



Review of the Civil Commitment of Sexually Violent Predators



In Brief

Item 30 of the 2011 Appropriation Act directed JLARC staff to review Virginia's civil commitment of sexually violent predators (SVPs).

JLARC staff found that Virginia's actuarial risk assessment approach is flawed. The citation of a specific actuarial assessment instrument and score in statute does not allow qualified professionals to use their professional judgment to review certain high-risk offenders. It also makes it likely that the State will use an out-of-date instrument as actuarial science evolves. To address these flaws, it is recommended that the *Code of Virginia* be amended to remove references to a specific instrument and score.

JLARC staff also found that Virginia's risk assessment process does not provide for enough flexibility or sufficient use of consensus in deciding whether to proceed with the civil commitment process. Recommendations to improve SVP evaluations and the deliberations of the Commitment Review Committee are intended to create a more flexible and consensus-based risk assessment process.

Virginia's civil commitment program will continue to grow over time, as more individuals are committed each year than are released. However, the rate of program growth can be reduced if certain program changes, such as those recommended, are made.

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January 11, 2012

The Honorable Charles J. Colgan
Chair
Joint Legislative Audit and Review Commission
General Assembly Building
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Dear Senator Colgan:

Item 30 of the 2011 Appropriation Act directed the Joint Legislative Audit and Review Commission (JLARC) to undertake a comprehensive review of the civil commitment of sexually violent predators at the Virginia Center for Behavioral Rehabilitation (VCBR) and the conditional release program administered by the Department of Behavioral Health and Developmental Services (DBHDS). Specifically, staff were directed to review the civil commitment assessment process and the treatment provided at VCBR. Staff were also directed to review VCBR's operating costs and staffing.

The final report was briefed to the Commission on November 14, 2011. The report was subsequently approved for printing on December 12, 2011. On behalf of the Commission staff, I would like to thank the staff at DBHDS, VCBR, the Department of Corrections, and the Office of the Attorney General for their assistance during this review.

Sincerely,

A handwritten signature in black ink that reads "Glen S. Tittermary".

Glen S. Tittermary
Director

GST/jcb

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JLARC Report Summary:

Review of the Civil Commitment of Sexually Violent Predators

Key Findings

- Virginia’s switch to the Static-99 actuarial risk assessment instrument and score of “5” resulted in a 450 percent increase in the number of offenders eligible for civil commitment as a sexually violent predator (SVP). (Chapter 1)
- Virginia’s actuarial risk assessment screening approach is flawed, in part because it does not allow qualified professionals to use their professional judgment to review certain high-risk offenders, including those who state their intent to re-offend. (Chapter 3)
- Virginia’s risk assessment process and civil commitment proceedings rely heavily on expert SVP evaluators. These evaluators find offenders to be SVPs at widely varying rates. (Chapter 4)
- Virginia’s risk assessment process does not provide enough flexibility and does not sufficiently use consensus to decide whether to proceed with the civil commitment process. (Chapter 4)
- Given the history of violence and complex psychological challenges of many SVPs, it is difficult to predict how long it will take them to progress through the Virginia Center for Behavioral Rehabilitation (VCBR) treatment program. This makes it difficult to accurately project VCBR’s future capacity needs. (Chapter 6)
- VCBR’s costs are within the range of selected Virginia facilities and other state SVP civil commitment program facilities. They are higher, however, than Florida’s privatized facility costs. (Chapter 8)
- Virginia’s civil commitment program will continue to grow over time. However, the rate of program growth can be reduced if certain program changes, such as those recommended, are made. (Chapter 9)

Item 30 of the 2011 Appropriation Act directs the Joint Legislative Audit and Review Commission (JLARC) to undertake a comprehensive review of the civil commitment of sexually violent predators at the Virginia Center for Behavioral Rehabilitation (VCBR) and the conditional release program administered by the Department of Behavioral Health and Developmental Services. The full budget language text is provided in Appendix A.

CIVIL COMMITMENT CONFINES AND TREATS SEXUALLY VIOLENT PREDATORS AFTER RELEASE FROM PRISON

SVP Predicate Crime

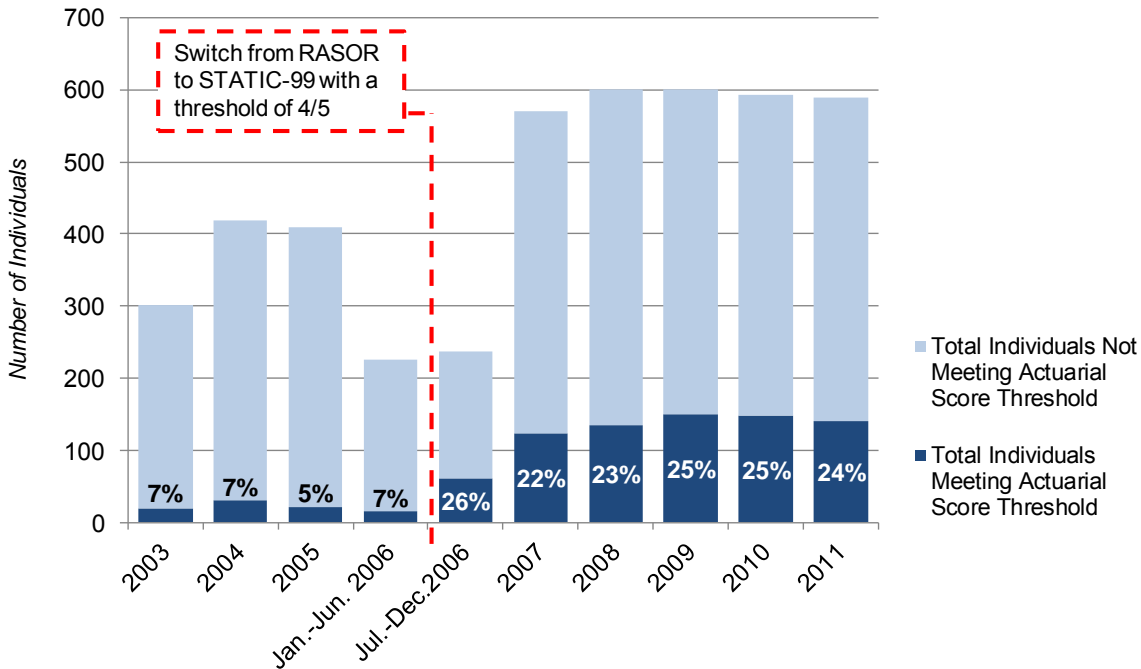
The *Code of Virginia* identifies certain crimes, such as rape, that make an offender eligible for screening with the Static-99 near the end of his or her prison sentence. These crimes are SVP predicate crimes.

Civil commitment of sexually violent predators (SVP) is the process of involuntarily confining offenders after they have served a prison sentence. While under civil commitment, the SVP has access to treatment and is not released until a court determines he represents a sufficiently low risk of committing another violent sexual offense. Virginia is one of 20 states with an SVP civil commitment program.

Virginia established its program in the *Code of Virginia* in 1999, and the first SVP was placed under civil commitment in 2003. Since 2003, Virginia has civilly committed about seven percent of the more than 4,000 offenders released from the Department of Corrections (DOC) that were convicted of an SVP predicate crime. As of August 2011, Virginia had 270 SVPs in civil commitment.

Since 2006, Virginia's program has grown rapidly, largely because of two statutory changes. The first change was an increase in the number of SVP predicate crimes from four to 28. This change led to a moderate increase in the number of offenders found to be SVPs. As shown in the figure, the second change was a switch to the Static-99 actuarial risk assessment instrument. This change led to a dramatic, 450 percent increase in the number of offenders eligi-

Switch From the RRASOR to the Static-99 With Threshold Score of 4/5 Resulted in Substantial Increase in Offenders Eligible for Civil Commitment



Source: JLARC staff analysis of DOC and DBHDS data.

ble for civil commitment. Prior to this change, about seven percent of those released from DOC each year met the actuarial threshold. After this change, between 22 and 26 percent of those released from DOC convicted of an SVP predicate crime met the threshold for review.

VIRGINIA’S ACTUARIAL RISK ASSESSMENT APPROACH IS FLAWED

Since 2006, the *Code of Virginia* has required the Static-99 actuarial risk assessment instrument to be used in the civil commitment process as a screening tool. The *Code* also specifies that violent sex offenders scheduled to be released from prison that score at or above a “5” (or “4” in certain cases) should be further reviewed, while those below those scores should be released after serving their prison sentence. Since 2006 when Virginia began using the Static-99, about three-quarters of the offenders assessed have scored below this threshold. The other one-quarter scored at or above the threshold and were further reviewed; 40 percent of these offenders were ultimately civilly committed.

While actuarial risk assessments have value, they can substantially over- or underestimate the potential that a given individual may reoffend if released, and are not intended to precisely predict an individual’s actual risk of future reoffense. Virginia is the only state that designates a specific actuarial risk assessment instrument and score in statute. This citation of a specific instrument and score in statute results in two substantial flaws. The first is that the threshold score of “5” in statute limits the ability of qualified individuals to use their professional judgment to decide which offenders should be further evaluated, including some offenders who are likely sexually violent predators. The case study below describes one such offender who the State was not able to further review and commit as an SVP.

Case Study

Offender A was in a Virginia prison for committing an SVP predicate crime against a victim under 13 years old. While in prison, Offender A admitted to a DOC counselor that he was still attracted to children and was concerned that if released, he would not be able to control his compulsion to have sex with children. The DOC counselor informed the DOC Sex Offender Screening and Assessment (SOSA) unit of Offender A’s compulsion and stated intent to reoffend if released from prison. When assessed by the DOC SOSA unit prior to his release, Offender A scored a “3” on the Static-99 because the instrument does not capture stated intent to reoffend. Because Offender A scored below the statutory threshold of “5,” he could not be reviewed further for possible

civil commitment and was released at the end of his prison sentence.

The second flaw in Virginia’s actuarial risk assessment approach is that citing a specific instrument and score in statute makes it likely that the State will use an out-of-date instrument while actuarial science for violent sex offenders continues to evolve. Since Virginia adopted the original Static-99 and the threshold score of “5” in 2006, its developers have updated it with more recent risk estimates, and also released a newer version called the Static-99R. The developers have determined that each score on the Static-99 represents a lower risk of reoffense than was believed when Virginia adopted the instrument in 2006.

Since these updates, Virginia has assessed at least 275 offenders using the Static-99. Eighty-one percent, or 224, of them would not have met a comparable risk threshold using more recent versions of the instrument. Thirty of these 224 offenders have already been civilly committed and at least another 25 likely will be.

To address these flaws in Virginia’s actuarial risk assessment approach, it is recommended that the *Code of Virginia* be amended to remove the reference to the Static-99 and score of “5.” It is also recommended that in its place, the *Code* direct DBHDS to choose a current and scientifically validated actuarial risk assessment instrument, score, and risk threshold to identify individuals that merit further assessment as a possible sexually violent predator. It is further recommended that DBHDS report biannually to the General Assembly which instrument, score, and risk threshold will be used. These changes are intended to allow more professional discretion in certain cases and allow the State’s risk assessment process to adapt as actuarial science evolves.

VIRGINIA’S RISK ASSESSMENT PROCESS RELIES HEAVILY ON SVP EVALUATORS, YET CERTAIN ASPECTS OF EVALUATOR DECISIONS ARE PROBLEMATIC

Offenders who score at or above the threshold on the Static-99 are evaluated by a trained and licensed SVP evaluator. The evaluators are asked to determine whether the individual has a “mental abnormality” or “personality disorder” that makes it difficult to control predatory behavior, therefore making him an SVP. This SVP evaluation is a major factor cited by the Commitment Review Committee (CRC), Office of the Attorney General, and courts in their decisions about whether an individual is an SVP.

The *Code of Virginia* requires these SVP evaluators to be licensed and skilled in diagnosing and assessing the risk that violent sex offenders will reoffend. Conducting these evaluations to predict

someone's future behavior is a difficult task. However, there are two aspects of SVP evaluator decisions that are problematic.

First, SVP evaluators have found offenders with relatively low actuarial risk scores to still be SVPs. Specifically, SVP evaluators found nearly half of the 224 offenders who would not have met a comparable risk threshold using more recent versions of the Static-99 to be SVPs. There are factors that may at least partially explain this situation, including mental abnormalities that actuarial risk assessments do not address. Nevertheless, the lack of alignment between the predicted risk of reoffense based on the actuarial instrument and the SVP evaluator opinion is somewhat problematic.

Second, SVP evaluators find offenders to be SVPs at rates that vary widely from 28 to 75 percent. The rate at which evaluators have collectively found offenders to be SVPs each year has also fluctuated. Because the Office of Sexually Violent Predators (OSVP) does not systematically identify and explore the reasons for this variation, it is impossible to rule out the possibility of bias or determine whether there is unwarranted variation among evaluator approaches and methodologies. It is recommended that OSVP periodically review the underlying reasons why evaluators have unusually high or low rates of SVP findings over time.

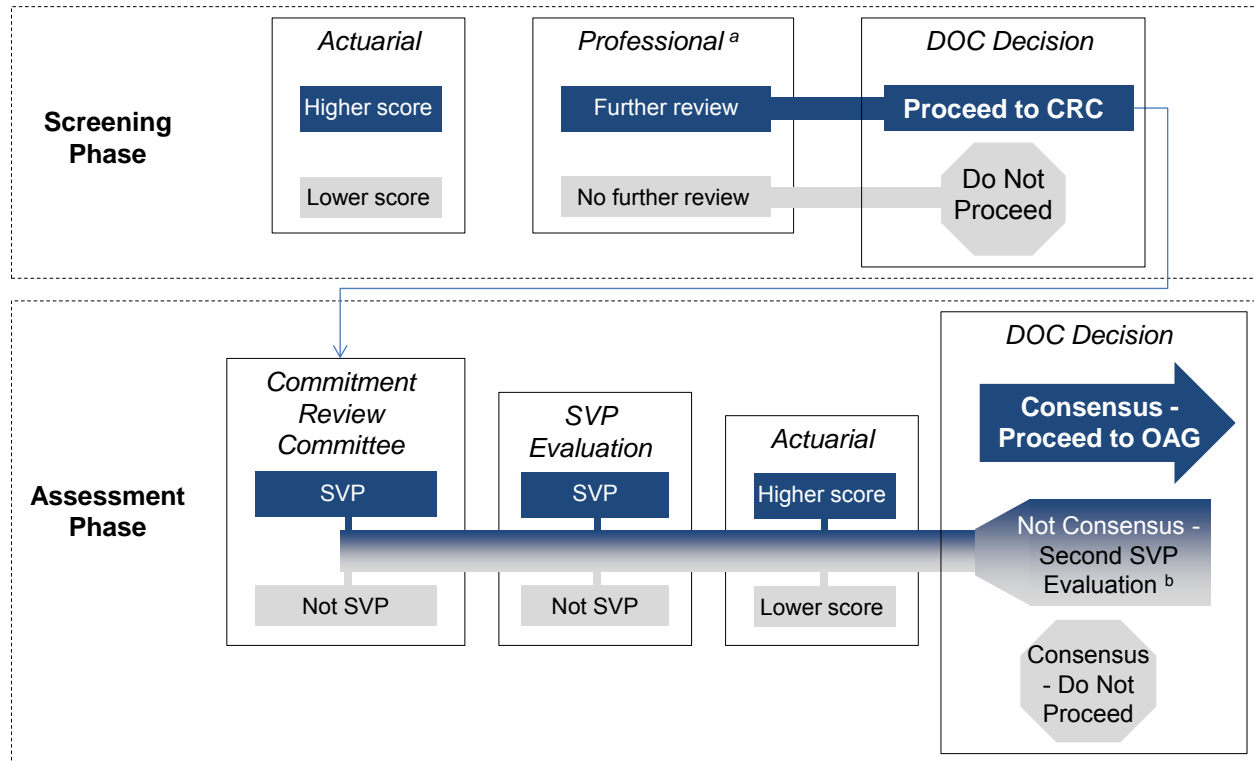
VIRGINIA'S RISK ASSESSMENT PROCESS LACKS FLEXIBILITY AND SHOULD BE MORE CONSENSUS-BASED

A series of changes are recommended to Virginia's current risk assessment process (figure). The changes are intended to create a process that is more flexible given the concerns about the lack of flexibility in the screening phase. The changes are also intended to be more consensus-based and not rely as heavily in certain cases on a single SVP evaluation during the risk assessment phase. This change is especially important given the variation in rates at which SVP evaluators find individuals to be SVPs, and the speculative nature of the entire SVP decision because it is an attempt to predict what an offender might do in the future.

The recommended process would make several key improvements compared to the current process. They would include

- providing the flexibility to initiate the risk assessment process for a small number of individuals each year who may score below a specific actuarial risk assessment threshold, yet still warrant further review;
- not including the SVP evaluation in the information reviewed by the CRC because doing so could have the effect of unnecessarily "centering" the CRC around the SVP finding; and

Recommended Risk Assessment Process to Give State More Flexibility and Use Consensus to Determine Whether to Proceed



Note: Implementation of a process such as this would require addressing key implementation issues, including at what point consensus is reached and whether there is discretion in certain cases about the need for a second SVP evaluation.

^a Professional review step could override actuarial score during screening phase and select offenders to forward to the CRC.

^b A second SVP evaluation would be requested when there is not consensus among the CRC, SVP evaluation, and actuarial score.

Source: JLARC staff.

- reducing the over-reliance on the results of a single SVP evaluation in certain circumstances. The inherent limitations in both actuarial and clinical evaluations require establishing checks in the system where possible.

