of Va. Code § 16.1-269.1, including "whether remanding jurisdiction would not depreciate the seriousness of the offense." Under SB 205, the circuit court would consider the same factors, those provided in subdivision A(4) of Va. Code § 16.1-269.6, as well as any other factors necessary for a determination of whether or not the juvenile should remain within the jurisdiction of the circuit court. The burden of proof under SB 205 would be with the moving party, presumably the juvenile, using a preponderance of the evidence standard. If the juvenile succeeded in his appeal, he would retain his juvenile status, even if he were later adjudicated delinquent by the juvenile court.

Senate Bill 389, introduced by Senator Ryan McDougle, sought to add new offenses to subsection B, which includes crimes that result in automatic transfer, and to subsection C, which includes crimes that will be transferred if the prosecutor so desires, without any opportunity for judicial oversight or the ability of the juvenile to appeal the prosecutor's decision. The proposed new offenses to be added to subsection B were any acts "of violence as defined in § 19.2-297.1 if the juvenile has been previously adjudicated delinquent for an offense defined as act of violence in § 19.2-297.1." The proposed new offenses to be added to subsection C were gang participation in violation of Va. Code § 18.2-48, and felony drug distribution offenses, if the juvenile had previously been adjudicated delinquent of such a drug distribution offense in the past. In an effort to determine the additional number of juveniles that might be affected by adding these new crimes to subsections B and C, staff reviewed available data from the past few years. It was found that there was an average of 168 juvenile intakes each year from Fiscal Year (FY) 2007 to 2009 that resulted in a charge of a second or subsequent act of violence under Va. Code § 19.2-297.1.[76] (Under the bill, these charges would be automatically transferred, after a finding of probable cause). According to DJJ, there was an average of 199 juvenile intakes each year from FY07 to FY09 that resulted in a charge of gang participation in violation of Va. Code § 18.2-48.[77] It was also determined by DJJ that there was an average of 43 juvenile intakes each year from FY07 to FY09 that resulted in a charge of a second or subsequent offense of felony drug distribution.[78]

Juvenile Transfer Data

Juvenile Transfer and Certification Data Limitations

The issue of data collection is critical to understanding the effectiveness of transfer laws. Unfortunately, information regarding the effectiveness and impact of the nation's transfer laws is lacking, even though policymakers and the public rely on such information to show whether transfer laws are effective. Most states, including Virginia, have large gaps in available data regarding juvenile transfers. This study was extended an additional year in 2009 in an effort to gather data regarding the number of juveniles who are transferred under Virginia's transfer statute by subsections A, B, and C. One of the data limitations encountered included trying to collect data from four different agencies: DJJ, the Supreme Court of Virginia, the Virginia Criminal Sentencing Commission (VCSC), and the Department of Corrections (DOC). During the course of the study, the VCSC determined that they were not receiving all of the sentencing guideline reports for juveniles transferred to circuit court, which is required by statute.[79] The

VCSC had to supplement their data with figures from DOC, the Supreme Court of Virginia, pre-sentence investigation reports, and local and regional jails.

Other limitations included having an unknown number of juveniles considered for transfer and an unknown number of juveniles convicted in circuit court broken down by Virginia's transfer statute subsections. Another issue is that other agencies do not have access to all juvenile data and are therefore limited in the information and data they can provide. Additionally, some of Virginia's largest localities are not included in the dataset provided by the Virginia Supreme Court.[80] Some of this data had to be collected by making individual data requests to those localities. These limitations set the parameters in which findings could be interpreted.

Virginia Juvenile Transfer Data

Transfer reports are completed by local CSU's and may include information such as the juvenile's school and mental health records and prior adjudications and proceedings. Prior to the transfer law change in 1996, transfer reports were required in <u>every</u> instance where a request for transfer was made. After the transfer statute was amended in 1996, the requirement for transfer reports was limited to only those transferred under Va. Code § 16.1-269.1 subsection A. Currently, all requests for transfer under subsections B and C are done without a written transfer report.

Since the transfer changes to the Va. Code in 1996, the number of transfer reports has declined from 1,168 in FY96 [81] to 155 in FY10.[82] After a significant decrease in the number of transfer reports from FY96 to FY97, the difference in the number of reports completed each year has not fluctuated greatly and tends to decrease each year.[83] The steady decline in transfer reports should not be seen as proof that prosecutors are making fewer requests for transfer because currently when they request a transfer, a report is no longer required. There are other possible explanations as to why the number of transfer reports has declined in Virginia; such as the decline in the juvenile population, as well as a decline in the number of juvenile arrests, intakes and offenses.

Much like the number of transfer reports, the number of intake complaints has been slowly decreasing over the years, as illustrated in Figure 1 below:

Figure 1: Juvenile Intake Complaints by Offense Severity, FY07-10

Intake Complaints	**FY07**	**FY08**	**FY09**	**FY10**
Felony	20,466	18,626	17,884	14,866
Class 1 Misdemeanor	39,035	38,065	37,604	33,417
Class 2-4 Misdemeanor	6,525	6,662	6,372	5,597
CHINS/CHINSup	13,138	12,403	12,264	10,744
Technical Violations	10,451	9,838	9,576	8,527
Traffic	957	1,305	1,281	1,197
Other	1,466	1,354	1,166	1,249
Total Complaints	**92,038**	**88,253**	**86,147**	**75,597**

Source: Email from DJJ.
January 11, 2011.

A juvenile with one or more intake complaints will then result in an intake case. Again, there has been a slight decline in the number of intake cases throughout the past four years, as shown in Figure 2.

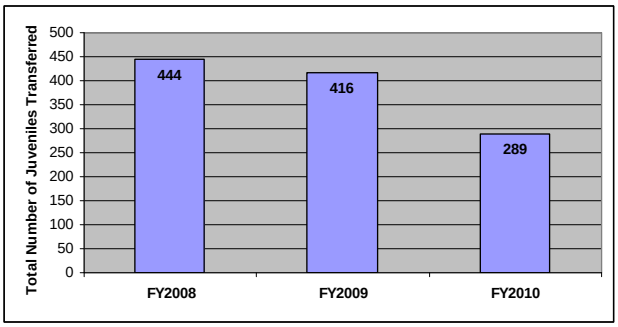
Figure 2: Juvenile Intake Cases by Offense Severity, FY07-10

Intake Cases	FY07	FY08	FY09	FY10
Felony	11,543	10,869	10,214	8,452
Class 1 Misdemeanor	26,489	26,253	26,666	23,988
Class 2-4 Misdemeanor	3,905	3,942	3,895	3,574
CHINS/CHINSup	11,280	10,444	10,437	9,295
Technical Violations	9,088	8,514	8,399	7,371
Traffic	494	800	760	723
Other	1,050	1,121	1,007	1,082
Total Cases	**63,849**	**61,943**	**61,378**	**54,485**

Source: Email from DJJ.
January 11, 2011.

Staff also requested data from the Supreme Court of Virginia regarding the total number of juveniles who were transferred in Virginia. Unfortunately, they were unable to classify the number of juveniles transferred by subsection; they were only able to do this in a proxy fashion as there is no way to determine transfers by subsections -- this data is not being collected by clerks. Figure 3 shows the total number of juveniles transferred from JDR court to circuit court from FY08 to FY10, including juveniles previously convicted in circuit court. The declining number of juveniles transferred correlates with the decline in the number of complaints and intake cases.

Figure 3: Total Number of Juveniles Transferred, FY08-FY10

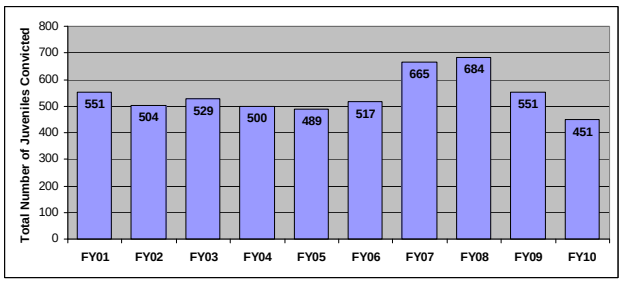


Source: Supreme Court of Virginia - Juvenile Case Management System.

Data was also obtained from the VCSC. After examining this data, it was discovered that the number of juveniles convicted in circuit court has also been on the decline over the past three fiscal years. The VCSC data includes offenders under the age of 18 at the time of the offense (or under the age of 18 for at least one offense in the case), juveniles who were transferred from JDR court, and juveniles automatically prosecuted in circuit court due to a prior conviction as an adult. The analysis focuses on the original felony conviction and excludes subsequent probation hearings for that offense and excludes offenders who were 21 years or older at the time of arrest or filing and therefore must be prosecuted in circuit court. It is important to note that the VCSC analysis is based on sentencing events, not individual juveniles.[84] The 2010 data uses the same methodology as previous studies; however, there are three differences: the DOC provided replacement data for FY01 to FY08, the DOC is not able to provide automated Pre/Post Sentence Investigation data for cases sentenced after October 2008, and jail data can include juveniles who are ultimately adjudicated in JDR court.

As seen in Figure 4, the total number of juveniles convicted in circuit court from FY01 to FY10 was 5,441, ranging from a high of 684 to a low of 451. It is important to note that the data provided by the VCSC includes juveniles previously tried and convicted as adults; thus, the conviction numbers are higher than the actual number of juveniles transferred each year.

Figure 4: Total Number of Juveniles Convicted in Circuit Court, FY01-10*



Source: Virginia Criminal Sentencing Commission.
**Data for 2010 is preliminary.*

These figures can also be broken down by age of juvenile at the time of the offense. The majority of juveniles transferred were 17 years old. Only a small fraction, about one sixth, of juveniles transferred were 15 years old or younger. Of the 5,441 juveniles convicted in circuit court:

- 209 were 14 years old;
- 731 were 15 years old;
- 1,435 were 16 years old; and,
- 3,066 were 17 years old.

As seen in Figure 5, juveniles were transferred for committing robbery more frequently than any other crime and more often than not, juveniles were transferred for more serious crimes.