SVPs PROGRESS THROUGH VCBR AT VARYING RATES, MAKING IT DIFFICULT TO PREDICT HOW LONG AN SVP WILL REMAIN AT VCBR

Treatment at VCBR is intended to reduce the risk of new offenses so that SVPs can be more safely managed once they are released into the community. However, treating the disorders associated with sexual offending does not eliminate the risk for new offenses, and the effectiveness of treatment varies by individual. VCBR mainly uses group psychotherapy to treat SVPs. Treatment at the facility is segmented into three phases with defined criteria to determine treatment progress and recommend conditional release. VCBR's program is consistent with treatment provided by other

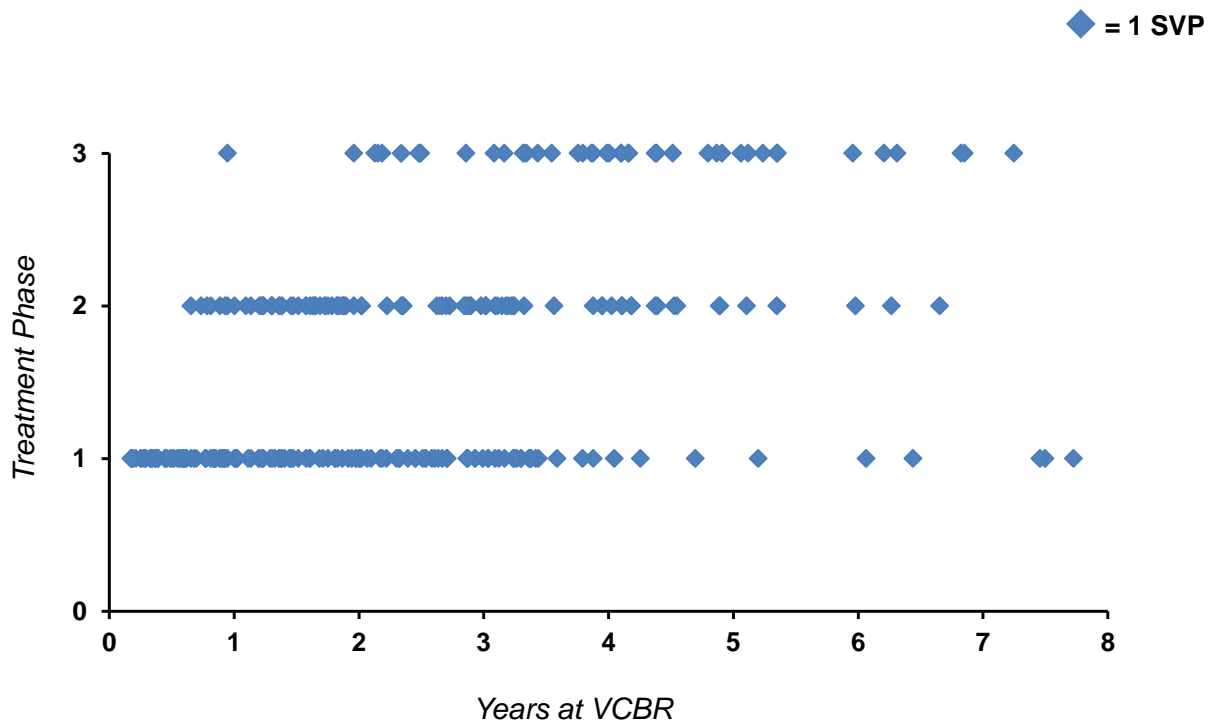
states and private practitioners, but it has evolved considerably with the growth of Virginia’s SVP program. Certain program deficiencies have been addressed in recent years, but sustaining the improvement depends on VCBR’s census, budget, and staffing.

SVPs at VCBR have progressed through treatment at widely varying rates, with some demonstrating substantial progress over several years and others showing little or no progress (figure). Approximately 80 percent of SVPs that have been at the facility four or more years have progressed beyond the first phase of treatment.

A total of 44 VCBR residents, or about 15 percent of SVPs, have reached the final phase of treatment and begun planning for their return to the community. Nearly half of these residents have been recommended for conditional release by VCBR staff. On average, SVPs have needed more than four years to complete treatment at VCBR and be recommended for conditional release.

About 20 percent of SVPs have been at VCBR for two or more years but remain in the first phase of treatment. Half of these residents have been at VCBR more than three years, and in some cases, more than five years. Progress through VCBR’s treatment

SVPs Have Made Varying Degrees of Progress Through Treatment Over a Wide Range of Time at VCBR



Source: JLARC staff analysis of data from the Virginia Center for Behavioral Rehabilitation.

program depends primarily on an individual's motivation to change and the severity of his clinical needs, though past deficiencies in the treatment program may have delayed progress for some SVPs. These dynamics make it difficult to predict how long an SVP will remain at VCBR.

HOUSING IS MAJOR IMPEDIMENT TO CONDITIONAL RELEASE, AND STRATEGIES TO FACILITATE CONDITIONAL RELEASE HAVE BENEFITS AND DRAWBACKS

SVPs that do not require civil commitment at VCBR can be placed on conditional release and managed in the community. SVPs on conditional release must participate in outpatient treatment and are monitored by probation officers using GPS technology, field visits, and polygraph exams. Since 2003, 78 of the approximately 350 SVPs have been approved for conditional release by Virginia courts, including 21 after civil commitment at VCBR. Monitoring and supervision by DOC do not eliminate the risk of further violent sex offenses: three SVPs have been charged with a new sex offense while on conditional release, and one has been convicted. Similar rates of reoffense have been found among SVPs on conditional release in other states with civil commitment programs.

A lack of viable housing in the community is the primary impediment to conditional release when it is otherwise appropriate.

A lack of viable housing in the community is the primary impediment to conditional release when it is otherwise appropriate. SVPs have few housing options, mainly due to limited employment prospects and restrictions on where they can live. Other states with civil commitment programs have attempted to make conditional release a more viable option by providing transitional housing assistance and intensive monitoring for SVPs in the community. Using these strategies to facilitate conditional release when housing is the only impediment can be more cost-effective than commitment at VCBR. However, further facilitating conditional release has benefits and drawbacks that require policymakers to balance the cost of civil commitment, the risk of new sex offenses, and the civil liberties of SVPs.

VCBR'S COSTS ARE IN THE RANGE OF OTHER FACILITIES, BUT HIGHER THAN FLORIDA'S PRIVATIZED FACILITY

Since 2005, VCBR's appropriations have increased 320 percent, though the VCBR census has increased 1,374 percent. For FY 2011, VCBR was appropriated about \$91,000 for each of its 270 patients. Based on comparisons made by JLARC staff, VCBR's cost and staffing per patient is lower than two similar DBHDS facilities, but higher than two similar DOC facilities.

VCBR's costs per patient were also within a range of selected other states' SVP facilities (table). The range across six state SVP civil commitment programs, including Virginia, was between \$38,300

Virginia's Cost Per Patient Is Within a Range of Selected Other States' SVP Programs

	State A	State B	Virginia	State C	State D	State E
Census	678	215	269	152	618	308
Budget (millions)	\$26.0	\$14.4	\$24.5	\$16.1	\$67.4	\$43.4
Budget / Census	\$38,300	\$66,799	\$90,898	\$105,921	\$109,061	\$140,909

Source: JLARC staff analysis of white papers by other state SVP programs for the Sex Offender Civil Commitment Programs Network, 2011 and analysis of data provided by other states.

and \$140,909. Variation in cost per patient can be due to many factors, including the age of the program, the design and number of facilities that are used to house SVPs, and whether transitional housing assistance is provided. Collectively, these analyses suggest that VCBR is not an outlier in terms of its costs or staffing.

In mid-2011, DBHDS received an unsolicited proposal from a private company requesting that the State consider privatizing VCBR to reduce costs. If DBHDS decides to proceed with the process, Virginia's previous experience with privatization of information technology services and Florida's experience with privatizing its civil commitment program both hold valuable lessons learned. These lessons include the importance of clearly defining the State's needs and having an effective contract that specifies roles and responsibilities as program size and costs fluctuate.

Florida's privatized program costs substantially less per patient than Virginia's, in part due to a facility that permits lower staffing levels. Florida's facility—which was constructed as part of its privatization—is more cost-effective than if operated by the state. The facility was designed to include features aimed at minimizing operating or maintenance costs, such as an energy-efficient cooling system. Other design features were intended to reduce staffing needs. The installation of cameras in multiple locations, and a radial layout of dormitories that permits direct observation of four to five wings from a central control room, have helped Florida minimize security staffing requirements.

These design features partly account for why staffing ratios at Florida's facility are substantially lower than at VCBR (table). For example, the security staffing ratio at the Florida facility is less than half the staffing ratio at VCBR. Due to VCBR's design, however, it may not be possible to achieve this same ratio of security staffing for that facility. Total staffing per patient at Florida's facility is about one-third of staffing at VCBR.

VCBR expects its cost per patient to decline moving forward as the census continues to increase at a faster rate than its budget. However, it is likely that even with this trend VCBR's costs will remain higher than Florida's privatized facility. If DBHDS decides to

Staffing Per Patient at Florida’s Privatized Facility Is About One-Third of Staffing at VCBR

	VCBR	Florida Privatized SVP Facility
Treatment	0.14	0.07
Security	0.38	0.15
Resident Services Assistants	0.45	0.12
Managerial / Administrative / Other	0.25	0.07
<i>Total Staff / Patient</i>	<i>1.23</i>	<i>0.42</i>

Note: Staff / patient ratios do not equal totals due to rounding. ‘Other’ includes medical, food service, and plant operations staff.

Source: JLARC staff analysis of staffing and census data from DBHDS and the Florida Department of Children and Families.

proceed with considering the privatization of VCBR or a future facility, it is recommended that DBHDS further consult with Florida to learn about its specific contract requirements and provisions, including how a facility can be designed and operated to minimize costs and staffing levels.

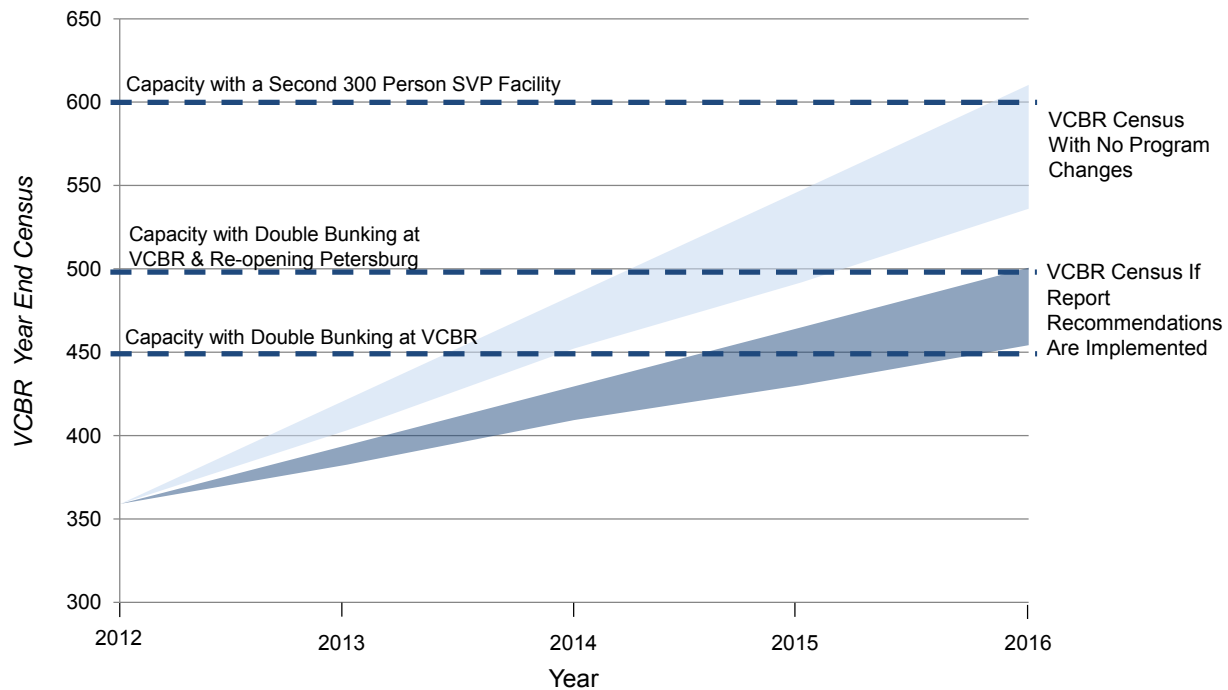
CIVIL COMMITMENT PROGRAMS TEND TO GROW OVER TIME, BUT CERTAIN PROGRAM CHANGES COULD SLOW RATE OF PROGRAM GROWTH

As the VCBR census continues to increase, its new capacity of 450 SVPs achieved through double bunking may again soon be insufficient. This is in part due to the inherent dynamic of most civil commitment programs that more individuals are committed each year than released. Because of this dynamic, it appears likely that new civil commitments will continue to outpace the number of SVPs released from VCBR each year.

As shown in the figure, if no changes are made and the current rate of growth continues, VCBR’s new capacity of 450 SVPs could be insufficient as early as sometime during 2013. Depending on the rate of growth, double bunking could provide sufficient capacity until closer to 2014. If no changes are made to the program, even building a second 300 person SVP facility could only provide sufficient capacity until 2016.

Alternatively, if the recommendations included in this report are implemented in a timely manner, JLARC staff estimate that the VCBR census will grow more slowly. This would largely be due to the recommended changes to the risk assessment process that would likely lead to a lower rate of offenders being referred for further review and possible civil commitment. This lower rate of growth would then allow the State to add less capacity at a later date.

Decision About (1) By How Much and (2) When to Expand Capacity Depends on Whether Program Changes Are Implemented



Source: JLARC staff analysis.

CIVIL COMMITMENT DECISIONS WILL ALWAYS BE SPECULATIVE AND WEIGHT PUBLIC SAFETY OVER INDIVIDUAL CIVIL LIBERTIES

The recommendations presented in this report are intended to improve Virginia's civil commitment process. These improvements will primarily be

- better prioritization of available civil commitment resources towards higher risk offenders; and
- greater confidence in the civil commitment decision based on consensus across multiple, more independent steps.

However, even with these improvements to the process, the decision to civilly commit an offender based on the potential he might reoffend in the future will continue to be speculative. While 20 states including Virginia have civil commitment programs for SVPs, 30 states do not have such programs. This lack of uniformity nationwide is reflective of the weighty and complex policy issues and trade-offs associated with the decision to have an SVP civil commitment program. These issues include individual civil liberties, the use of public funds, and public safety.

Given the likelihood that even higher risk offenders may not always reoffend and be convicted again if released, the entire civil commitment process itself prioritizes public safety in the form of preventing potential reoffenses over an individual's civil liberties. Deciding whether this is appropriate depends on how policy-makers weigh these two important, yet competing, priorities. Whatever civil commitment process is used, it will continue to have this dynamic because of the difficulty of predicting what an individual will do in the future.

However, there are clearly some individuals who are sufficiently dangerous to justify placing them under civil commitment. The majority of SVPs at VCBR have multiple convictions for violent sexual crimes, in combination with mental health or personality disorders. The objective, therefore, of a civil commitment process should be to use the most accurate and current means available to prioritize public resources towards treating the individuals most likely to reoffend. When implemented in this manner, civil commitment programs do provide value by attempting to proactively deal with the individuals who would otherwise be released into society and likely reoffend.

Civil Commitment Confines and Treats Sexually Violent Predators After Release From Incarceration

In Summary

Civil commitment of sexually violent predators (SVPs) is the process of involuntarily confining offenders after they have served a prison sentence. While under civil commitment, an SVP has access to treatment and is not released until a court determines he represents a sufficiently low risk for committing another violent sexual offense. Virginia is one of 20 states with an SVP civil commitment program; Virginia's SVP program was established in the *Code of Virginia* in 1999, and the first SVP was placed under civil commitment in 2003. Since 2003, Virginia has civilly committed about seven percent of the more than 4,000 individuals released from the Department of Corrections who were convicted of a crime defined in the *Code* as an SVP predicate crime. As of August 2011, there were 270 SVPs under civil commitment. Since 2006, Virginia's program has grown rapidly, largely because of statutory changes. This rapid growth has forced the State to create additional capacity to house more SVPs.

Item 30 of the 2011 Appropriation Act directs the Joint Legislative Audit and Review Commission (JLARC) to undertake a comprehensive review of the civil commitment of sexually violent predators at the Virginia Center for Behavioral Rehabilitation (VCBR) and the conditional release program administered by the Department of Behavioral Health and Developmental Services (DBHDS). The full budget language text is provided in Appendix A. Specific aspects of the program that JLARC was directed to review include

- the treatment of sexually violent predators (SVPs) at VCBR, including convictions and time served for SVP “predicate crimes”;
- the screening and assessment process, including the use of the current risk assessment instrument;
- the commitment review process; and
- program costs, including an analysis of VCBR's security and treatment staff ratios, and cost-effective best practices in civil commitment programs operated in other states.

Most of these issues relate to explaining the factors that have contributed to the increase in the number of individuals placed under civil commitment. This increase has necessitated increases in the civil commitment program's funding and an expansion of VCBR's capacity.

To address the study mandate, JLARC staff interviewed key decision-makers in Virginia’s SVP civil commitment process as well as researchers and practitioners in the field of sexually violent offenders; analyzed relevant data provided by the Department of Corrections (DOC) and VCBR; reviewed other states’ civil commitment programs for sexually violent offenders; visited VCBR; and reviewed the research literature on risk assessment, treatment, and recidivism rates for sexually violent offenders. More details on the research methods used in the study are in Appendix B.

SEXUALLY VIOLENT PREDATORS MAY BE CONFINED AFTER RELEASE FROM PRISON AND RELEASE FROM CIVIL COMMITMENT USUALLY DEPENDS ON THEIR PROGRESSION THROUGH TREATMENT

Prior to civil commitment programs for sexually violent offenders, these individuals were released into society upon completing their prison sentence. Over the last few decades, civil commitment programs have become more prominent as a way to prevent violent sexual offenders from re-entering society and potentially committing new crimes. According to the Congressional Research Service (CRS), civil commitment of sex offenders can be broadly defined as “when a state retains custody of an individual, found by a judge or jury to be a sexually dangerous person, by involuntarily committing the person to a secure mental health facility after the offender’s prison sentence is done.” Whether and when an SVP is released from civil commitment depends on if he progresses through the prescribed treatment program to the point where psychiatric professionals and a court determine he poses a sufficiently lessened risk for reoffense such that he can be released.