Figure 5: Juveniles Convicted in Circuit Court by Type of Offense, FY01-FY10*

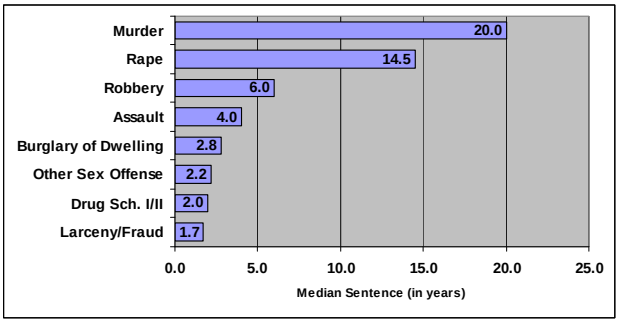
Offense	Number	Percent
Robbery	1,879	35%
Assault	826	15%
Larceny/Fraud	644	12%
Drug Schedule I/II	428	8%
Murder/Manslaughter	337	6%
Burglary Dwelling	319	6%
Rape/For. Sodomy/Obj. Pen.	295	5%
Miscellaneous/Other	151	3%
Other Sex Offense	146	3%
Burglary Other	135	2%
Weapon	123	2%
Kidnapping	65	1%
Drug Other	53	1%
Traffic	40	1%
Total Juveniles	**5,441**	**100%**

Source: Virginia Criminal Sentencing Commission.
** Data for FY2010 is preliminary.*

According to the VCSC, the majority of juveniles who receive adult sentences end up serving their time in prison. Overall, 46% of juveniles convicted in circuit court serve their sentence in prison while 26% are subject to adult jail or probation. Roughly 11% of juveniles received a DJJ determinate sentence, meaning the court specified a length of commitment, while 7% of juveniles received a DJJ indeterminate disposition. Only 7% of juveniles were subject to DJJ probation and the remaining 3% received a blended DOC/DJJ sentence.

Below is the median prison sentence, in years, for a juvenile convicted in circuit court. The most serious offenses, such as murder and rape, are clearly generating the more lengthy prison sentences for juveniles of up to 20 years. On the other hand, the more minor convictions such as larceny, drug offenses, sex offenses, burglary, and assault typically carry a median prison sentence of less than five years.

Figure 6: Median Prison Sentence (In Years) for Juveniles Convicted in Circuit Court, FY01-FY10*



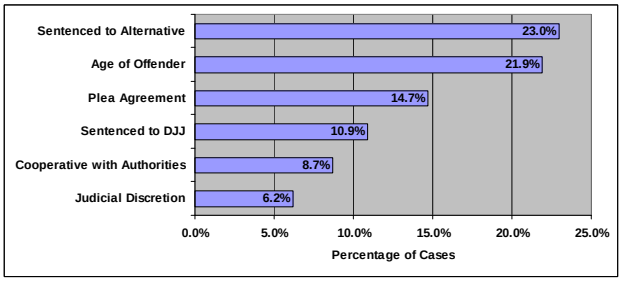
Source: Virginia Criminal Sentencing Commission.
** Data for FY2010 is preliminary.*

The overall compliance rate summarizes the extent to which Virginia's judges concur with recommendations provided by the sentencing guidelines, both in type of disposition and in length of incarceration.[85] In FY10, of the 243,066 adult guideline cases, there was an 80% compliance rate.[86] There was only a 56% compliance rate for the 3,310 juvenile offenders

convicted in circuit court in the same year.[87] The rate at which judges sentence offenders to sanctions more severe than the sentencing guidelines' recommendation is known as the aggravation rate.[88] The aggravation rate for FY10 was 10% for adult offenders and 13% for juvenile offenders.[89] The mitigation rate, or the rate at which judges sentence offenders to sanctions considered less severe than the guidelines recommendation, was 10% for adult offenders and 31% for juvenile offenders.[90]

Judges can cite multiple reasons for departing from the guidelines. The most frequently cited reasons, shown below in Figure 7, for sentencing guidelines mitigations for juveniles convicted in circuit court include:

Figure 7: Reasons for Sentencing Guidelines Mitigation, FY01-FY10*



Source: Virginia Criminal Sentencing Commission.
** Data for FY2010 is preliminary.*

Finally, disproportionate minority contact (DMC) is another issue that appears to be impacting Virginia. This exists when the racial or ethnic proportion of youth who have contact with the juvenile justice system exceeds their proportions in the general population.[91] States are required to ensure equal and fair treatment for juveniles in the juvenile system regardless of their race or ethnicity; however, it was noted that African American youth comprise 30% of those arrested nationally while only representing 17% of the overall youth population.[92] According to the 2007 Virginia Census, 23.2% of 10-17 year olds were African American. In 2008, that same group of youth represented:

- 45% of youth at intake;
- 55% of youth at detention; and,
- 66% of youth at commitment.[93]

Conclusion

As a result of numerous meetings with juvenile justice professionals and a thorough review of the literature and statewide data, staff identified the following policy options for Crime Commission members to consider:

- Endorse or reject the proposed language in SB 205, which seeks to add a reverse waiver possibility for subsection C transfers;
- Endorse or reject the proposed language in SB 389, which seeks to add crimes eligible for transfer under subsections B and C;
- Endorse or reject allowing a judge the ability to give a juvenile a "delinquent" finding in circuit court;
- Create standard criteria for assessing whether transfer is appropriate, such as the YASI tool;
- Improve data collection by requiring transfer reports for transfers under all subsections, and allowing the VCSC access to the JDR court case database maintained by the Virginia. Supreme Court; and,
- Provide prosecutors with additional background information on juveniles who are eligible for transfer.

At the December 8, 2010, meeting, Crime Commission members endorsed adding offenses for which a juvenile is subject to transfer and certification as an adult. Senator Ryan McDougle

introduced Senate Bill 914 during the 2011 General Assembly Session. This bill was left in the Senate Courts of Justice Committee.[94] Additionally, Crime Commission members endorsed allowing a circuit court judge the ability to give a juvenile, after a transfer of the case to circuit court and a finding of guilt, a "delinquent" finding, after a supervised probation period was successfully completed. This would allow the juvenile to avoid having an adult criminal record. Senator Janet Howell introduced Senate Bill 948 during the 2011 General Assembly Session.[95] This bill was left in the House Courts of Justice Committee.

[1] H.J.R. 136 Gen. Assem., Reg. Sess. (2008).
[2] H.J.R. 113, Gen. Assem., Reg. Sess. (2006).
[3] S.B. 205 Gen. Assem., Reg. Sess. (2010).
[4] S.B. 389 Gen. Assem., Reg. Sess. (2010).
[5] REPORT OF THE VIRGINIA COMMISSION ON YOUTH ON THE STUDY OF SERIOUS JUVENILE OFFENDERS, Virginia Commission on Youth, H.D. 81 (1994).
[6] S.B. 520 Gen. Assem., Reg. Sess. (1994).
[7] H.B. 1243 Gen. Assem., Reg. Sess. (1994).
[8] Technically, juveniles are not convicted of crimes, unless they have been transferred. The correct terminology is they have been adjudicated delinquent of a misdemeanor, or adjudicated delinquent of an offense that would be a felony if committed by an adult. However, even many attorneys shorten these lengthy phrases to "convicted of a Class 1 misdemeanor" or "convicted of a felony."
[9] 1994 Va. Acts chs. 859 and 949.
[10] 1996 Va. Acts chs. 755 and 914.

[11] National Center for Health Statistics (2004). *Bridged-race intercensal estimates of the July 1, 1990-July 1, 1999 United States resident population by county, single-year of age, sex, race, and Hispanic origin*. [Released 7/26/2004; Retrieved 9/15/2004]. Prepared by the U.S. Census Bureau with support from the National Cancer Institute. Available at: http://www.cdc.gov/nchs/nvss/bridged_race.htm, and; National Center for Health Statistics (2009). *Estimates of the July 1, 2000-July 1, 2008, United States resident population from the Vintage 2008 postcensal series by year, county, age, sex, race, and Hispanic origin*. [Released 9/2/2009; Retrieved 9/3/2009]. Prepared under a collaborative arrangement with the U.S. Census Bureau, *available at*: http://www.cdc.gov/nchs/nvss/bridged_race.htm.

[12] *OJJDP Statistical Briefing Book*. Online. *Available at:* http://ojjdp.ncjrs.gov/ojstatbb/crime/qa05103.asp?qaDate=2007. Released on October 24, 2008.
[13] *Available at:* http://www2.fbi.gov/ucr/cius2009/arrests/index.html.
[14] Sickmund M. *Juveniles in court*. Juvenile offenders and victims bulletin: national report series. Washington, DC: Office of Juvenile Justice and Delinquency Prevention; June 2003; *and,* Griffin P. Trying and sentencing juveniles as adults: an analysis of state transfer and blended sentencing laws. Pittsburgh, PA: National Center for Juvenile Justice; 2003; *and,* Bishop D, Frazier C. Consequences of waiver. In: Fagan J, Zimring FE, eds. The changing borders of juvenile justice: transfer of adolescents to the criminal court. Chicago, IL: University of Chicago Press; 2000:227–76; *and,* Zimring FE. American youth violence. New York, NY: Oxford University Press; 1998; *and,* Redding RE, Howell JC. Blended sentencing in American juvenile courts. In: Fagan J, Zimring FE, eds. The changing borders of juvenile justice: transfer of adolescents to the criminal court. Chicago, IL: University of Chicago Press; 2000:145–180.
[15] *Effects on Violence of Laws and Policies Facilitating the Transfer of Youth from the Juvenile to the Adult Justice System*. CDC. Morbidity and Mortality Weekly Report. November 30, 2007. Vol. 56. No. RR-9.
[16] Singer SI. Recriminalizing delinquency: violent juvenile crime and juvenile justice reform. Cambridge, England: Cambridge University Press; 1996; *and,* Barnoski, *supra* note 15; *and,* Jensen EL, Metsger LK. A test of the deterrent effect of legislative waiver on violent juvenile crime. Crime Delinq 1994;40:96–104.
[17] Patrick Hoover, Esq., from the National Conference on Juvenile Justice, March 11-14, 2009, citing from *Effects on Violence of Laws and Policy Facilitating the Transfer of Juveniles from the Juvenile Justice System to the Adult Justice System, was published in the* AMERICAN JOURNAL OF PREVENTIVE MEDICINE, April 2007.
[18] Id.
[19] Id.
[20] Id., citing from "*Effects on Violence of Laws and Policies Facilitating the Transfer of Juveniles from the*

Juvenile Justice System to the Adult Justice System: A Systemic Review," Volume 32, Issue 4, Supplement, p. 7-28, (April 2007).

[21] Id., citing from *Juvenile Transfer Laws: An Effective Deterrent to Delinquency?* OJJDP Juvenile Justice Bulletin, August (2008).

[22] Id.

[23] Deitch, Michele, et.al. (2009). *From Time Out to Hard Time: Young Children in the Adult Criminal Justice System*, Austin, TX: The University of Texas at Austin, LBJ School of Public Affairs.

[24] Id.