CRS notes that “... there is still the possibility that an offender who would not reoffend might be committed.”

CRS notes that “for civil commitment to be effective, practitioners must be able to identify sex offenders who pose a high risk of reoffending. Although the ability of practitioners to identify offenders has improved, there is still the possibility that an offender who would not reoffend might be committed. Moreover, determining when it is safe to release a sex offender from custody is still difficult for practitioners.”

U.S. Supreme Court Has Upheld the Constitutionality of Civil Commitment Programs for Sexually Violent Predators

Civil commitment laws have been both politically and legally contentious because they allow for confinement of SVPs after they have served their prison sentence. Despite the controversy surrounding these programs, however, the U.S. Supreme Court has upheld the constitutionality of civil commitment of SVPs three times; two of these decisions addressed the practice of a state civilly committing SVPs (the other addressed federal civil commitment). Both of these decisions were in cases challenging the Kan-

sas Sexually Violent Predator Act. This act established procedures for the civil commitment of a person who, due to a “mental abnormality” or a “personality disorder,” is likely to engage in “predatory acts of sexual violence.”

The first court decision, in 1997, was *Kansas v. Hendricks*. The U.S. Supreme Court upheld the constitutionality of the Kansas Sexually Violent Predator Act by overturning a Kansas Supreme Court decision by a five-to-four vote. The U.S. Supreme Court found:

- The Kansas Sexually Violent Predator Act’s definition of “mental abnormality” met substantive due process standards by requiring considerable evidence of past violent sexual behavior in the defendant and a present mental inclination making it difficult for the defendant to avoid repeating such offenses.
- The act did not violate double jeopardy guarantees since it established “civil” rather than “criminal” proceedings.
- Civil commitment was not punishment, as long as treatment was the primary goal of the detainment and individuals were permitted immediate release upon showing that they are no longer dangerous.

In 2002, *Kansas v. Crane* overturned another Kansas Supreme Court decision that civil commitment required finding that the defendant has a total or complete lack of control of his dangerous behavior. The U.S. Supreme Court found:

- The 1997 *Hendricks* decision set forth no requirement for determining a total or complete lack of control. The 1997 *Hendricks* decision characterized the Kansas Sexually Violent Predator Act as requiring an abnormality or disorder that makes it difficult, if not impossible, for the person to control his dangerous behavior. The word “difficult” indicates that the lack of control was not absolute, and indeed, an absolutist approach is unworkable and would risk preventing the civil commitment of highly dangerous persons suffering severe mental abnormality.
- States retain considerable leeway in defining the mental abnormalities and personality disorders that make an individual eligible for commitment and the U.S. Constitution’s liberty safeguards in the area of mental illness are not always best enforced through precise, bright lines.

States retain considerable leeway in defining the mental abnormalities and personality disorders that make an individual eligible for commitment ...

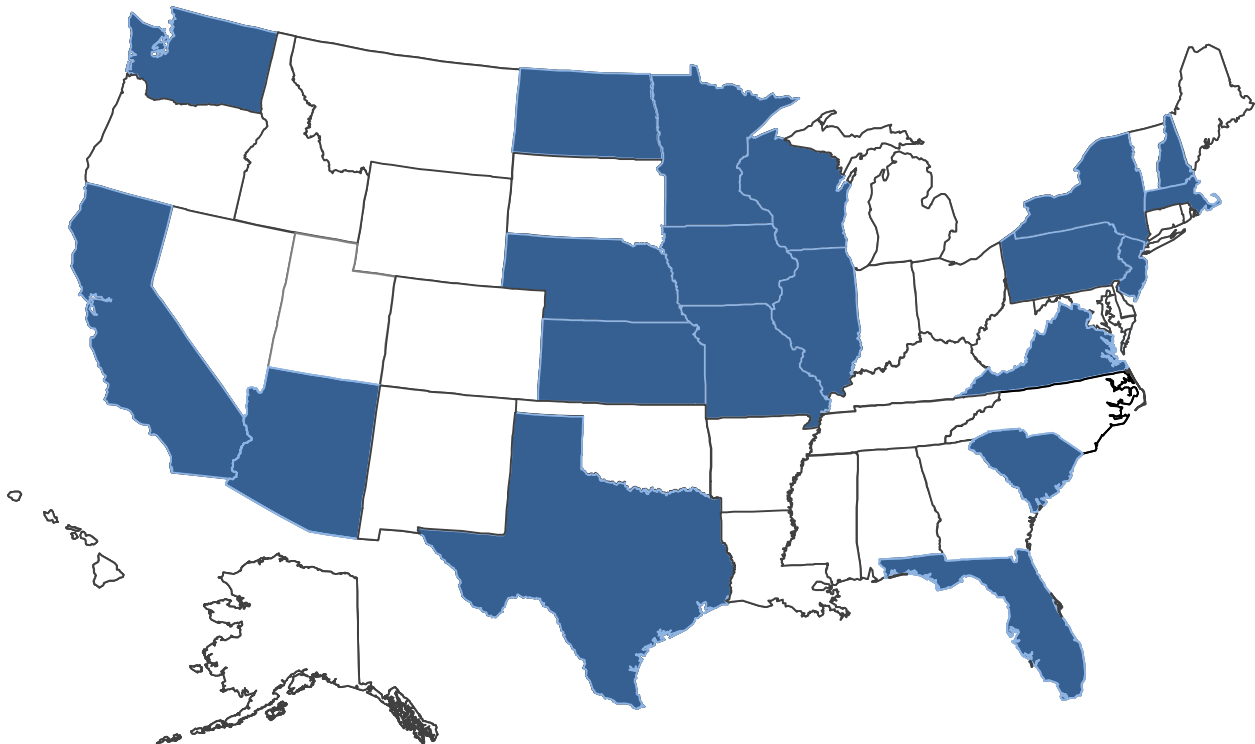
Absent further legal challenges of the practice of civil commitment of SVPs, the U.S. Supreme Court has ruled that it is constitution-

al, and states can detain SVPs indefinitely as long as treatment is available and is the primary goal of the program.

Virginia Is One of 20 States That Has an SVP Civil Commitment Program

Collectively, the above two U.S. Supreme Court decisions have legitimized civil commitment programs for SVPs. In addition to Virginia, 19 other states have established civil commitment programs for SVPs (Figure 1). These programs largely have the same goal of detaining individuals after their prison sentence who might reoffend in the future. These other state programs vary, however, in the processes and structure they use to achieve that goal. More information about many of these other state programs is presented throughout the remainder of this report.

Figure 1: Twenty States, Including Virginia, Have SVP Civil Commitment Programs



Source: JLARC staff analysis of media reports and information provided by the Minnesota Office of the Legislative Auditor.

Most of Virginia’s Civil Commitment Process for SVPs Is Defined in the *Code of Virginia*

Virginia’s civil commitment program for sexually violent predators was established in the *Code of Virginia* in 1999. The *Code* in section 37.2-900 defines a sexually violent predator as

SVP Predicate Crime

Being convicted of an SVP predicate crime, such as rape, makes an individual eligible for screening with the Static-99 near the end of his prison sentence. The Office of the Attorney General can petition the court for civil commitment if the individual has (1) been convicted of an SVP predicate crime and (2) meets the threshold on the Static-99.

Vast Majority of SVPs Are Male

Since the inception of Virginia's SVP program, only three female inmates have been placed under civil commitment. These females do not reside at VCBR, but instead are kept at other facilities. Throughout this report, the masculine pronoun will be used when referring to sexually violent offenders and SVPs, as males make up 99 percent of Virginia's SVP population.

any person who (i) has been convicted of a sexually violent offense or has been charged with a sexually violent offense and is unrestorably incompetent to stand trial; and (ii) because of a mental abnormality or personality disorder, finds it difficult to control his predatory behavior, which makes him likely to engage in sexually violent acts.

The majority of Virginia's civil commitment process for sexually violent predators and the key State agencies in this process are detailed in the statute, including DOC, DBHDS—which includes the Office of Sexually Violent Predators (OSVP)—the Office of the Attorney General (OAG), and the circuit court system (Figure 2).

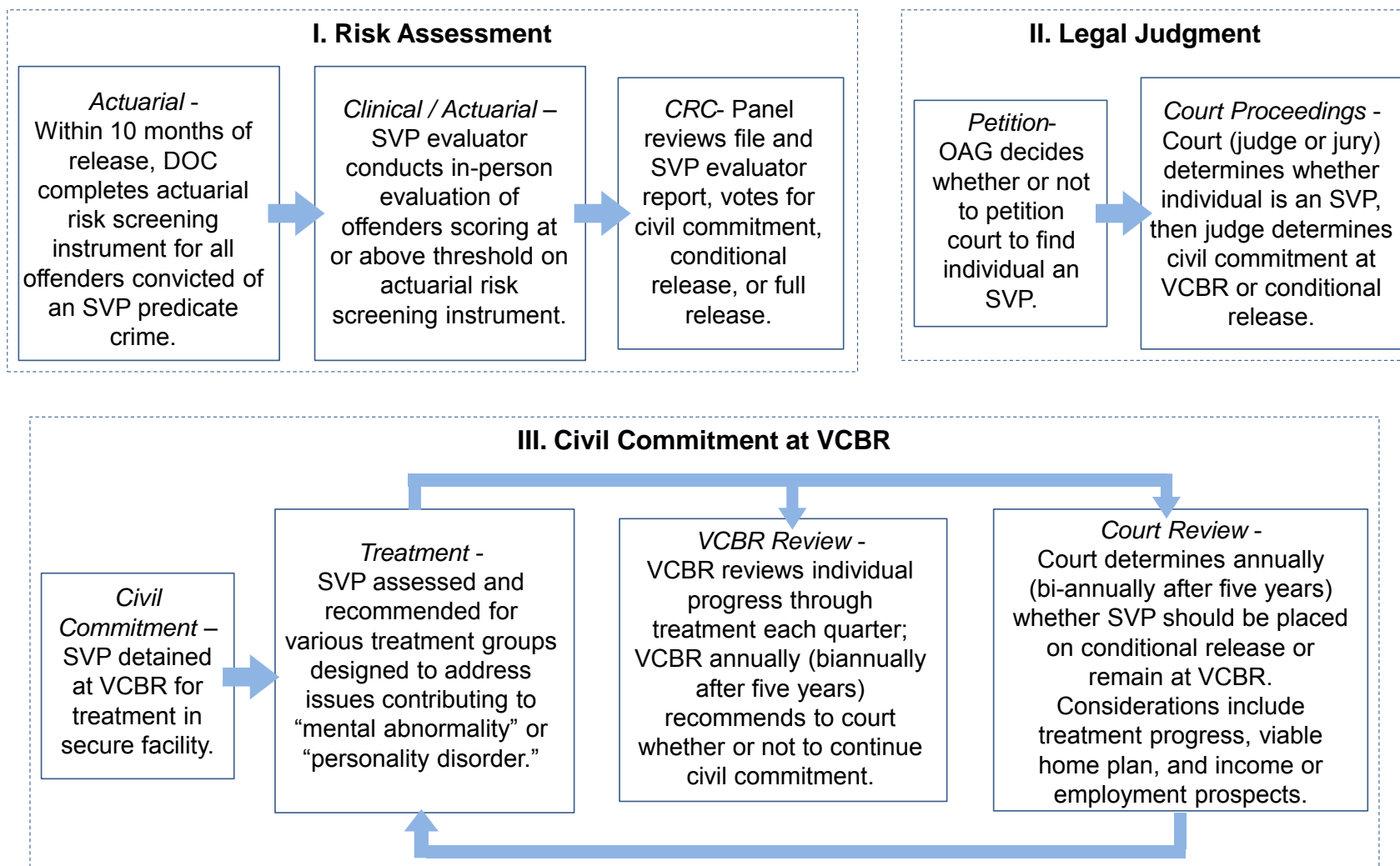
Phase I: Risk Assessment. The *Code of Virginia* directs DOC to maintain a database of each inmate in its custody who is incarcerated for an SVP predicate crime (such as rape, which makes an offender eligible for screening with an actuarial risk assessment instrument). Ten months prior to the inmate's release, the DOC Sex Offender Screening and Assessment unit uses the Static-99 (the assessment instrument currently used) to review the inmate's file and assign the inmate a risk score. Each month, DOC reviews its database and identifies all the male inmates that have been assessed and received a score of "5" or higher ("4" or higher for crimes against someone 13 or younger) on the Static-99. DOC then forwards the names of these individuals to the Commitment Review Committee (CRC) for assessment.

The CRC is comprised of three DOC staff, three DBHDS staff, and one OAG staff. Section 37.2-904.A of the *Code of Virginia* directs the CRC to "complete its assessment of the prisoner or defendant for possible commitment ... and forward its written recommendation regarding the prisoner or defendant to the" OAG upon receiving notification from DOC. The *Code* states that the

CRC assessments of eligible prisoners or defendants shall include a mental health examination, including a personal interview, of the prisoner or defendant by a licensed psychiatrist or a licensed clinical psychologist who is designated by the Commissioner, skilled in the diagnosis and risk assessment of sex offenders, knowledgeable about the treatment of sex offenders, and not a member of the CRC.

The *Code* allows the CRC to contract for the services "of additional experts in order to complete its review of the prisoner or defendant" to conduct the assessment. An SVP evaluator is a licensed psychiatrist or clinical psychologist that specializes in risk assessment of sex offenders. The CRC contracts with these clinicians to review the inmate's file and conduct an in-person interview and

Figure 2: Virginia's Civil Commitment Process Consists of Three Phases to Determine the Status and Disposition of SVPs



Note: DOC, Department of Corrections; SVP, Sexually Violent Predator; CRC, Commitment Review Committee; OAG, Office of the Attorney General; VCBR, Virginia Center for Behavioral Rehabilitation.

Source: JLARC staff analysis of the *Code of Virginia* and interviews with State agency staff, 2011.

clinical assessment. The SVP evaluator then produces a written assessment using a template designed by OSVP. The template includes, but is not limited to, information such as criminal record, psychological status, risk potential, medical history, and personal life. The template also requires the SVP evaluators to determine whether, in their opinion, the individual is an SVP.

The CRC then meets to discuss each evaluation, and as required by the *Code* recommends that “the prisoner or defendant

- be committed as a sexually violent predator; or
- not be committed, but be placed in a conditional release program as a less restrictive alternative; or
- not be committed because he does not meet the definition of a sexually violent predator.”

The CRC recommendation is determined by a majority vote of its seven members. The CRC then transmits its vote along with a brief cover memo to the OAG.

Phase II: Legal Judgment. Upon receipt of the CRC’s recommendation, which is non-binding, the OAG conducts its own review and either (i) files a petition for the civil commitment of the prisoner as a sexually violent predator or (ii) notifies DOC, DBHDS, and the court that it will not file a petition for commitment. If the OAG decides to file a petition for civil commitment, that petition is filed with the circuit court for the judicial circuit in which the prisoner was last convicted of a sexually violent offense. If the OAG does not file a petition, the inmate is freed on his scheduled prison release date. These offenders are still subject to registry requirements that apply to all sex offenders.

If a petition is filed, the circuit court holds a probable cause hearing during which the court determines whether probable cause exists to believe that he is an SVP. Upon the finding of probable cause, the court holds a trial to determine whether the offender is an SVP. If the judge does not find probable cause, the petition is dismissed and the offender is released from prison on his scheduled release date.

The OAG or the individual has the right to request a trial by jury. When this right is not exercised, the trial is held before the judge. According to the *Code of Virginia* “the court or jury shall determine whether, by clear and convincing evidence, the [defendant] is a sexually violent predator.” This evidentiary standard is less than the beyond a reasonable doubt standard for criminal trials, but greater than the preponderance of the evidence standard for civil trials. If the judge or jury finds the individual to be a sexually violent predator, the judge then determines whether he will be com-

mitted to VCBR or placed on conditional release under the supervision of DOC Community Corrections. If the court or jury does not find the inmate to be an SVP, DOC releases the inmate.

Phase III: Civil Commitment at VCBR. When the court determines that a person is an SVP and is ordered for civil commitment, he is transferred into custody of DBHDS and sent to VCBR, a secure inpatient treatment facility in Nottoway County, Virginia. The *Code* directs that SVPs be held “for control, care, and treatment until such time as the respondent’s mental abnormality or personality disorder has so changed that the respondent will not present an undue risk to public safety.”

While held at VCBR, various types of treatment are available to SVPs, also referred to as patients. The *Code of Virginia* directs DBHDS to recommend a specific course of treatment, programs for provisions of such treatment, and to monitor the patient’s compliance with such treatment. In general, treatment is provided in group therapy settings. Each quarter, VCBR treatment providers evaluate each patient’s progress through a three-phased treatment program.

The *Code* states that a “hearing for assessment shall be conducted at yearly intervals for five years and at biennial intervals thereafter.” The purpose of the hearing is to assess each SVP’s need for continued civil commitment and further treatment. Prior to this hearing, DBHDS must provide the court a re-evaluation of the patient’s risk and corresponding treatment. If the court finds the individual is no longer an SVP, he is released from VCBR. If the court finds the individual is still an SVP, he remains at VCBR under civil commitment.

Conditional Release. Individuals found by the court to be an SVP can either be placed under civil commitment at VCBR or placed on conditional release. Individuals that have sufficiently progressed through treatment at VCBR are also eligible for conditional release. Section 37.2-912.A of the *Code* directs the court to place a patient on conditional release when the court determines (i) [the SVP] does not need inpatient treatment but needs outpatient treatment or monitoring; (ii) appropriate outpatient supervision and treatment are reasonably available; (iii) there is significant reason to believe that the patient would comply with the conditions specified; and (iv) conditional release will not present an undue risk to public safety. DOC manages the SVP conditional release program on behalf of DBHDS. SVPs placed on conditional release are assigned to a probation or parole officer and monitored using a GPS tracking device and other methods of supervision. The *Code* requires DOC to submit a written report on the SVP’s status at least every six months.

SVPs Under Civil Commitment Are Housed and Treated at a Secure Facility in Nottoway County

The first civil commitment to VCBR occurred in 2003 and VCBR was first provided separate appropriations as an agency in FY 2005. VCBR was originally on property at the Southside Virginia Training Center in Petersburg, but is now in a 300-bed facility in Nottoway County completed in 2008. VCBR shares a campus with the Piedmont Geriatric Hospital. Since late 2009, the two facilities have shared a variety of functions to reduce costs, including fiscal management, human resources, physical plant services, house-keeping, and food service.

VCBR is divided into three residential “pods” that house patients and a central section that includes instructional and activity rooms, a medical and nursing center, a library, and several other shared spaces. Each of the three residential pods is divided into four “living units.” Living units consist of 25 separate resident rooms and one central living area (Figure 3 A). All residents have unrestricted access to the central living area in their living unit, as well as a small outdoor courtyard. Each resident room includes a toilet, sink, several storage cabinets, and a bed (Figure 3 B).

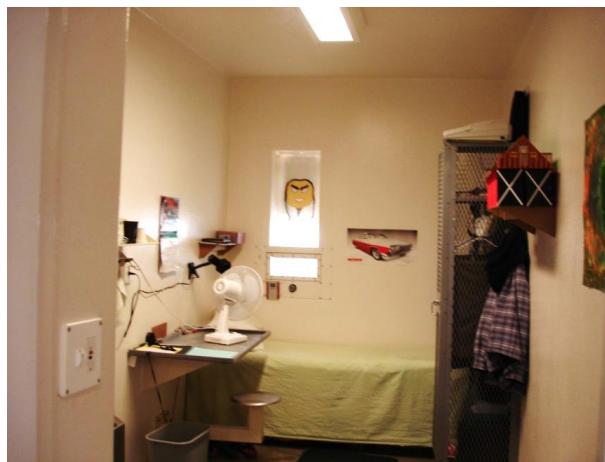
For most patients, a typical day at VCBR includes scheduled breakfast, lunch, and dinner, as well as designated times for distribution of medication. Each day, a resident may attend a general treatment group and a topic-specific treatment group. General treatment groups meet four days a week for 90 minutes each session. Topic-specific groups meet once a week for 60 minutes and

Figure 3: Example VCBR Living Unit and Resident Room

A: Living Unit



B: Resident Room



Source: VCBR staff photographs.

focus on areas such as substance abuse, anger management, and also include support groups for patients who have themselves been victims. Depending on their treatment plan, residents are also scheduled for educational classes and vocational training. Overall, a typical patient receives eight to ten hours of treatment and training each week, though patients can refuse treatment, and attendance and participation are optional.

The following case study below describes one SVP currently committed at VCBR.

Case Study

Mr. D, 41, completed his prison sentence in 2009 and was civilly committed to VCBR in June 2010. He has three violent sex convictions, including aggravated sexual battery. According to treatment staff at VCBR, since his teens Mr. D has sexually molested four children under the age of 12. He has been diagnosed with pedophilia and has a history of substance abuse, including alcohol-related blackouts. He is currently scheduled to attend a general therapy group four times per week, and topic-specific therapy groups once per week to address his chemical dependencies and learn basic treatment skills.

VIRGINIA'S CIVIL COMMITMENT PROGRAM HAS GROWN RAPIDLY, PRIMARILY DUE TO STATUTORY CHANGES IN 2006

Virginia's civil commitment program has grown rapidly. Though it grew at a high rate during its early years, the actual numbers of civil commitment were small compared to the numbers of civil commitment after statutory changes made in 2006. After 2006, the number of individuals both reviewed for, and placed under, civil commitment increased substantially. This growth, along with the commensurate increase in program costs, was the primary reason JLARC staff were directed to review the program.

Virginia Has Civilly Committed About Seven Percent of Those Convicted of SVP Predicate Crimes and Released From DOC

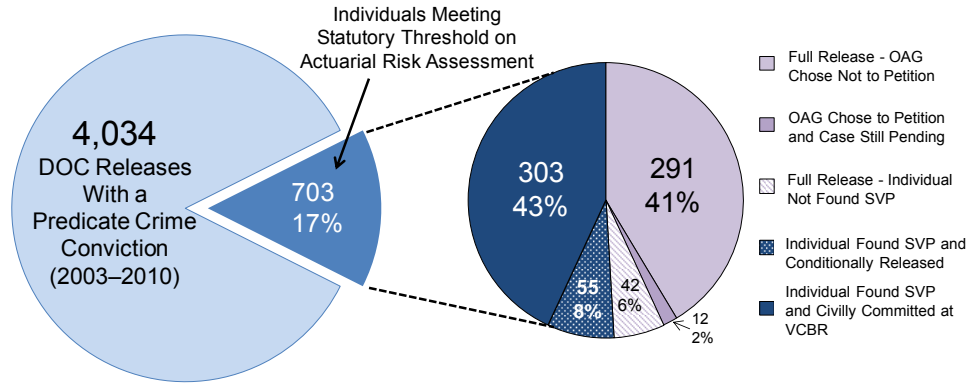
The rate of growth in the SVP program, which is described below, must be placed in the context of the total number of individuals that are eligible for civil commitment. As shown in Figure 4, Virginia has civilly committed about seven percent of those released from DOC that were convicted of an SVP predicate crime. Of the 4,034 individuals released from DOC who were convicted of an SVP predicate crime between 2003 and 2010, JLARC staff project that an estimated 303 will be placed under civil commitment upon completion of a civil trial. Another 55 have been placed on

JLARC Staff Used Prison Release Date As Base Year

Due to the length of the review and trial process, the final disposition for civil commitment cases is often determined in a different calendar year than when they entered the review process. To accurately calculate rates and outcomes, JLARC staff used an individual's prison release date as the base year from which to conduct analysis.

Appendix B includes more information about this, and other research methods.

Figure 4: Virginia Has Civilly Committed About Seven Percent of Individuals Convicted of an SVP Predicate Crime and Released From DOC (2003–2010)



Note: Number of civil commitments shown is JLARC staff estimate based on projection of civil commitments for those who have been assessed using the Static-99, but have not been transmitted to the Office of Attorney General.

Source: JLARC staff analysis of DBHDS, DOC, and OAG data, 2011.

conditional release (without being civilly committed to VCBR) during the same time period.

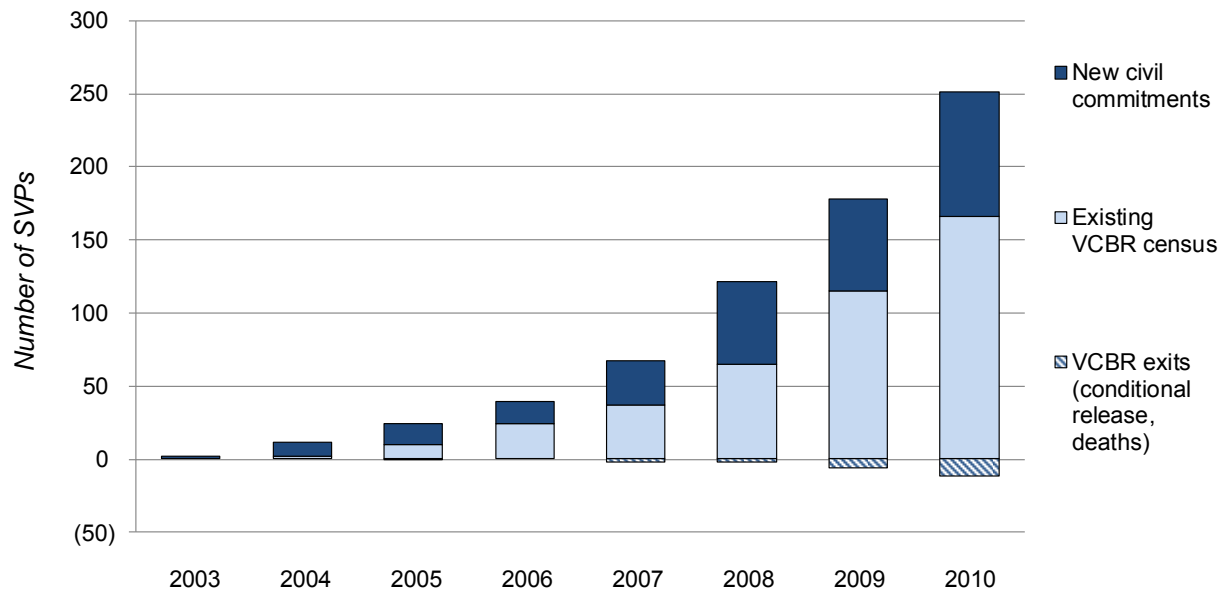
VCBR Census Has Grown Since 2003

The census at VCBR has increased along with the number of individuals placed under civil commitment each year (Figure 5). Between 2003 and 2006, there were 38 civil commitments, or an average of about ten per year. In contrast, from 2007 to 2010, there were 228 civil commitments, or an average of about 57 per year. The rate of growth between 2007 and 2010 was six times more than the rate of growth between 2003 and 2006, and has resulted in the VCBR census rising to near its intended capacity of 300.

... the number of new civil commitments is far greater than the number of releases from VCBR.

The VCBR census has also risen so dramatically because in any given year, the number of new civil commitments is far greater than the number of releases from VCBR. For example, in 2009 there were 63 new civil commitments to VCBR and only six exits either through conditional release or death. In that year, this was a ratio of more than ten civil commitments per exit from VCBR. In 2010, this ratio was about seven civil commitments per exit. This dynamic, which is to some extent inherent in civil commitment programs, has the effect of increasing the census of a civil commitment facility over time.

Figure 5: The Number of Civil Commitments and the VCBR Census Have Increased Substantially Since 2003



Source: JLARC staff analysis of DBHDS data, 2011.

Statutory Changes in 2006 Primarily Responsible for Accelerated SVP Program Growth

In 2005, the Virginia State Crime Commission released a study, *Sex Offenders in Virginia*. The study recommended amending the *Code of Virginia* to (1) add certain crimes that would qualify as an SVP predicate crime, (2) designate the Static-99 as the actuarial risk screening instrument for SVPs, and (3) using a score of “4” or higher on the instrument as the threshold for further assessment.

After the Crime Commission study was released, there were numerous bills introduced during the 2006 session to change the SVP program. Two changes the General Assembly made to the *Code* in 2006 are primarily responsible for the accelerated growth in the SVP program. The first was expanding the number of predicate crimes that qualify for civil commitment as an SVP (Table 1). Prior to 2006, four offenses qualified as an SVP predicate crime: rape, forcible sodomy, object sexual penetration, and aggravated sexual battery. Ten new offenses were added in 2006, including abduction with sexual intent and carnal knowledge of a child. Conspiracy or attempt to commit any of the pre-2006 offenses and those added in 2006 were also included as SVP predicate crimes, effectively doubling the number of predicate crimes specified in *Code*. These changes collectively resulted in a total of 28 SVP predicate crimes.

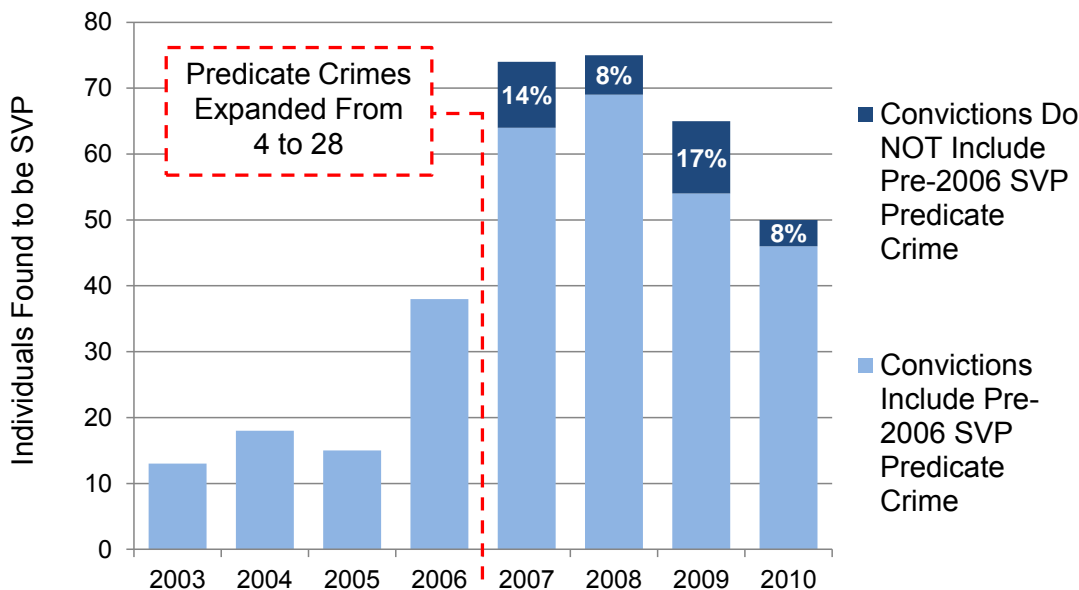
Expansion of SVP Predicate Crimes Led to a Moderate Increase In the Number of Individuals Found SVP. The expansion in the number of SVP predicate crimes led to a moderate increase in the number of individuals found to be SVPs (Figure 6). For example, in 2007, 14 percent of those found to be an SVP had been convicted of

Table 1: Number of SVP Predicate Crimes Expanded From Four to 28 in 2006

Pre-2006	Added in 2006	
<ul style="list-style-type: none"> Rape (§18.2-61) Forcible sodomy (§18.2-67.1) Object sexual penetration (§18.2-67.2) Aggravated sexual battery (§18.2-67.3) 	<ul style="list-style-type: none"> Rape, 1950 Code (§18-54) Rape, 1950 Code (§18.1-44) Capital murder with sexual assault (§18.2-31 (5)) Abduction with sexual intent (§18.2-48 (ii)) Abduction of a child under 16 with intent for concubinage or prostitution (§18.2-48 (iii)) Carnal knowledge of minor in care by caregiver (§18.2-64.1) Capital murder in commission of abduction with intent to defile (§18.2-31 (1)) 	<ul style="list-style-type: none"> Carnal knowledge of a child, 13 to 15 years old (§18.2-63) 1st or 2nd degree murder when present with intent to rape, forcible sodomy or inanimate or animate object sexual penetration (§18.2-32) Forcible sexual offense committed prior to July 1, 1981 that constitutes forcible sodomy, object sexual penetration, or aggravated assault Conspiracy or attempt to commit any of the pre-2006 offenses and those added in 2006

Source: Virginia Office of Sexually Violent Predators and §37.2-900 of the *Code of Virginia*.

Figure 6: Expansion of SVP Predicate Crimes in 2006 Resulted in a Moderate Increase in Offenders Found to be SVPs



Note: Because reliable information about an individual's predicate crimes is not available until they enter the DBHDS SVPTTracker system, JLARC staff analyzed the predicate crimes of those found to be SVPs rather than individuals at earlier points in the civil commitment process, such as those meeting the actuarial threshold.

Source: JLARC staff analysis of DBHDS SVPTTracker database.

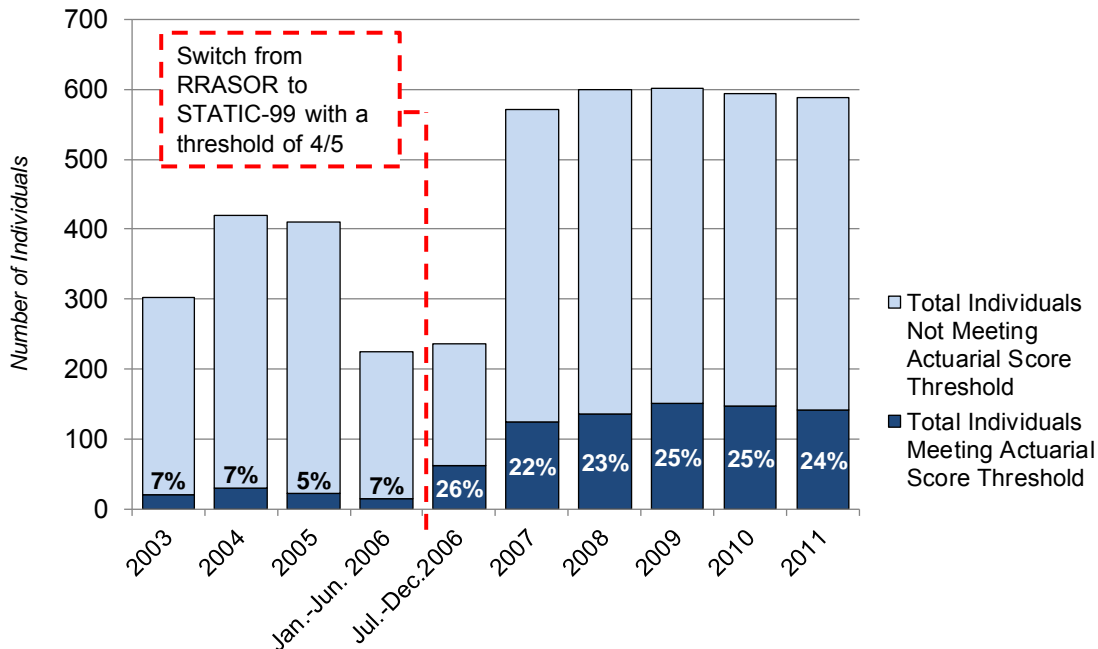
a predicate crime(s) added in 2006. In subsequent years, individuals convicted of a crime added in 2006 represented between eight and 17 percent of those found by the court to be SVPs. This relatively moderate increase does not, however, explain the large increase in those eligible for civil commitment starting in 2007.

The change to using the Static-99 ... resulted in a 450 percent increase in the number of individuals that met the actuarial threshold for further review.

Switch From RRASOR to Static-99 Increased the Number Eligible for Civil Commitment by 450 Percent. The bulk of the increase in the number of individuals found to be SVPs that began in 2007 can be explained by the second statutory change in 2006--the change from the previous actuarial risk assessment instrument, the RRASOR, to the Static-99. The rationale for the change in instruments was that the Static-99 was specifically designed to assess an offender's risk of committing future violent sex offenses. When this change was made, not only was the specific actuarial risk assessment instrument specified in *Code*, a threshold score of "5" out of a possible "12" (or "4" if the offense was against a child 13 or younger) was also specified in *Code*.