[25] Id.

[26] Barnoski R. Changes in Washington State's jurisdiction of juvenile offenders: Examining the impact. Olympia, WA: Washington State Institute for Public Policy (2003);Myers DL, Excluding violent youths from juvenile court: The effectiveness of legislative waiver. New York, NY: LFB Scholarly (2001); Podkopacz M.R. The juvenile court's final decision: An empirical examination of transferring juveniles to adult court (1996); Lanza-Kaduce L., Frazier C.E., Lane J., Bishop D.M. Juvenile transfer to criminal court study: Final report. Tallahassee, FL: Florida Department of Juvenile Justice (2002); Winner L, Lanza-Kaduce L, Bishop DM, Frazier CE. The transfer of juveniles to criminal court: Reexamining recidivism of the long term. Crime Delinq 43:548–63 (1997); Fagan J. The comparative impacts of juvenile and criminal court sanctions on adolescent felony offenders. Law Policy 18:77–119 (1996).

[27] Barnoski, *supra* note 26.

[28] Winner, *supra* note 26.

[29] Barnoski, *supra* note 26.

[30] Myers, Lanza-Kaduce, and Fagan, *supra* note 26.

[31] Barnoski, *supra* note 26.

[32] Id. *Effects on Violence of Laws and Policies Facilitating the Transfer of Youth from the Juvenile to the Adult Justice System*. CDC. Morbidity and Mortality Weekly Report. November 30, 2007. Vol. 56. No. RR-9.

[33] Id.

[34] Campaign for Youth Justice (November 2007). *Jailing Juveniles: The Dangers of Incarcerating Youth in Adult Jails in America*, pg.46, *available at:* http://www.campaign4youthjustice.org/Downloads/NationalReportsArticles/CFYJ-Jailing_Juveniles_Report_2007-11-15.pdf.

[35] Id.

[36] Id.

[37] Id.

[38] Id.

[39] Id., citing from OJJDP, April 2000*, Effective Intervention for Serious Juvenile Offenders Treatment Types in Order of Effectiveness.*

[40] Id.

[41] Benjamin Adams and Sean Addie, OJJDP Fact Sheet: Delinquency Cases Waived to Criminal Court, 1985-2005, U.S. DOJ, OJJDP, March 2009.

[42] Id.

[43] Id.

[44] *Different from Adults: An Updated Analysis of Juvenile Transfer and Blended Sentencing Laws, With Recommendations for Reform*, Models for Change, NCJJ, November 2008.

[45] Id.

[46] Id., citing from NCJFCJ DELINQUENCY GUIDELINES*,* Chapter 5*, Motions to Waive Jurisdiction and Transfer to Criminal Court,* p. 102.

[47] Id. This particular suggestion would not be applicable to Virginia, where the legislature can mandate certain juveniles be transferred, with no discretion or review by judges.

[48] Id. *Supra* 43.

[49] Id., citing from In Re Trader, 315 A.2d 528 (Md. App. 1974).

[50] Id.

[51] Id., citing from OJJDP Child Delinquency Bulletin, May 2003.

[52] Campaign for Youth Justice (March 2007). *The Consequences Aren't Minor: The Impact of Trying Youth as Adults and Strategies for Reform*, pg. 4 *available at* http://www.campaign4youthjustice.org/Downloads/NEWS/National_Report_consequences.pdf, citing Woolard, J. (2005). Juveniles within adult correctional settings: legal pathways and developmental considerations. *International Journal of Forensic Mental Health*, 4(1), 18; Coalition for Juvenile Justice. (2005). *Childhood on trial: The failure of trying and sentencing youth in adult criminal court*. Washington, D.C.. Campaign for Youth Justice (March 2007). *The Consequences Aren't Minor: The Impact of Trying Youth as Adults and Strategies for Reform*, pg. 6 *available at* http://www.campaign4youthjustice.org/Downloads/NEWS/National_Report_consequences.pdf.

[53] *Available at* http://www.djj.state.va.us/Initiatives/YASI.aspx.

[54] Id.

[55] Adam Ortiz, ABA Juvenile Justice Center, Cruel and Unusual Punishment: The Juvenile Death Penalty

Adolescence, Brain Development and Legal Culpability, *available at* http://www.abanet.org/crimjust/juvjus/Adolescence.pdf.

[56] Id.

[57] William Killgore & Deborah Yurgelun-Todd, *Unconscious processing of facial affect in children and adolescents*, Social Neuroscience, 2 (1), 28 (2007).

[58] Goldbery, Elkhonon. The Executive Brain: Frontal Lobes and the Civilized Mind. 2001.

[59] *Available at* http://www.pbs.org/wgbh/pages/frontline/shows/teenbrain/interviews/todd.html.

[60] Id.

[61] ARIZ. REV. STAT. ANN. § 13-501 (2009); ARK. CODE ANN. § 9-27-318 (West 2009); CAL. WELF. & INST. CODE § 707 (West 2009); COLO. REV. STAT. ANN. § 19-2-517, § 19-2-518 (West 2009); FLA. STAT. ANN. § 985.557 (West 2009); GA. CODE ANN. § 15-11-28 (West 2009); La. Child. Code Ann. Art. 305 (2009); MASS. GEN. LAWS ANN. Ch. 119, § 54 (2009); MICH. COMP. LAWS ANN. § 712A.2d (West 2009); MINN. STAT. ANN. § 260B.141 (West 2009); MONT. CODE ANN. § 41-5-206 (West 2008); NEB. REV. STAT. § 43-276 (2008); N.H. REV. STAT. ANN. § 169-B:25 (West 2009); OKLA. STAT. ANN. tit. 10 §§ 7306-2.1 to 7306-2.12 (West 2009); VT. STAT. ANN. tit. 33 § 5203 (2009); VA. CODE ANN. § 16.1-269.1 (West 2009); WYO. STAT. ANN. § 14-6-203 (2009). Information gathered June 2009.