The change to using the Static-99 with a "5" (or "4") threshold score resulted in a 450 percent increase in the number of individuals that met the actuarial threshold for further review (Figure 7). From 2003 to 2006 when the RRASOR was used, between five percent and seven percent of offenders convicted of an SVP predicate

Figure 7: Switch From the RRASOR to the Static-99 With Threshold Score of 4/5 Resulted in Substantial Increase in Individuals Eligible for Civil Commitment



Source: JLARC staff analysis of DOC SOSA SVP database and DBHDS SVPTTracker database.

crime met the threshold for further review. However, in 2007 after the change to the Static-99 was made, between 22 percent and 26 percent of those released from DOC convicted of an SVP predicate crime met the actuarial threshold.

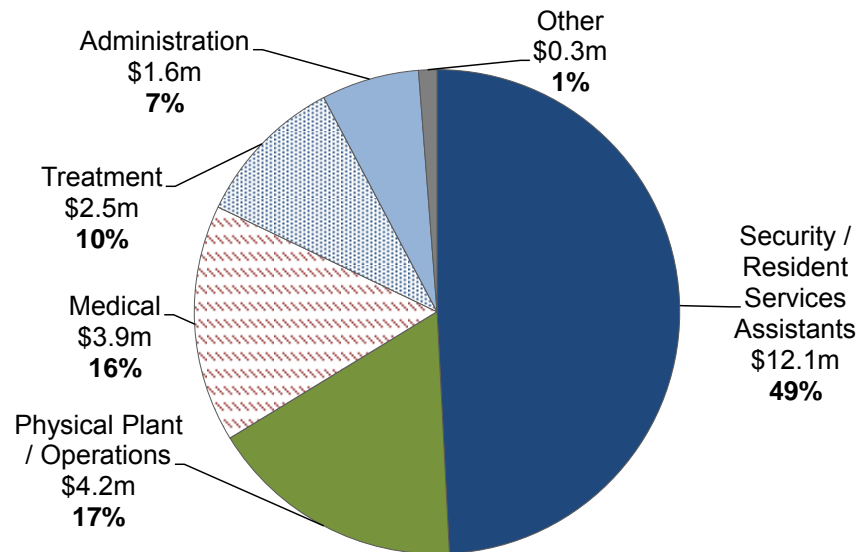
Growth in Civil Commitments to VCBR Has Increased Costs

Bills introduced in 2006 to change the civil commitment program were accompanied by a fiscal impact statement (FIS). The FIS projected that the proposed changes would increase the number of civil commitments in Virginia, and the operating and capital costs associated with housing and treating more SVPs. Collectively, the Crime Commission study, various bills introduced in 2006, and the FIS suggest that the objective of the statutory changes was to increase the number of offenders eligible for civil commitment. As shown in Figures 5, 6, and 7 above, the projected increase in SVPs and subsequent increase in costs has occurred.

The projected increase in the number of civil commitments shown has necessitated an increase in appropriations to the SVP program. VCBR received its first appropriation as a separate agency in FY 2005 when it was appropriated \$5.8 million. VCBR is scheduled to receive \$32.5 million in FY 2012, representing growth of nearly 460 percent. VCBR staff noted they moved about \$8 million of FY 2012 appropriations forward into FY 2011, which will result in about \$24 million in available funding for both FY 2011 and FY 2012. This shift forward of FY 2012 funds results in a lower growth rate through FY 2012 of 316 percent. According to VCBR, these appropriations are all general funds. These funds do not include the costs to construct VCBR, which cost approximately \$62 million to complete in 2008.

Most of VCBR's funding is spent on non-treatment-related activities and operations. In FY 2011, VCBR spent \$24.5 million, or about \$91,000 for each of the 269 patients at VCBR as of August 2011. About half of this spending was attributed to staffing for security and resident services assistant staffing (Figure 8). These staff have a wide range of duties, including ensuring order in the facility, helping patients with daily tasks, and conducting simple dispute resolution between patients. Ten percent of VCBR's spending was for treatment, including salaries and benefits for 38 professional treatment providers. More information about VCBR's costs and staffing is included in Chapter 8.

Figure 8: VCBR Spent \$24.5 Million in FY 2011



Source: JLARC staff analysis of VCBR expenditure data for FY 2011.

OSVP PROJECTS CONTINUED GROWTH IN SVP PROGRAM AND ADMINISTRATION HAS REQUESTED INCREASES IN CAPACITY

The *Code of Virginia* requires OSVP to make annual projections of the number of SVPs that will be at VCBR each year. Using these projections, OSVP estimates that the dynamic of (1) continually high numbers of civil commitments to VCBR and (2) relatively few releases from VCBR will result in the facility reaching its 300 patient capacity sometime in late 2011 or early 2012. OSVP projects there will be 684 SVPs at VCBR by 2016—more than twice the occupancy that VCBR was built to accommodate.

To address this anticipated capacity problem, the Governor authorized VCBR to use FY 2012 funds in FY 2011 to increase its operating budget. In addition, in December 2010, the Governor's proposed changes to the budget included several options to create additional capacity to accommodate the number of civil commitments expected in the future. These options included

- increasing staffing in FY 2012 to manage the increased number of patients at VCBR;
- requesting funds to re-open a temporary, 48-bed SVP facility in Petersburg in FY 2012 (this facility was the previous VCBR site and would have been used to house SVPs as VCBR reached its capacity); or

- requesting \$43.5 million in bond authority to build a second 300-bed facility to house SVPs on the site formerly occupied by the Brunswick Correctional Center.

The 2011 General Assembly did not authorize the re-opening of an additional facility in Petersburg and also did not grant the authority to build a second facility. The Governor did, however, amend the budget to provide an additional \$2.5 million to VCBR. In the spring of 2011, DBHDS began planning a variety of interim approaches to house the growing number of individuals under civil commitment. Chief among these is to retrofit the rooms at VCBR, currently designed for one person, to accommodate two people. Chapter 9 provides more information about double-bunking and VCBR's capacity in the future.

SVP Predicate Crimes and Sentence Lengths

In Summary

About 600 inmates released from the Department of Corrections each year have been convicted of one of the 28 crimes that have been identified as sexually violent predator (SVP) predicate crimes. Three of those 28 crimes, which are also among the four SVP predicate crimes prior to 2006, account for more than 75 percent of the convictions for an SVP predicate crime of those subsequently found to be an SVP. These three crimes are aggravated sexual battery, rape, and forcible sodomy. The length of time that these individuals serve in prison ranges from one year to more than 20 years. Several factors account for this variation, including the discretion that judges have when determining sentence length and the difficulty of effectively prosecuting violent sexual offenders. However, attempting to lengthen the sentences that these offenders serve—solely to reduce the rate at which individuals enter the civil commitment process—does not seem prudent.

The number of crimes identified as sexually violent predator (SVP) predicate crimes and the length of the sentences given to those convicted of such crimes are key factors in Virginia’s civil commitment process. A conviction for an SVP predicate crime determines *whether* someone is eligible for civil commitment. In addition, the length of time offenders serve impacts *when* they are eligible for civil commitment.

As noted in Chapter 1, the 2006 expansion of predicate crimes from four to 28 has resulted in a moderate increase in the number of offenders eligible for civil commitment as an SVP. Other factors, in particular the requirement to use the Static-99, have had a more substantial impact on the increase in those numbers. As a result of these and other factors, the Virginia Center for Behavioral Rehabilitation (VCBR) is expected to reach its capacity this year.

MAJORITY OF THE 600 OFFENDERS DOC RELEASES EACH YEAR THAT COMMITTED AN SVP PREDICATE CRIME WERE CONVICTED OF THE ORIGINAL FOUR SVP PREDICATE CRIMES

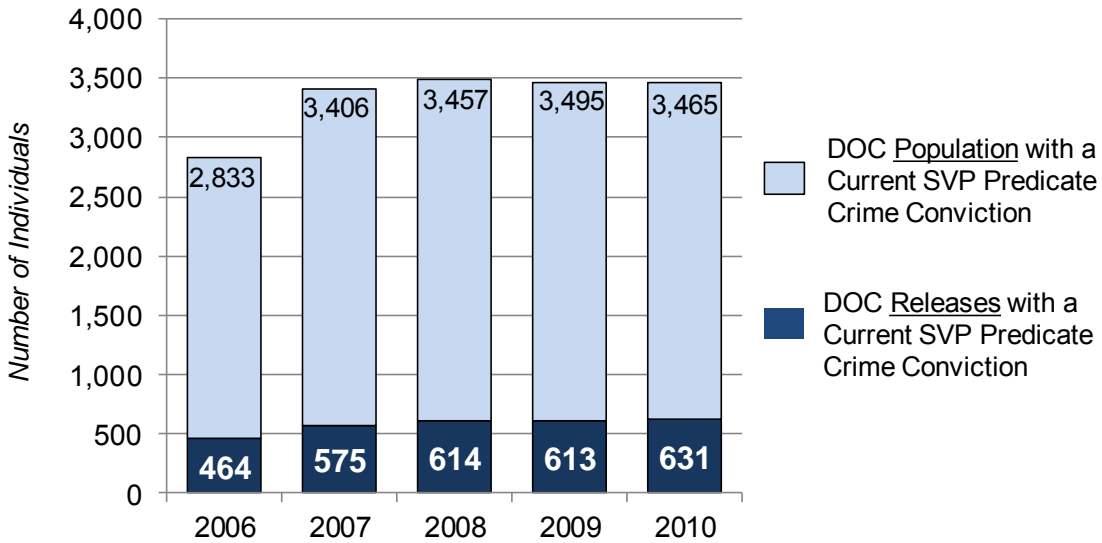
In 2010, more than 600 inmates convicted of SVP predicate crimes were released from the Department of Corrections. Though the list of SVP predicate crimes was expanded in 2006, the majority of those under civil commitment were convicted of one of the four crimes that were SVP predicate crimes prior to 2006. In fact, more than three-quarters of those under civil commitment were convict-

ed of three crimes that were SVP predicate crimes prior to 2006, aggravated sexual battery, rape, and forcible sodomy.

DOC Releases About 600 Inmates Each Year Convicted of an SVP Predicate Crime

In 2006, there were 2,833 individuals in Virginia prisons who had been convicted of an SVP predicate crime. Of these offenders, 464, or about 16.3 percent, were released from DOC and therefore potentially eligible for civil commitment (Figure 9). After the number of predicate crimes was expanded from four to 28, the number of individuals in DOC convicted of these crimes increased to 3,406. In 2007, DOC released 575, or 16.8 percent of these individuals. In the three subsequent years, the number of individuals in DOC each year convicted of an SVP predicate crime and the number released has remained relatively stable. Last year 631 inmates were released.

Figure 9: DOC Released 631 Offenders Convicted of an SVP Predicate Crime in 2010



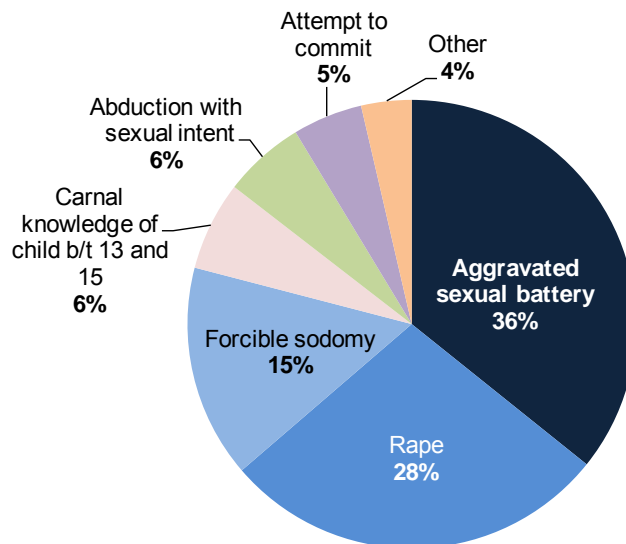
Note: The DOC confined population is recorded in fiscal years by DOC Research and Management Services, while releases shown were calculated in calendar years by JLARC staff. Those included in the figure are all inmates that were assessed with the Static-99 as well as women and juveniles with a sexually violent offense that are not assessed with the Static-99 during the review process.

Source: JLARC staff analysis of DOC data and DOC Research and Management Services.

Three of the Four Pre-2006 SVP Predicate Crimes Account for Majority of Convictions Among Those Civilly Committed

Most civilly committed SVPs were convicted of three crimes, each of which was a predicate crime prior to the list being expanded in 2006. Aggravated sexual battery was the crime for which the most

Figure 10: Aggravated Sexual Battery Accounts for More Than One-Third of Total Predicate Crime Convictions for Those Under Civil Commitment



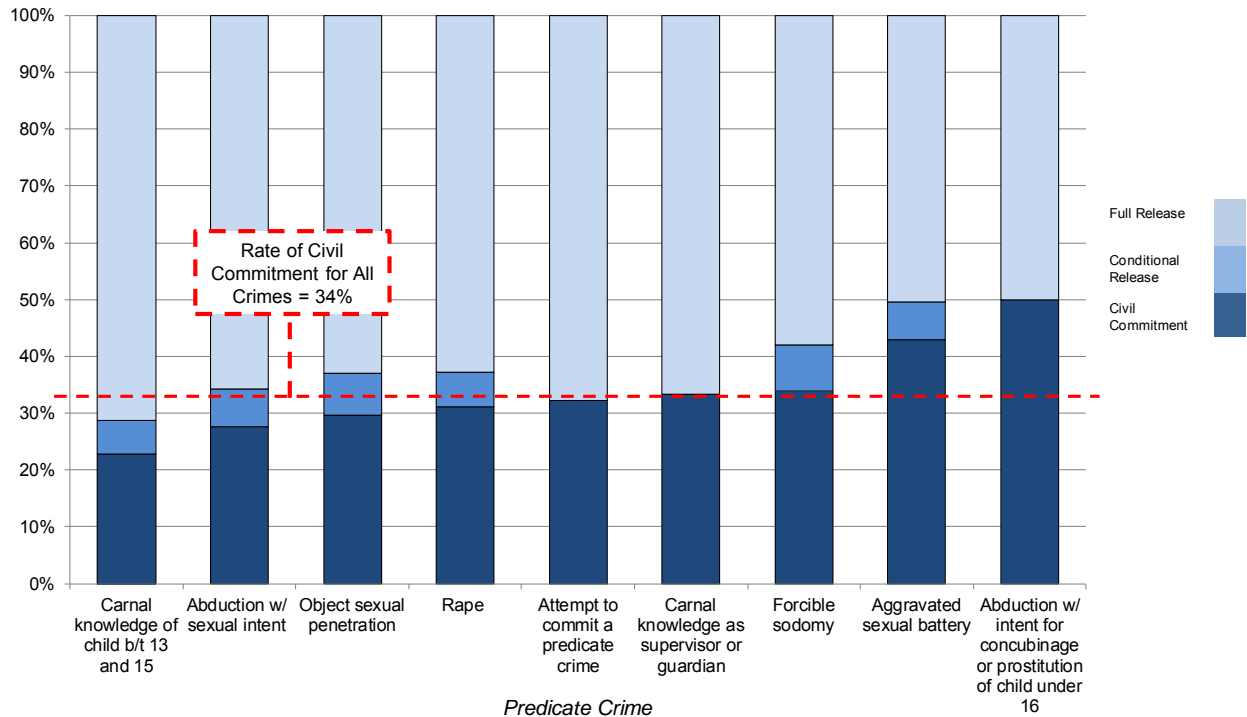
Source: JLARC staff analysis of DBHDS and DOC data, 2011.

SVPs under civil commitment were convicted, representing 36 percent of the total convictions (Figure 10). Rape and forcible sodomy were the next most common crimes for which SVPs under civil commitment were convicted, accounting for 28 and 15 percent, respectively. Together, these three crimes account for over 75 percent of the total convictions among the civilly committed population at VCBR.

Convictions for other SVP predicate crimes are much less common among the population at VCBR. For example, carnal knowledge and abduction with sexual intent each accounted for about six percent of the total convictions. Attempt or conspiracy to commit an SVP predicate crime represented about five percent of the total convictions of those civilly committed; however, none of the offenders with these convictions were civilly committed on this conviction alone. Those with convictions for attempt or conspiracy also had been convicted of other SVP predicate crimes.

Similarly, offenders who are convicted of certain SVP predicate crimes have a higher chance of being civilly committed as an SVP (Figure 11). For example, offenders convicted of aggravated sexual battery and abduction with intent for concubinage or prostitution

Figure 11: Those Convicted for Murder, Abduction, and Aggravated Sexual Battery Were Civilly Committed at the Highest Rate



Note: Civil commitment rates are calculated from the number of offenders meeting the actuarial risk assessment threshold score and may be underestimated as not all cases have moved through the trial process.

Source: JLARC staff analysis of DBHDS and DOC data, 2011.

of a child under 16 had the highest rates of eventual civil commitment, at 43 and 50 percent respectively. In contrast, offenders convicted of carnal knowledge of a child between 13 and 15 had the lowest rate of civil commitment at 23 percent. Only 19 offenders were civilly committed on this charge alone. As will be noted in Chapter 5, some of these cases involve consensual sex between, for example, an 18-year-old and a 15-year-old. Abduction with sexual intent and object sexual penetration were the next lowest rates.

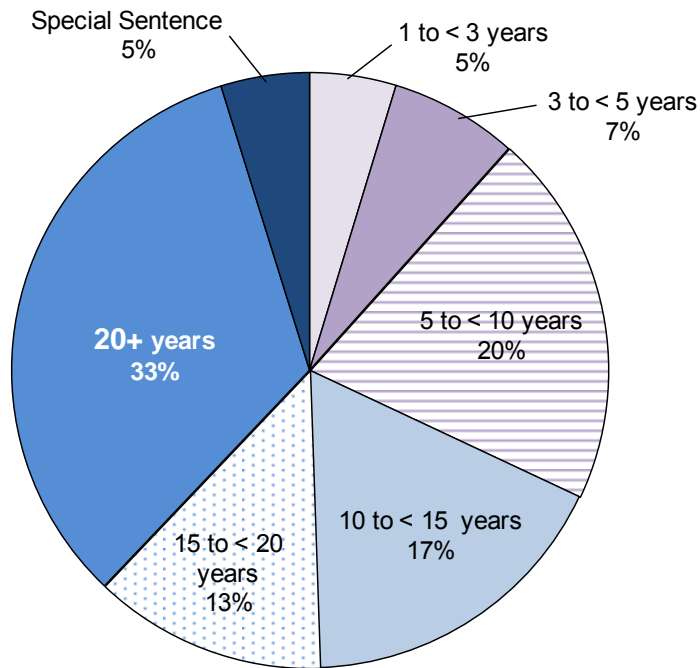
LENGTH OF SENTENCE FOR OFFENDERS CONVICTED OF SVP PREDICATE CRIMES VARIES WIDELY

The length of sentence an inmate serves determines when he will be potentially eligible for civil commitment as an SVP. In Virginia, judges sentence those convicted of SVP predicate crimes to a range of between one to more than 20 years in prison. This variation can be explained by several factors, including that judges have discretion in how to use the sentencing guidelines to determine how much time a convicted offender should serve and that cases can be difficult to prosecute.

Judges Sentence Offenders Convicted of SVP Predicate Crimes to From One to More Than 20 Years

There is wide variation in the sentence length for offenders convicted of an SVP predicate crime who were confined in Virginia prisons in 2010 (Figure 12). Approximately 12 percent of offenders are serving a sentence of five years or less. One-third of this population is serving sentences of 20 or more years, and another 30 percent were given 10 to 20 year sentences. The variation is the result of numerous factors including the court, nature of the offense, witness and victim testimony, and plea deals.

Figure 12: Offenders Convicted of SVP Predicate Crimes Serve a Wide Range of Sentences



Note: "Special Sentence" includes offenders serving single life, multiple life, death, or three time loser sentences.

Source: JLARC staff summary of 2010 DOC data.

Judges Have Discretion to Use Sentencing Guidelines Within Statutory Penalty Range to Decide Sentence Length

Virginia judges determine the sentence length for offenders convicted of an SVP predicate crime. Those sentences, however, must be within the statutory penalty ranges stipulated in the *Code of Virginia*. Judges also consult sentencing guidelines developed by the Virginia Criminal Sentencing Commission that recommend more precise sentencing ranges within the statutory range.

The statutory penalty ranges categorize crimes into six classes of felonies and five classes of misdemeanors. A penalty range, written in statute, is associated with each category and class. SVP predicate crimes are nearly all classified as felonies (one type of carnal knowledge is a misdemeanor). However, SVP predicate crimes often fall into a “special” class of felony. Offenses that fall into a “special” class tend to have statutory penalty ranges that encompass a wider range of years than typical felony and misdemeanor ranges. These wider statutory ranges allow courts more flexibility in sentencing SVPs depending on factors unique to the case (such factors are discussed later in this chapter).

Three SVP predicate crimes have mandatory minimum sentences in statute, all of which are crimes against a victim under 13 years of age that include kidnapping, burglary, or wounding. When mandatory minimums are required by law, a judge is prevented from suspending time that makes an effective sentence less than the minimum. For these crimes, the minimum sentences are one strategy to address the variation in sentences for certain convictions.

Sex Offender Risk Assessment

The Virginia Criminal Sentencing Commission tracked 579 felony sex offenders who were released from incarceration in Virginia from 1990 to 1993. Using the findings, the VCSC developed a risk instrument specific to Virginia that takes into account nine factors about each offender.

The sentencing guidelines include an additional risk assessment instrument for sex offenders. Scoring for the instrument places sex offenders into four relative categories of risk. These include a category for offenders that present no additional level of risk beyond that of a typical sex offender and three additional categories of high-risk sex offenders. The risk instrument is combined with the recommended sentence from the guidelines worksheet to calculate a recommended sentence range specifically for high-risk sex offenders. The risk instrument affects the guidelines recommendations by increasing the maximum sentence of the recommended range by 50, 100, or 300 percent, respectively, for the three levels of high risk.

The guidelines are specific to 16 offense categories, two of which are “rape” and “other sexual assault.” A sentence guideline range is calculated by completing a guideline worksheet that assigns points for multiple factors related to the crime and the offender’s criminal history. The score produced by the worksheet is associated with a recommended effective sentence that includes a low-end, mid-point, and high-end sentence length recommendation. Completing the guidelines worksheets is mandatory; however, the recommended effective sentence range is voluntary, and judges may choose to sentence outside the guidelines as long as a reason for the deviation is cited.

Appendix C provides more information about the SVP predicate crime ranges, sentencing guidelines, and sentence lengths.

Judges May Sentence Offenders Convicted of an SVP Predicate Crime to Less Than What Sentencing Guidelines Recommend

Imposed Sentence and Effective Sentence Length

The imposed sentence is the sentence awarded by the court at trial, while the effective sentence is the actual time of incarceration an offender is ordered to serve. The effective sentence may be different from the imposed sentence length because the court has the option to suspend time from the imposed sentence; thus, the imposed sentence minus any such suspended time results in the effective sentence.

According to the Virginia Criminal Sentencing Commission, sex offenses are among the most difficult crimes to prosecute. Sex offenses may have victims who are too young or unwilling to testify. In addition, the accused individual may be a family member or someone with a close relationship to the victim, making the victim more reluctant to testify. Furthermore, because most sex offenses take place out of sight from others and/or in an isolated setting, it is less likely that there will be witnesses other than the victim.

The eventual conviction and resulting sentence length may reflect the strength of the prosecution's case, rather than the seriousness of the allegations. A case weakened by the factors cited above may result in a conviction on a lesser charge and shorter sentence. More often however, a lesser charge or sentence is the result of a plea deal. A Commonwealth's Attorney may accept a plea deal with a lesser charge and shorter sentence when it appears that a case is weak and will be difficult to win at trial. Prosecuting attorneys often accept a plea deal rather than risk an offender being fully exonerated if the prosecution does not prevail at trial.

TRUTH-IN-SENTENCING HAS INCREASED THE PERCENTAGE OF SENTENCE SERVED

While offenders convicted of SVP predicate crimes receive sentences that vary widely, these offenders now serve the majority of the sentence they received. This is largely because in 1995, Virginia abolished parole and implemented Truth-in-Sentencing. Under Truth-in-Sentencing, sentences given reflect actual time to be served minus no more than 15 percent for earned sentence credit. As shown in Table 2, offenders released from DOC with a parole-eligible sentence served, on average, only two-thirds of their total awarded sentence. In contrast, those sentenced after 1995 under Truth-in-Sentencing are serving nearly 90 percent of their sentence. However, this does not necessarily mean that parole eligible offenders served shorter sentences on average, as many were awarded longer sentences at trial to compensate for an early release due to parole eligibility.

Table 2: Offenders Released From DOC For an SVP Predicate Crime in Recent Years Serve 87 Percent of Their Sentence Under Truth-in Sentencing

	FY 2008	FY 2009	FY 2010
Truth-in-Sentencing	87%	87%	87%
Parole Eligible (Pre-1995)	66%	67%	69%

Source: DOC Research and Management Services, 2011.

Virginia does not appear to be experiencing a temporary increase in the number of offenders eligible for civil commitment because of a disproportionate number of offenders being released on parole. DOC data indicates that offenders being released under the pre-Truth-in-Sentencing rules now comprise an increasingly lower percentage of the total releases (Table 3). For example, 22 percent of the total inmates released from DOC in 2010 who had been convicted of an SVP predicate crime were parole eligible. The remaining 78 percent were sentenced under Truth-in-Sentencing, and therefore served at least 85 percent of their sentence. Currently, only 14 percent of the remaining DOC population serving time for an SVP predicate crime were sentenced under the parole system. Moving forward, the percentage of offenders released who were sentenced under the parole system will continue to decline as new offenders are sentenced.

Table 3: Parole-Eligible Offenders Comprise an Increasingly Small Percentage of DOC Population

	FY 2008	FY 2009	FY 2010	Remaining DOC Population Convicted of SVP Predicate Crime
Truth-in-Sentencing	74%	76%	78%	86%
Parole Eligible (Pre-1995)	26%	24%	22%	14%

Source: DOC Research and Management Services, 2011.

ATTEMPTING TO INCREASE SENTENCE LENGTH SOLELY TO ADDRESS CAPACITY PROBLEMS AT VCBR DOES NOT SEEM PRUDENT

Interest has been expressed in lengthening statutory sentence lengths, increasing sentence lengths in sentencing guidelines, or imposing mandatory minimum sentences for SVP predicate crimes with the goal of slowing the rate of SVP risk assessments and civil commitments. The rationale for this position is that offenders serving longer sentences in prison will not become eligible for the civil commitment process as quickly.

Longer sentences and/or mandatory minimum sentences for predicate crimes would provide some benefits specifically for the SVP civil commitment process. These include

- easing the rate of civil commitment in the near term since offenders serving longer sentences will not enter the risk assessment process until a point further in the future; and
- keeping offenders in prison, on average, to a more advanced age, thus potentially allowing some offenders to “age out” or become too old to present a high risk. Additionally, offenders entering VCBR at a later age that remain high risk and/or do not progress in treatment will be at VCBR for fewer years.

Offenders Accept a Guilty Plea With Two Common Types of Plea Bargaining

Sex offense cases often are settled with a “sentence bargain” or “charge bargain” in lieu of a full trial being conducted. A “sentence-bargain” is when an offender accepts a guilty plea on the current charges in exchange for a shorter sentence. This is impossible, however, when a mandatory minimum is in place. Under a “charge bargain,” an offender accepts a guilty plea for a specific, often lesser, charge, most likely a charge that is not an SVP predicate crime.

However, the number of civil commitments is relatively small compared to the number of individuals prosecuted for violent sexual offenses each year. In addition, attempting to increase sentence lengths could result in unintended consequences that could make it more difficult for Commonwealth’s Attorneys to prosecute sexually violent crimes. For example, more individuals may attempt to “charge bargain” (see sidebar) away from SVP predicate crimes in an attempt to avoid longer sentences associated with those crimes. Consequently, it does not seem prudent to alleviate the capacity problem at VCBR by attempting to increase sentence length.

Virginia's Actuarial Risk Assessment Approach Is Flawed

In Summary

The *Code of Virginia* requires use of the Static-99 actuarial risk assessment instrument in the civil commitment process. The *Code* also specifies that individuals scoring at or above a “5” (or “4” in certain cases) should be further reviewed, while those below those scores should be released after serving their prison sentence. Since 2006 when Virginia began using the Static-99, about three-quarters of the offenders assessed have scored below this threshold. The other one-quarter scored above the threshold and were further reviewed; 40 percent of these offenders were civilly committed. While actuarial risk assessments have value, they can substantially over- or underestimate the potential that a given individual may reoffend if released and are not intended to precisely predict an individual’s actual risk of future reoffense. Virginia is the only state that designates a specific actuarial risk assessment instrument and score in statute. This citation of a specific instrument and score in statute results in two substantial flaws. The first is that the threshold score of “5” in statute limits the ability of qualified individuals to use their professional discretion to decide which offenders should be further evaluated, including some offenders who are likely sexually violent predators. The second flaw is that citing a specific instrument and score in statute makes it likely that the State uses an out-of-date instrument as actuarial science for violent sex offenders continues to evolve. To address these flaws, the *Code of Virginia* should be amended to remove references to the Static-99 and score of “5.”

As outlined in Chapter 1, Virginia uses a three-step process to assess the future risk of individuals who were convicted of a sexually violent predator (SVP) predicate crime. The first step of the risk assessment process is to use an actuarial risk assessment instrument to assign a risk score to each offender being released from the Department of Corrections (DOC) who is serving time for an SVP predicate crime.

Actuarial risk assessment instruments (ARAI) are derived from risk factors that have been empirically shown to be associated with violent sexual recidivism. ARAIs are developed using statistical analysis of samples of individuals with known outcomes (either did, or did not, reoffend) during a follow-up period. These analyses isolate which characteristics seem to differentiate those who reoffend from those who do not. Rather than being descriptive or diagnostic in nature, ARAIs are designed to predict future behavior. ARAIs have gained prominence because of several advantages when compared to other risk assessment methods, including

- efficiency, as most ARAIs take less than an hour to complete;

- simplicity, because they can be completed with relatively little training; and
- relative accuracy, because risk scores are based on empirically established relationships between data and the probability of reoffense, rather than human judgment.

VIRGINIA USES THE STATIC-99 TO DETERMINE WHETHER TO PROCEED IN THE RISK ASSESSMENT PROCESS

Virginia uses the Static-99, which along with its revised version the Static-99R, is the type of ARAI used most widely by psychologists, treatment providers, and correctional practitioners. The Static-99 family of assessment instruments also has the most published research supporting its use and is noted for its relative accuracy predicting risk for violent sex offenders. The instrument's most current recidivism estimates are based on samples of thousands of sex offenders from several countries. Appendix D provides more information about the Static-99.

Offenders that score a "5" or higher (or a "4" when the victim is under 13 years old) are eligible for further review by an SVP evaluator and the Commitment Review Committee (CRC). Offenders who score below this threshold are released from DOC at the end of their prison sentence. Consequently, the process, instrument, and threshold score that Virginia uses are critical factors in determining whether or not an inmate moves forward in the civil commitment process.

DOC Completes the Static-99 by Reviewing the Files of All Violent Sex Offenders Being Released From DOC

The DOC Sex Offender Screening and Assessment (SOSA) unit is responsible for completing the Static-99 by conducting a file review of all sex offenders convicted of an SVP predicate crime who are being released from prison. The unit consists of two staff psychologists, two administrative assistants, and one supervising psychologist. Administrative assistants help the psychologists gather the necessary files and information to complete the assessment and the psychologists do the initial scoring of the instrument. No in-person interview of the offender is conducted. A second SOSA employee will re-score the Static-99 (independent of the first scoring) when an offender scores above the threshold or when an offender's file or scoring could be subject to interpretation. If the second score differs from the first, the supervising psychologist reviews the findings and makes a final scoring decision. These re-scoring practices are consistent with guidance provided by the developers of the Static-99. SOSA employees also receive the training to use the Static-99 that is recommended by the developers of the instrument.

One-Quarter of Those Assessed Using the Static-99 Have Met Key Threshold; 40 Percent of Them Are Found to Be an SVP

Whether an offender scores at or above, or below the Static-99 threshold determines whether he continues further in Virginia’s risk assessment process, or is released at the end of his prison sentence. Since 2006 when Virginia began using the Static-99, about three quarters of those assessed have scored below the threshold of 4/5. The remaining 24 percent were subsequently reviewed by an SVP evaluator and the CRC. Of these offenders, 40 percent were ultimately found to be an SVP by the court (Table 4).

A critical factor, therefore, that determines whether an offender will be found an SVP is whether or not he meets the threshold score on the Static-99. Offenders scoring below the threshold cannot be further reviewed, and therefore have no chance of being found an SVP. In contrast, those scoring above the threshold are reviewed further and ultimately have an approximately 40 percent chance of being found to be an SVP.

In general, offenders receiving higher Static-99 scores are ultimately found to be an SVP at a higher rate. For example, those scoring an “8” on the Static-99 are approximately twice as likely to be found an SVP as those scoring a “4.” While a higher Static-99 score is somewhat associated with a higher chance of being found to be an SVP, simply meeting or not meeting the threshold is a stronger indicator of an offender’s outcome in the review process.

Table 4: About One-Quarter of Offenders Assessed With Static-99 Scored Above the Threshold; 40 Percent of Those Offenders Were Determined to Be SVPs

	Static-99 Score (2006-mid 2011)												Total
	0	1	2	3	4	4 ^a	5	6	7	8	9	10	
Number Receiving Score	311	496	635	622	333	80	285	207	115	40	15	1	3,140
Percentage of Total			76%						24%				
Chance of Being Found SVP ^b			0%						40%				

Note: Assessments were done for sexually violent offenders being released from DOC after July 1, 2006, and include partial year data for 2011.

^a These offenders met the threshold because their victims were under the age of 13.

^b Includes offenders who are placed on conditional release or civilly committed.

Source: JLARC staff analysis of SOSA and SVPTracker databases.

ACTUARIAL RISK ASSESSMENT INSTRUMENTS HAVE SOME PREDICTIVE VALUE, BUT CANNOT PRECISELY PREDICT AN OFFENDER'S ACTUAL RISK OF FUTURE REOFFENSE

Although ARAIs offer certain benefits when compared to other types of risk assessment, they have limited predictive ability for a single person. Researchers emphasize that accurate predictions for a large group as a whole do not necessarily translate into accurate predictions for a specific individual within that group. This is largely the result of the distinction between group averages and individual characteristics, which are briefly described in this section and in more detail in Appendix E.

Actuarial Risk Assessment Instruments Are as Accurate, Or More Accurate, Than Other Risk Assessment Approaches

The most current ARAIs typically are as accurate, or more accurate than, other methods of sex offender risk assessment. The two primary methods of risk assessment for sex offenders, other than ARAIs, include general clinical evaluations and structured clinical evaluations (see sidebar). These other approaches typically have lower predictive accuracy than ARAIs in most cases, and predictive accuracy equal to ARAIs in certain settings.

Research has demonstrated the superiority of actuarial methods over general clinical evaluations. Practitioners using general clinical evaluation have been shown to be no more accurate than chance when predicting future sexual violence. One study noted that “there is no reason to believe ... that clinical judgments are systematically better than even the weakest of the actuarial assessment scales.”

The accuracy of structured clinical evaluations however, which is the type of evaluation conducted by SVP evaluators in Virginia, has been shown to be similar to that of actuarial assessments. Studies find comparable results between ARAIs and structured clinical evaluation, but only when the clinicians conducting the structured evaluations are highly experienced and qualified.

Actuarial Risk Assessments Have a Low Degree of Confidence When Predicting Whether a Given Individual Will Reoffend

ARAIs separate offenders into groups of similar score categories or risk levels. The risk estimate corresponding to each score is empirically based because it is calculated from the proportion of people with a certain score from a sample of sex offenders who reoffended during a follow-up period. Often, however, the group recidivism estimate for any given score does not accurately predict the future behavior of a single offender.