[62] ALA. CODE § 12-15-204 (West 2009); ALASKA STAT. § 47.12.030 (2009); ARIZ. REV. STAT. ANN. § 13-501 (2009); CAL. WELF. & INST. CODE § 602 (West 2009); DEL. CODE ANN. tit. 11 § 1447A (2009); FLA. STAT. ANN. § 985.557 (West 2009); GA. CODE ANN. § 15-11-28 (West 2009); IDAHO CODE ANN. § 20-509 (2009); 705 ILL. COMP. STAT. ANN. 405/5-130 (West 2009); IND. CODE ANN. § 31-30-1-4 (West 2009); IOWA CODE ANN. § 232.8 (West 2009); LA. CHILD. CODE ANN. ART. 305 (2009); MD. CODE ANN., CTS. & JUD. PROC. § 3-8A-03 (West 2009); MASS. GEN. LAWS ANN. Ch. 119, § 74 (2009); MINN. STAT. ANN. § 260B.007 (West 2009); MISS. CODE ANN. § 43-21-151 (West 2009); MONT. CODE ANN. § 41-5-206 (West 2008); NEV. REV. STAT. ANN. § 62B.330 (West 2009); N.M. STAT. ANN. § 32A-2-6 (West 2009); N.Y. CRIM. PROC. LAW § 180.75 (McKinney 2009); OKLA. STAT. ANN. TIT. 10 § 7306-2.5 (West 2009); OR. REV. STAT. ANN. 10 § 137.707 (West 2009); 42 PA. CONS. STAT. ANN. § 6355 (West 2009); S.C. CODE ANN. § 63-19-20 (2008); S.D. CODIFIED LAWS § 26-11-3.1 (2009); TEX. FAM. CODE ANN. § 51.03 (Vernon 2009); UTAH CODE ANN. § 78A-6-701 (West 2008); VT. STAT. ANN. tit. 33 § 5204 (2009); WASH. REV. CODE ANN. § 13.04.030 (West 2009); WIS. STAT. ANN. § 938.183 (West 2009). Information gathered June 2009.

[63] ARIZ. REV. STAT. ANN. § 13-501 (2009); ARK. CODE ANN. § 9-27-318 (West 2009); CAL. WELF. & INST. CODE § 707.2 (West 2009); COLO. REV. STAT. ANN. § 19-2-517 (West 2009); CONN. GEN. STAT. ANN. § 46b-127 (West 2009); DEL. CODE ANN. tit. 10 § 1011 (2009); GA. CODE ANN. § 15-11-28 (West 2009); 705 ILL. COMP. STAT. ANN. 405/5-130 (West 2009); IOWA CODE ANN. § 232.8 (West 2009); KY. REV. STAT. ANN. § 640.010 (West 2009); MD. CODE ANN., CRIM. PROC. § 4-202 (West 2009); MISS. CODE ANN. § 43-21-159 (West 2009); MONT. CODE ANN. § 41-5-206 (West 2008); NEB. REV. STAT. § 43-1816 (2008); NEV. REV. STAT. ANN. § 62B.390 (West 2009); N.H. REV. STAT. ANN. § 169-B:25 (West 2009); N.Y. CRIM. PROC. LAW § 180.75 (McKinney 2009); OKLA. STAT. ANN. tit. 10 § 7306-2.6 (West 2009); OR. REV. STAT. ANN. 10 § 419C.361 (West 2009); 42 PA. CONS. STAT. ANN. § 6322 (West 2009); S.C. CODE ANN. § 63-19-20 (2008); S.D. CODIFIED LAWS § 26-11-3.1 (2009); VT. STAT. ANN. tit. 33 § 5281 (2009); VA. CODE ANN. § 16.1-269.6 (West 2009); WIS. STAT. ANN. § 970.032 (West 2009); WYO. STAT. ANN. § 14-6-237 (2009). Information gathered June 2009.