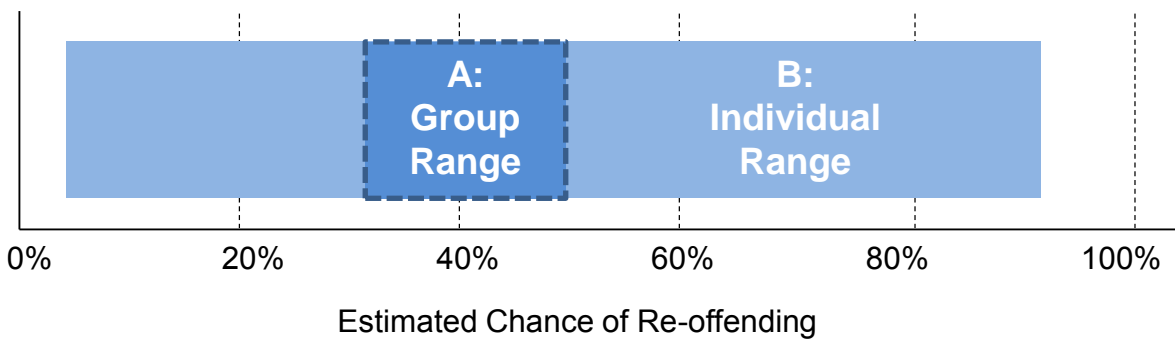
Difference Between General and Structured Clinical Evaluations

General clinical evaluations include an interview with, and behavioral history of, the individual to gather information. To assess the individual's risk of re-offending, the evaluator considers the information using his or her professional judgment.

Structured clinical evaluations also include an interview and a review of the individual's behavioral history. However, the evaluator considers the information guided by empirical data on likely risk factors for sex offenders. In addition, evaluators can consider any unusual or case-specific factors that are deemed relevant. To assess the individual's risk of re-offending, the evaluator uses his or her professional judgment using the standardized data as a guide.

While the Static-99 is moderately predictive for a group of violent sex offenders, it can be far less predictive of a given individual's risk of reoffending (Figure 13). In one study, researchers estimated the group and individual reoffense rates based on observed reoffense rates. For the group of sexually violent offenders, the study found that 31 percent to 50 percent of those scoring a "5" on the

Figure 13: STATIC-99 Is Moderately Predictive for a Group of Violent Sex Offenders, Yet Far Less Predictive for a Given Individual



Note: Group and individual ranges shown are for a score of "5." Average and ranges for all STATIC-99 scores are shown in Appendix E.

Source: Steven D. Hart, Christine Michie, and David J. Cook, "Precision of Actuarial Risk Assessment Instruments" *British Journal of Psychology*, 2007.

Static-99 are likely to reoffend. However, for a given individual scoring a "5," the risk of reoffense is distributed across a wide range above and below the group range. Researchers found that an individual who scores a "5" may have a risk of reoffense as low as four percent or as high as 92 percent. This very wide range for a given individual illustrates the limitations of the Static-99 as a tool to predict whether a given offender will reoffend.

The loss of predictive accuracy when comparing a group to an individual is not unique to the Static-99. For example, an actuarial table may indicate that male life expectancy is 76 years. In a given period of time, the average lifespan observed for a large group of men will remain close to this number. However, there will be males who die at age 40 and those who die at age 97. For these individuals, the predicted life expectancy is highly inaccurate.

Individuals With Different Actuarial Risk Scores May Have Negligible Difference in Risk Level

A second limitation that is inherent with ARAIs is the similar risk estimate ranges between individuals that receive different scores. Given the lack of precision of ARAIs in predicting the risk of reoffense, the usefulness of trying to distinguish between individuals based on different instrument scores is limited. For example,

with the risk of reoffense ranging from four to 92 percent based on a score of “5” and the risk of reoffense ranging from three to 91 percent for a score of “4,” the difference in risk of reoffense between individuals with the two scores is negligible.

This negligible difference in the range of individual risk estimates makes it very difficult to conclude with any degree of certainty that someone who scores a “5” is more risky than someone who scores a “4.” Alternatively, it is also very difficult to conclude that someone who scores a “5” is less risky than someone who scores a “6.” Appendix E provides more detail about the implications of group and individual risk estimates.

SPECIFYING ACTUARIAL INSTRUMENT AND SCORE IN STATUTE HAS CONTRIBUTED TO RELEASE OF DANGEROUS OFFENDERS AND THE ASSESSMENT AND COMMITMENT OF POTENTIALLY LOWER RISK OFFENDERS

The citation of a specific instrument and score in statute results in two substantial flaws. The first is that the ARAI threshold score in statute limits the ability of qualified individuals to use their professional judgment to decide which offenders should be further evaluated, including some who are likely sexually violent predators. The second flaw is that citing a specific ARAI and score in statute contributes to the State’s continued use of an out-of-date instrument as actuarial science for violent sex offenders evolves. Virginia is also the only state that designates a specific actuarial risk assessment instrument and score in statute to screen which sex offenders will be further reviewed for possible civil commitment.

Risk Assessment Process Limits Ability to Further Assess High-Risk Violent Sex Offenders for Possible Civil Commitment

Virginia’s ARAI threshold stipulated in statute does not give the professionals involved in the civil commitment process the flexibility to decide which offenders receive further evaluation. The limited predictive accuracy of ARAI scores, combined with this lack of discretion, creates scenarios in which Virginia cannot further review some potentially high-risk offenders who score below the threshold; yet uses resources to evaluate low-risk offenders who score above the ARAI threshold. One expert interviewed by JLARC staff explained that when using a rigid threshold to decide whether an offender should advance in the civil commitment process that “broadly speaking, you may be wrong one in four times.”

In interviews with JLARC staff, DOC, DBHDS, and the Office of the Attorney General (OAG) staff each stressed two weaknesses associated with Virginia’s statutory threshold score. The first weakness is that the State is forced to spend time and money fur-

Virginia cannot further review some potentially high-risk offenders that score below the threshold ...

ther assessing offenders that may receive high scores on the Static-99, when other factors point to the offender being low risk. They cited examples of individuals that score relatively high on the Static-99 for offenses they committed 30 years ago, but who are so medically compromised that it is highly unlikely they would reoffend (Table 5). The second weakness is that the OAG cannot petition the court to civilly commit a small number of offenders that may score below the Static-99 threshold, yet for whom other evidence suggests they warrant further review. They cited examples of offenders that in prison routinely make threats to commit additional violent, sexual crimes when released.

Table 5: Statutory Threshold for Actuarial Risk Assessment Instrument Is Problematic in Certain Cases

Example Offender With <i>High</i> Score Who Is Likely a <i>Low</i> Risk	Example Offender With <i>Low</i> Score Who Is Likely a <i>High</i> Risk
<ul style="list-style-type: none"> • Medically compromised such that he would be physically unable to reoffend • Advanced age such that he would likely be unable to reoffend • Antisocial personality with a pattern of general criminality, but may not be a sexual predator • Young adult convicted of carnal knowledge for a consensual relationship with a younger female 	<ul style="list-style-type: none"> • States intent to re-commit violent sex crimes when released ^a • Has committed numerous offenses but has only one conviction or sentencing date • Displays dynamic factors such as alcoholism, drug dependency, or a mental condition that can increase future risk • Displays idiosyncratic or other risk factors ^a

^a These factors may surface in an interview or in offender’s behavioral history but are not captured by an ARAI.

Source: JLARC staff analysis of literature and interviews with ARAI experts and DOC, DBHDS, and OAG staff.

Despite the limitations of ARAIs, they still play a valuable role in screening out certain offenders that represent a relatively lower level of risk. In fact, eliminating the use of an ARAI as a screening tool would increase the number of full risk assessments, including SVP evaluations, by 400 percent. This is neither feasible nor cost effective. However, the ARAI screening process may function best with an identified risk score serving as a guideline threshold, but with an override option to further review those under the threshold or exclude those over the threshold in certain cases. This concept is further addressed in Chapter 4.

The two case studies demonstrate the problem with a statutory requirement that a specific instrument and threshold rigidly govern which violent sex offenders can be further reviewed. The offenders highlighted in the two case studies below would seem to be the types of offenders who should at least be further reviewed for potential civil commitment as sexually violent predators. However, in both cases, it was concluded that the offenders could not be further reviewed and their release would be required under Virginia law—despite clear evidence they represented a danger.

Case Study #1

Offender A was in a Virginia prison for committing an SVP predicate crime against a victim under 13 years old. While in prison, Offender A admitted to a DOC counselor that he was still attracted to children and was concerned that if released, he would not be able to control his compulsion to have sex with children. The DOC counselor informed the DOC SOSA unit of Offender A's compulsion and stated intent to reoffend if released from prison. When assessed by the DOC SOSA unit prior to his release, Offender A scored a "3" on the Static-99 because the instrument does not capture stated intent to reoffend. Because Offender A scored below the statutory threshold of "5", he could not be reviewed further for possible civil commitment and was released at the end of his prison sentence.

Case Study #2

Offender B, known in local press as the "Charlottesville Rapist," is in a Virginia prison for committing rape and forcible sodomy, both SVP predicate crimes. During a 10 year period, Offender B committed violent sexual assaults and rapes against female college students before being caught and convicted. Offender B was convicted and sentenced for these crimes during a single court proceeding, which under the Static-99 coding rules would only be counted once. Offender B was sentenced to four life sentences and is unlikely to be released from prison. However, if he were released, he would not be eligible for further review as a sexually violent predator because DOC SOSA estimates that the "Charlottesville Rapist" would score less than a "5" on the Static-99.

It is unclear exactly how many of these high-risk offenders are released in a given year. However, as noted above, interviews with DOC, DBHDS, and OAG suggest it is a relatively small number compared to the total number of offenders that score below a "5" on the Static-99 each year. One agency official estimated there could be three to five such offenders in a given year. Though there are relatively few of these offenders each year, there is a high risk that they are inflicting substantial harm—especially to children—after release. Preventing this harm would seem to be the intent of the SVP program, yet these offenders are not eligible for commitment and are released at the end of their prison sentence.

Preventing this harm would seem to be the intent of the SVP program ...

More Recent Versions of Static-99 Suggest That Original Static-99 Overestimates Risk of Future Reoffense

Since Virginia adopted the original Static-99 and the threshold score of “5” in 2006, its developers have updated it with more recent risk estimates, and also released a newer version called the Static-99R. The developers have determined there is less risk of reoffense with each score on the Static-99 that was believed when Virginia adopted the instrument in 2006 (Table 6). For example, an offender assessed using the updated Static-99 would have to score a “7” or “8” to have a level of projected risk of reoffense comparable to scoring a “5” on the original Static-99. Alternatively, the estimated risk of an offender scoring a “5” dropped from a 32 percent chance of reoffending to 17 percent using the updated Static-99. When interviewed by JLARC staff, one developer of the Static-99 characterized the higher risk associated with the original Static-99 scores as “a fluke in the data.”

Table 6: Compared to the Updated Static-99 and Static-99R, the Static-99 Overestimated Risk of Reoffense

	Risk of Reoffense (%) After Five Years, by Instrument Score										
	0	1	2	3	4	5	6	7	8	9	10
Original Static-99	5%	6%	9%	12%	26%	32%	39%				
Updated Static-99	4	5	7	10	13	17	22	28	35	43	51
Static-99R	3	4	5	7	9	11	15	19	24	30	

Note: Risk estimates shown for the Static-99R are for the routine sample. Risk estimates may differ for the instrument depending on the base rate assigned to an offender.

Source: JLARC staff analysis of "Static-99 Coding Rules," "Static-99R Evaluators Workbook," and "Reporting Static-99 in Light of New Research on Recidivism Norms," Hanson, Helmus, and Thornton.

The Static-99R, released after the updated Static-99, further lowered the risk associated with a given score. For example, an offender assessed using the Static-99R would potentially need to score as high as a “9” to have a level of projected risk comparable to the current Static-99 score of “5” in statute (depending on the type of risk and specific population considered). The Static-99R included several changes, the most important of which reduced the risk score for offenders past certain ages. In addition, the Static-99R also introduced base rates. Base rates are different sets of risk estimates calculated from the reoffense data of subsets of the sex offender population. Appendix E provides further information on Static-99R base rates.

When interviewed by JLARC staff, Dr. Karl Hanson (one of the developers of the Static-99) strongly recommended now using the Static-99R rather than the original Static-99. Dr. Hanson noted that “it would be hard to find a credible expert arguing for Static-99 rather than the Static-99R.” However, in various discussions with DBHDS and DOC staff, and at professional conferences, the

Assumptions for JLARC Staff Analysis

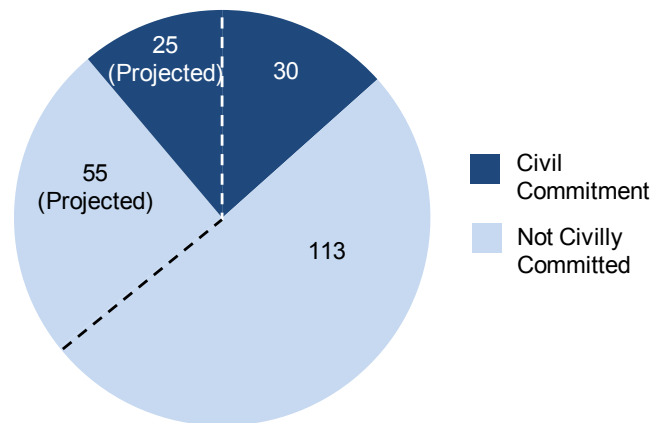
To calculate the number of offenders assessed and civilly committed after more recent versions of the Static had been released, JLARC staff made four assumptions: (1) DBHDS could have been aware of, assessed the implications of, and used the updated Static-99 as of July 1, 2009; (2) a score of "7" on the updated Static-99 represents a comparable risk level to the score of "5" on the original Static-99; (3) DBHDS could have been aware of, assessed the implications of, and used the Static-99R as of July 1, 2010; and (4) a score of "7" on the Static-99R represents a comparable risk level to the score of "5" on the original Static-99.

developers of the Static-99 have given mixed guidance about under what circumstances and how to transition from the original Static-99 to either the updated Static-99 or the Static-99R.

To illustrate the impact of Virginia's continued use of the Static-99 that is prescribed by statute, JLARC staff calculated the number of individuals who have been civilly committed after being assessed and forwarded in the review process after newer versions of the Static-99 were made available. To do so, assumptions were made about when DBHDS could have selected the newer versions for use and what threshold score is comparable to a "5" on the original Static-99 (see sidebar).

Using these assumptions, DOC has forwarded at least 275 individuals for further review using the original Static-99 and threshold score of "5" after more recent versions of the Static were made available. As shown in Figure 14, the analysis shows that 224, or 81 percent, of these offenders would not have met a comparable risk threshold using these more recent versions of the Static-99. Thirty, or 13 percent, of these 224 offenders that were assessed after July 1, 2009 have been civilly committed. JLARC staff estimate that, if recent rates of civil commitment hold steady, another 25 offenders that were still in the review process as of June 2011 (who also would not have been forwarded if more recent actuarial science were used) will likely also be civilly committed.

Figure 14: As Many as 55 Offenders May Be Civilly Committed Who Would Have Scored Below Risk Threshold Using Updated STATIC Assessment



Note: Offenders shown are those assessed between July 1, 2009 and June 30, 2010 and scoring a "4," "5," or "6" on the Static-99 and offenders assessed from July 1, 2010 until the present that would have scored below a "7" on the Static-99R had they been assessed using that instrument. The "Not Civilly Committed" category of offenders includes those the OAG chose not to petition and those that were fully released or conditionally released at trial. The cases of 80 offenders are either awaiting a petition decision from the OAG or a final disposition from the circuit court. The projected number of civil commitments from these 80 cases is extrapolated from rates seen at each process step during the time period in question. One offender died before a court decision was reached.

Source: JLARC staff analysis of the SVPTTracker and SOSA databases.

Appendix F provides more detail on the numbers of individuals assessed using the Static-99 and threshold score of “5” after the updated Static-99 and Static-99R were released.

Other States Allow Professionals More Discretion to Determine Need for Additional Risk Assessment

Virginia is the only state that designates a specific actuarial risk assessment instrument and score in statute to screen violent sex offenders for further review and possible civil commitment. In contrast, other state statutory frameworks typically use broad language that delegates discretion to the executive branch. For example, the statutory language for Missouri’s program stipulates

The Department of Mental Health ... and the Department of Corrections shall establish a multidisciplinary team ... of seven members ... The team, within thirty days of receiving notice, shall assess whether or not the person meets the definition of a sexually violent predator.

Texas’ statutory language is similar to Missouri’s, with the exception that it provides specific direction that its multi-disciplinary team can decide whether further evaluation is required by an outside expert.

A few states appoint boards to periodically review and refine their screening and assessment practices. For example, the Illinois sex offender management board develops and implements standards for review, treatment, and supervision of offenders. The board includes licensed mental health professionals, prosecuting and defense attorneys with experience in sex offense cases, and interest group representatives. California takes a similar approach and also has a similar board.

When interviewed by JLARC staff, officials in other states cited the need for flexibility and discretion in which ARAI to use and whether to proceed with further risk assessment. These officials indicated they would be concerned if they were bound by a specific instrument and score set in statute.

VIRGINIA SHOULD REMOVE THE DESIGNATION OF A SPECIFIC INSTRUMENT AND THRESHOLD SCORE FROM THE CODE OF VIRGINIA

The weaknesses in the current process point to the need to remove from statute the designation of a particular instrument and threshold score for screening sex offenders. Instead, the statute needs to provide DBHDS with the authority and discretion to select an actuarial instrument to screen violent sex offenders for further evaluation and potential civil commitment. The actuarial risk

assessment instrument should be current and scientifically-validated. DBHDS should also have the authority to specify a threshold score to screen offenders and retain the discretion to consider other factors in evaluating whether an offender should be further assessed. These changes are intended to allow more professional discretion in certain cases and allow the State's risk assessment process to adapt as actuarial science evolves.