[64] ALA. CODE § 12-15-203 (West 2009); ARIZ. REV. STAT. ANN. § 13-501 (2009); CAL. WELF. & INST. CODE § 707.01 (West 2009); COLO. REV. STAT. ANN. § 19-2-517 (West 2009); DEL. CODE ANN. tit. 10 § 1011 (2009); FLA. STAT. ANN. § 985.556 (West 2009); HAW. REV. STAT. § 571-22 (2009); IDAHO CODE ANN. § 20-509 (2009); 705 ILL. COMP. STAT. ANN. 405/5-130 (West 2009); IND. CODE ANN. § 31-30-1-2 (West 2009); IOWA CODE ANN. § 232.45A (West 2009); KAN. STAT. ANN. § 38-2347 (2009); ME. REV. STAT. ANN. tit. 15, § 3101 (2009); MD. CODE ANN., CTS. & JUD. PROC. § 3-8A-03 (West 2009); MICH. COMP. LAWS ANN, § 712A.4 (West 2009); MINN. STAT. ANN. § 260B.007 (West 2009); MISS. CODE ANN. § 43-21-157 (West 2009); MO. ANN. STAT. § 211.071 (West 2009); NEV. REV. STAT. ANN. § 62B.330 (West 2009); N.H. REV. STAT. ANN. § 169-B:27 (West 2009); N.C. GEN. STAT. ANN. § 7B-1604 (West 2008); N.D. CENT. CODE § 27-20-34 (2009); OKLA. STAT. ANN. tit. 10 § 7306-4.3 (West 2009); OR. REV. STAT. ANN. 10 § 419C.364 (West 2009); 42 PA. CONS. STAT. ANN. § 6302 (West 2009); R.I. GEN. LAWS ANN. § 14-1-7.1 (West 2009); S.D. CODIFIED LAWS § 26-11-4 (2009); TENN. CODE ANN. § 37-1-134 (West 2009); TEX. FAM. CODE ANN. § 54.02 (Vernon 2009); UTAH CODE ANN.§ 78A-6-702 (West 2008); VA. CODE ANN. § 16.1-269.6 (West 2009); WASH. REV. CODE ANN. § 13.40.020 (West 2009);

WIS. STAT. ANN. § 938.183 (West 2009). Information gathered June 2009.

[65] Those 22 states include: ALA. CODE § 12-15-203 (West 2009); ARIZ. REV. STAT. ANN. § 13-501 (2009); COLO. REV. STAT. ANN. § 19-2-517 (West 2009); FLA. STAT. ANN. § 985.556 (West 2009); IDAHO CODE ANN. § 20-509 (2009); IOWA CODE ANN. § 232.45A (West 2009); KAN. STAT. ANN. § 38-2347 (2009); ME. REV. STAT. ANN. tit. 15, § 3101 (2009); MINN. STAT. ANN. § 260B.007 (West 2009); MISS. CODE ANN. § 43-21-157 (West 2009); MO. ANN. STAT. § 211.071 (West 2009); NEV. REV. STAT. ANN. § 62B.330 (West 2009); N.H. REV. STAT. ANN. § 169-B:27 (West 2009); OR. REV. STAT. ANN. 10 § 419C.364 (West 2009); 42 PA. CONS. STAT. ANN. § 6302 (West 2009); R.I. GEN. LAWS ANN. § 14-1-7.3 (West 2009); S.D. CODIFIED LAWS § 26-11-4 (2009); TENN. CODE ANN. § 37-1-134 (West 2009); TEX. FAM. CODE ANN. § 54.02 (Vernon 2009); UTAH CODE ANN.§ 78A-6-703 (West 2008); VA. CODE ANN. § 16.1-271 (West 2009); WASH. REV. CODE ANN. § 13.40.020 (West 2009). Information gathered June 2009.

[66] ALASKA STAT. § 47.12.065 (2009); ARK. CODE ANN. § 9-27-506 (West 2009); COLO. REV. STAT. ANN. § 19-2-517 (West 2009); CONN. GEN. STAT. ANN. § 46b-133c (West 2009); 705 ILL. COMP. STAT. ANN. 405/5-810 (West 2009); KAN. STAT. ANN. § 38-2347 (2009); MASS. GEN. LAWS ANN. Ch. 119, § 58 (2009); MICH. COMP. LAWS Ann, § 712A.18 (West 2009); MINN. STAT. ANN. § 260B.130 (West 2009); MONT. CODE ANN. § 41-5-1604 (West 2008); N.M. STAT. ANN. § 32A-2-20 (West 2009); R.I. GEN. LAWS ANN. § 14-1-7.3 (West 2009); TEX. FAM. CODE ANN. § 54.04 (Vernon 2009);VT. STAT. ANN. tit. 33 § 5284 (2009). Information gathered June 2009.

[67] ARK. CODE ANN. § 9-27-330 (West 2009); CAL. WELF. & INST. CODE § 707 (West 2009); COLO. REV. STAT. ANN. § 19-2-601 (West 2009); FLA. STAT. ANN. § 985.556 (West 2009); IDAHO CODE ANN. § 20-509 (2009); 705 ILL. COMP. STAT. ANN. 405/5-810 (West 2009); IOWA CODE ANN. § 232.45 (West 2009); KY. REV. STAT. ANN. § 640.030 (West 2009); MASS. GEN. LAWS ANN. Ch. 276A, § 2 (2009); MICH. COMP. LAWS ANN. § 712A.18 (West 2009); MO. ANN. STAT. § 211.073 (West 2009); NEB. REV. STAT. § 43-2204 (2008); N.M. STAT. ANN. § 32A-2-20 (West 2009); OKLA. STAT. ANN. tit. 10 § 7306-2.6 (West 2009); VA. CODE ANN. § 16.1-272 (West 2009); W. VA. CODE ANN. § 49-5-13b (West 2009). Information gathered June 2009.

[68] Patrick Hoover, Esq., from the National Conference on Juvenile Justice, March 11-14, 2009, citing *Effects on Violence of Laws and Policy Facilitating the Transfer of Juveniles from the Juvenile Justice System to the Adult Justice System,* AMERICAN JOURNAL OF PREVENTIVE MEDICINE, April 2007.

[69] ALASKA STAT. § 47.12.100 (2009); ARIZ. REV. STAT. ANN. § 13-501 (2009); DEL. CODE ANN. tit. 10 § 1010 (2009); D.C. Code § 16-2307 (2009); FLA. STAT. ANN. § 985.556 (West 2009); GA. CODE ANN. § 15-11-30.2 (West 2009); HAW. REV. STAT. § 571-22 (2009); IDAHO CODE ANN. § 20-508 (2009); IND. CODE ANN. § 31-30-3-1 (West 2009); ME. REV. STAT. ANN. tit. 15, § 3101 (2009); MD. CODE ANN., CTS. & JUD. PROC. § 3-8A-06 (West 2009); NEB. REV. STAT. § 43-276 (2008); NEV. REV. STAT. ANN. § 62B.390 (West 2009); OKLA. STAT. ANN. tit. 10 § 7306-4.3 (West 2009); OR. REV. STAT. ANN. 10 § 419C.349 (West 2009); 42 PA. CONS. STAT. ANN. § 6355 (West 2009); R.I. GEN. LAWS ANN. § 14-1-3 (West 2009); S.C. CODE ANN. § 63-19-1210 (2008); S.D. CODIFIED LAWS § 26-11-4 (2009); TENN. CODE ANN. § 37-1-134 (West 2009); WASH. REV. CODE ANN. § 13.40.110 (West 2009); W. VA. CODE ANN. § 49-5-10; WIS. STAT. ANN. § 938.18 (West 2009).

[70] ALA. CODE § 12-15-203 (West 2009); Ark. Code Ann. § 9-27-318 (West 2009); CAL. WELF. & INST. CODE § 707 (West 2009); CONN. GEN. STAT. ANN. § 46b-127 (West 2009); IOWA CODE ANN. § 232.45 (West 2009); KY. REV. STAT. ANN. § 640.020 (West 2009); LA. CHILD. CODE ANN. ART. 857 (2009); MASS. GEN. LAWS ANN. Ch. 119, § 54 (2009); MICH. COMP. LAWS ANN. § 712A.4 (West 2009); MINN. STAT. ANN. § 260B.125 (West 2009); NEW JERSEY, N.D. CENT. CODE § 27-20-34 (2009); OHIO REV. CODE ANN. § 2152.10 (West 2009); TEX. FAM. CODE ANN. § 54.02 (Vernon 2009); UTAH CODE ANN. § 78A-6-703 (West 2008); VA. CODE ANN. § 16.1-269.1 (West 2009).

[71] *Available at* http://www.djj.virginia.gov/About_Us/Administrative_Units/Research_and_Evaluation_Unit/pdf/FY2010_DRG.pdf.

[72] Id.

[73] VA. CODE ANN. § 16.1-269.1 (Michie 2008).

[74] Presumably, only juvenile defendants would ever make use of such an appeal opportunity; if the prosecutor was uncertain as to the propriety of trying the juvenile as an adult, he probably would not have applied for the case to be certified under subsection C. A prosecutor would not be likely to appeal his own decision.

[75] As noted earlier, 26 states allow for reverse waiver.

[76] Fiscal Impact Statement, S.B. 389, *available at* http://lis.virginia.gov/cgi-bin/legp604.exe?111+oth+SB389F160+PDF. Information provided by the Department of Juvenile Justice.

[77] Id.
[78] Id.
[79] VA. CODE ANN. § 19.2-298.01 (Michie 2008).
[80] Fairfax, Alexandria, and Virginia Beach are currently on their own system database and are not required to share their information regarding the transfer and certification of juveniles with the Virginia Supreme Court.
[81] DATA RESOURCE GUIDE: FISCAL YEAR 1996, the Virginia Department of Juvenile Justice (1997).
[82] Email from Lynette Holmes, DJJ. December 7, 2010.
[83] Email from Lynette Holmes, DJJ. December 10, 2009.
[84] According to the VCSC methodology, a sentencing event consists of all offenses (and counts) for which an offender is sentenced before the same court at the same time.
[85] Virginia Criminal Sentencing Commission 2010 Annual Report.
[86] Virginia Criminal Sentencing Commission. PowerPoint Presentation 2010.
[87] Id.
[88] Id. at 59.
[89] Id. at 60.
[90] Id. at 59 and 60.
[91] *Available at* http://www.djj.virginia.gov/Initiatives/DMC.aspx.
[92] Richard E. Redding, *Juvenile Transfer Laws: An Effective Deterrent to Delinquency?*, Office of Juvenile Justice and Delinquency Prevention Juvenile Justice Bulletin, 3 (Aug. 2008). U.S. Department of Health and Human Services, Center for Disease Control and Prevention, Effects on Violence of Laws and Policies Facilitating the Transfer of Juveniles from the Juvenile Justice System to the Adult Justice System (2007) *available at* http://www.cdc.gov/mmwr/PDF/rr/rr5609.pdf.
[93] Barry Green, Director; Sam Abed, Chief Deputy Director; Department of Juvenile Justice, Juvenile Trends: Successes and Challenges, Judicial Conference August 2008, pg. 4, *available at* http://www.djj.state.va.us/Resources/DJJ_Presentations/pdf/JDRTrainingConference-FinalPresentation-08112008.pdf.
[94] S.B. Gen. Assem., Reg. Sess. (2011).
[95] S.B. 948 Gen. Assem., Reg. Sess. (2011).

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