Consequently, the General Assembly may wish to consider removing the reference to the Static-99 and a specific score from the *Code of Virginia*. In its place, the General Assembly may also wish to consider directing DBHDS to choose a current and scientifically validated actuarial risk assessment instrument to identify individuals that merit further assessment as a possible sexually violent predator.

Recommendation (1). The General Assembly may wish to amend §37.2-903.B of the *Code of Virginia* to remove the reference to “a score of five or more on the Static-99 or a similar score on a comparable, scientifically validated instrument designated by the Commissioner, or a score of four or more on the Static-99 or a similar score on a comparable, scientifically validated instrument.”

Recommendation (2). The General Assembly may wish to amend §37.2-903.B of the *Code of Virginia* to direct the Department of Behavioral Health and Developmental Services to choose a current and scientifically-validated actuarial risk assessment instrument to identify individuals that merit further assessment as a possible sexually violent predator. The statute should give qualified professionals the authority to designate the instrument, develop a threshold score as a guideline, and deviate from the threshold when justified.

Concurrent with these statutory changes, DBHDS and DOC should identify which actuarial risk assessment Virginia will use. These agencies should notify the General Assembly of which instrument they will use, and the basis for the decision, no later than June 30, 2012. This notification should include the score threshold the agencies will use to determine the need for further review as a possible sexually violent predator, and the estimated risk of reoffending associated with this score. Given that actuarial science will likely continue to evolve, DBDHS and DOC should report biennially thereafter on whether they intend to continue to use the same actuarial risk assessment instrument, or transition to a different one.

Recommendation (3). The Department of Behavioral Health and Developmental Services and the Department of Corrections should identify a current and scientifically-validated actuarial risk assessment instrument to use in Virginia's civil commitment process for sexually

violent predators. The agencies should report to the House Health, Welfare, and Institutions; House Appropriations; Senate Rehabilitation and Social Services; and Senate Finance Committees by June 30, 2012 which instrument will be used, which threshold score will be used to determine the need for further review as a possible sexually violent predator, and the estimated risk of reoffense associated with this score. The agencies should report biennially to the General Assembly whether they intend to continue to use the same instrument or a different one, as well as the reasons for, and implications of, the decision.

VIRGINIA SHOULD DEVELOP A PROCESS AND STANDARDS TO DETERMINE WHEN TO UPDATE ACTUARIAL RISK ASSESSMENT INSTRUMENT AS ACTUARIAL SCIENCE EVOLVES

Given the evolving nature of actuarial science, the State needs to be well-positioned to adapt as the actuarial science changes. Dr. Hanson, a developer of the Static assessments, informed JLARC staff that there will continue to be changes made to the Static family of assessments. Recent experience suggests that the State is not positioned to make necessary changes as it continues to use what appears to be an outdated actuarial instrument. Despite assertions by the developer of the Static-99 that it should not be used in the manner Virginia currently uses it, the State has continued to do so.

Officials at DBHDS, DOC, and the OAG all assert that the State is required to use the Static-99 under current Virginia law and does not have the authority to use another instrument. They believe that they are bound to use it even though the statute states that a “comparable, scientifically validated instrument” may be used. This language would appear to give the agencies discretion to adopt another instrument if there were concerns regarding the reliability of the Static-99, but they do not believe they have such discretion under the statute. They assert that the new Static-99R is not comparable despite its similarity to the Static-99 and that it has not been sufficiently scientifically validated and therefore the State does not have the authority to use it.

While it is likely that the changes in the Static-99 risk estimates will at some point be validated, there is no clear standard for how much validation is sufficient and at what point an older instrument should stop being used. What is clear, however, is that actuarial science will continue to evolve, and that Virginia’s lack of standards for adapting to newer actuarial instruments either is currently—or will soon—put the State at risk of relying on an out-of-date instrument.

Though amending the statute as recommended should provide the necessary authority and discretion to adapt to evolving actuarial

science in the future, the reluctance of the State to discontinue use of the Static-99 suggests that a process should be put in place to ensure that the State makes necessary adjustments as the actuarial science improves. This would involve adopting a process to periodically review whether the instrument being used remains current and confirming that there is not a superior instrument available. Along with a process for review, standards should be developed for determining under what conditions a new actuarial instrument should be adopted.

Recommendation (4). The Department of Behavioral Health and Development Services, Department of Corrections, and Office of the Attorney General should develop a process and standards that determine under what conditions the State should stop using the current instrument and begin using another actuarial risk assessment instrument.

Risk Assessment Process Lacks Flexibility and Should Be More Consensus-Based

In Summary

Offenders who are ten months from their release date and who score above the statutorily defined threshold on the Static-99 are referred to a trained and licensed sexually violent predator (SVP) evaluator. The evaluators are asked to determine whether the individual has a mental abnormality or personality disorder that makes it difficult to control predatory behavior, therefore making him an SVP. The results of this SVP evaluation are a major factor cited by the Commitment Review Committee (CRC), Office of the Attorney General, and courts in their decisions about whether an individual is an SVP. SVP evaluators find offenders to be SVPs at rates that vary widely from 28 to 75 percent. The rate at which evaluators have collectively found offenders to be SVPs each year has also fluctuated. Because of the inherent difficulty in predicting whether an offender will reoffend if released, several changes to Virginia's risk assessment process are warranted. Some of the recommended changes are needed to make the process more flexible so that certain high-risk offenders could be assessed while other low-risk individuals would not require further assessment. Other changes are needed to make the difficult decision of predicting what someone might do in the future based more on consensus about whether or not to proceed with the civil commitment process.

The study mandate directs JLARC staff to review “the assessment process for identifying those individuals who could be eligible for civil commitment as sexually violent predators, including the commitment review process ...” The first step in Virginia's risk assessment process is the actuarial risk assessment discussed in Chapter 3. The second step is for a licensed psychiatrist or clinical psychologist under contract with the State to conduct an SVP evaluation. This evaluation plays a critical role in the eventual SVP finding. The third and final step is for the Commitment Review Committee (CRC) to review the file and vote for either civil commitment, conditional release, or full release. The risk assessment process is an essential aspect of Virginia's civil commitment process that completes the evidentiary file transmitted to the Office of the Attorney General (OAG), which ultimately decides whether to petition the court for civil commitment.

SVP EVALUATOR FINDINGS HEAVILY INFLUENCE OUTCOME OF COMMITMENT REVIEW PROCESS

The determination of whether an individual has a mental abnormality or personality disorder necessary for possible civil commitment is a difficult one requiring experience and skill. Once an expert makes this determination, it plays a critical role in decisions

subsequently made by the CRC, OAG, and court. The SVP evaluator decision is often consistent with, but at times also can differ from the risk level suggested by an actuarial risk assessment score.

OSVP Contracts With Licensed Psychiatrists and Clinical Psychologists to Conduct the SVP Evaluation

The *Code of Virginia* allows the Commitment Review Committee (CRC) to contract for the services “of additional experts in order to complete its review of the prisoner or defendant.” These independent SVP evaluators review the inmate’s file and conduct an in-person interview and clinical assessment. The SVP evaluator then produces a written assessment using a template designed by the Office of Sexually Violent Predators (OSVP) within the Department of Behavioral Health and Developmental Services (DBHDS). The template includes, but is not limited to, information such as criminal record, psychological status, risk potential, and medical history. The template requires the SVP evaluator to conclude whether the offender has a mental abnormality or personality disorder that makes it difficult for him to control his predatory behavior, therefore identifying him as an SVP.

Each month, OSVP sends an email to all of the third-party SVP evaluators under contract with the State. The email includes the names and prison location of those that have scored at or above the actuarial threshold and are therefore eligible for further review. Based on their schedules and geographic location, SVP evaluators notify OSVP of which offenders they will evaluate. SVP evaluators are compensated at a rate guaranteed in their contract with OSVP. These rates range from \$2,000 to \$3,000 per evaluation. In FY 2011, OSVP paid SVP evaluators a total of \$566,942 for evaluations, court testimony, and travel expenses.

SVP Evaluators Are a Major Factor Cited by the CRC, OAG, and Courts in Decisions

The clinically based SVP evaluation is an essential complement to the actuarial risk assessments conducted earlier in the risk assessment process. As noted in Chapter 3, actuarial risk assessments have value, but alone are not sufficient. When properly administered, an actuarial risk assessment can provide useful information about the risk, for a given group on average, that they might reoffend. However, actuarial assessments do not provide guidance about the mental abnormality or personality disorder specified in the *Code of Virginia*. Consequently, the opinion of a qualified expert about the offender’s psychological status is also critical.

Providing such assessments with absolute precision each time is not a reasonable expectation. Nevertheless, in interviews with JLARC staff, SVP evaluators expressed their belief that they generally had the information and time to make a sound, defensible finding of whether each individual is an SVP. They also were confident that their evaluations made the proper findings based on the information available at that time.

Members of the CRC, OAG staff attorneys, and judges indicated in JLARC staff interviews that the SVP evaluation was a primary consideration when deciding whether an individual should be civilly committed as an SVP. Consistent with this characterization, there has been a high level of agreement in the subsequent process steps with the SVP evaluator's determination of whether the offender is an SVP:

- The CRC recommends civil commitment or conditional release 81.6 percent of the time when evaluators find the offender to be an SVP.
- The OAG petitions 82.1 percent of the time when the evaluator finds the offender to be an SVP (discussed in Chapter 5).
- The court finds an offender to be an SVP 90.3 percent of the time when the evaluator finds him to be an SVP (discussed in Chapter 5).

SVP Evaluators Have Found Individuals With Relatively Low Actuarial Risk Scores to Still Be SVPs

SVP evaluators found nearly half of the 224 offenders (discussed in Chapter 3) who would not have met a comparable risk threshold using more recent versions of the Static-99 to be SVPs. This difference highlights the importance of having multiple steps in the risk assessment process to assess risk from a variety of perspectives. However, the lack of alignment between the predicted risk of reoffense based on the actuarial instrument and the SVP evaluator opinion is still somewhat problematic.

Two factors may at least partially explain the above problem. First, as discussed in Chapter 3, actuarial risk assessment instruments have a low degree of confidence when predicting whether a given individual will reoffend because risk estimates are based on group rates of reoffense. Second, it is the SVP evaluator's job to determine whether an offender has a mental abnormality or personality disorder that makes it difficult to control predatory behavior. The Static-99 does not capture this important factor.

SVP EVALUATORS ARE QUALIFIED, BUT THEY FIND OFFENDERS TO BE SVPs AT VARYING RATES

Given the influence SVP evaluators have on subsequent decisions, it is important to have qualified SVP evaluators. It is also critical to have a strong process to ensure evaluations are performed consistently. The consistency of evaluations can be measured across all evaluators over time, and across the different SVP evaluators.

SVP Evaluators Have Relevant Experience and Credentials

Given how heavily other process participants rely on the SVP evaluator, having experienced and qualified evaluators is extremely important. The *Code of Virginia* stipulates that evaluations should be conducted by a “licensed psychiatrist or a licensed clinical psychologist who is designated by the Commissioner, skilled in the diagnosis and risk assessment of sex offenders, knowledgeable about the treatment of sex offenders, and not a member of the CRC.” According to OSVP, the combination of experience and credentials to do these evaluations is unique and there is, consequently, a relatively small pool of potential SVP evaluators available in Virginia at any given time.

Consistent with that statutory direction, since the program’s inception, OSVP has contracted with a small number of SVP evaluators who have doctorates in psychology and other relevant certifications. OSVP provided JLARC staff with information for the ten SVP evaluators currently under contract. According to this information, three have been doing evaluations for OSVP since 2003 and one other since 2004 (Table 7). Eight of the ten have done at

Table 7: Virginia’s Contract SVP Evaluators Have Experience and Relevant Credentials

SVP Evaluator	Number of Evaluations	First Year SVP Evaluation Conducted	Psychology Ph.D.	Certified / Licensed Psychologist	Certified Sex Offender Treatment Provider	Certified in Forensic Evaluation
1	5	2009	✓	✓		✓
2	39	2003	✓	✓	✓	✓
3	118	2003	✓	✓	✓	
4	Unknown	Unknown	✓	✓	✓	
5	90	2006	✓	✓	✓	
6	49	2007	✓	✓	✓	✓
7	27	2007	✓	✓		
8	170	2004	✓	✓	✓	
9	90	2007	✓	✓	✓	
10	66	2003	✓	✓	✓	✓

Note: Evaluators shown are those currently under contract with the State.

Source: JLARC staff analysis of OSVP information.

least 20 evaluations, and four of these have done 90 or more. JLARC staff also interviewed six of the ten SVP evaluators, and each of them indicated they also conducted similar evaluations for other civil commitment or criminal proceedings. Each of the ten holds a Ph.D. in psychology and were licensed or certified in Virginia. Eight of the ten evaluators were also certified sex offender treatment providers, while four were certified in forensic evaluation. OSVP indicated that it also periodically provides training for SVP evaluators.

Rates That SVP Evaluators Find Offenders to be SVPs Vary Over Time, and by Evaluator

SVP evaluators find offenders to be SVPs at differing rates each year, and individually. However, given the complexity of their task and inherent difficulty of predicting what someone might do in the future, variation is to be expected. During the first two years of the program (2003-2004), SVP evaluators found 30 and 26 percent, respectively, of the offenders they evaluated to be SVPs (Table 8). The percentage of offenders that evaluators found to be SVPs steadily rose as the program grew, to 78 percent in 2007 and 79 percent in 2008. Beginning in 2009, the percentage has begun to decrease again, to 53 percent in 2010 (the last year for which complete data are available).

OSVP indicated these variations in the percentage of offenders that SVP evaluators find to be SVPs each year reflect the natural learning process as evaluators have gained more experience. OSVP

Table 8: SVP Evaluation Findings Differ by Year and by Evaluator

Evaluator	Number of Individuals Found SVP / Number of SVP Evaluations										Evaluator Totals
	2003	2004	2005	2006	2007	2008	2009	2010	2011 ^a		
1	-	0/5	1/5	15/25	18/22	26/31	20/27	20/26	17/29		117/170 (69%)
2	-	1/2	2/4	8/11	21/22	13/16	14/18	14/24	9/21		82/118 (69%)
3	1/1	2/4	1/1	6/11	16/20	19/23	13/25	7/12	-		65/97 (67%)
4	-	-	-	10/10	14/19	14/19	5/17	9/19	1/6		53/90 (59%)
5	-	-	-	-	13/15	17/18	15/20	13/19	7/18		65/90 (72%)
6	2/2	1/5	4/4	5/9	4/8	7/8	3/5	7/13	4/12		37/66 (56%)
7	-	-	-	-	2/5	3/8	4/9	1/14	4/13		14/49 (29%)
8	-	-	-	-	2/4	8/12	16/18	7/10	-		33/44 (75%)
9	1/1	1/6	1/4	0/4	2/4	0/1	3/5	1/7	2/7		11/39 (28%)
10	-	-	-	-	5/6	5/6	1/5	3/6	1/4		15/27 (56%)
Others ^b	2/16	3/9	1/2	0/1	2/2	3/3	4/5	0/3	1/3		16/44 (33%)
Annual Totals	6/20 (30%)	8/31 (26%)	10/20 (48%)	44/71 (62%)	99/127 (78%)	115/145 (79%)	98/154 (64%)	82/153 (53%)	46/113 (40%)		508/834 (61%)

^a Partial year data.

^b Includes four evaluators with ten or fewer evaluations each and evaluations for which the evaluator code is N/A in SVPTTracker database.

Note: Evaluators shown are those that have conducted the ten most evaluations.

Source: JLARC staff analysis of SVPTTracker, 2011.

... an offender released... in 2010 was 50 percent less likely to be found to be an SVP by an evaluator than an offender released ... in 2008.

also noted that because of the unique skillset necessary to conduct these evaluations, it has taken some time to build a cadre of SVP evaluators. OSVP indicated that it has facilitated SVP evaluators being trained by recognized experts and now has a template that each SVP evaluator is required to use. Nevertheless, this data reveals that an offender released from DOC and assessed in 2010 was 50 percent less likely to be found an SVP by an evaluator than an offender released and assessed in 2008.

While changes in the rate of individuals being found to be SVPs by evaluators over time may be unavoidable for a relatively new program, extreme variations in the rate at which different evaluators find individuals to be SVPs are more difficult to explain. For example, one evaluator (number 7 in Table 8) has conducted 49 SVP evaluations and found 14 individuals, or 29 percent, to be an SVP. In contrast, a different evaluator (number 8 in Table 8) has conducted 44 evaluations and found 33, or 75 percent, to be an SVP. As noted earlier, OSVP does not assign SVP evaluators which offenders to evaluate. Rather, SVP evaluators self-select the inmates for evaluation based on the inmate's geographic proximity and the evaluator's schedule. JLARC staff analysis did not detect any measurable pattern when comparing the number of evaluations done or type of offender to the rate at which the SVP evaluator finds an individual to be an SVP.

Based on what would appear to be largely chance, an individual's probability of being found to be an SVP can range from 28 to 75 percent based largely on which SVP evaluator conducts his evaluation. When asked about these varying rates, OSVP indicated that there are relatively few occasions in which the CRC or OSVP might ask for a second opinion from another evaluator. However, OSVP does not systematically (1) seek to identify and explore the reasons for this variation among evaluators nor (2) use this type of summary information to further calibrate SVP evaluators to ensure they are using a process that is as similar as possible for each individual evaluated.

There is no evidence to suggest that any SVP evaluators have a particular, inappropriate bias. However, it may be that certain evaluators are, despite using the evaluation template, using different approaches or methodologies to derive their diagnoses and conclusions. Because OSVP does not systematically identify and explore the reasons for variation, it is impossible to rule out the possibility of bias or determine whether there is unwarranted variation across evaluator approaches and methodologies.

Consequently, OSVP should periodically compile and review summary data as shown in Table 8. For those evaluators who, based on the data, appear to have unusually high or low rates of SVP find-

ings over time, OSVP should review the evaluator’s previous evaluations. The purpose of the review should be to determine whether the evaluator is using different methodologies and approaches that are unwarranted, or if there are other factors that explain the unusually high or low rates of SVP findings. The results of these reviews should be used to improve the evaluation template and process over time so that there is as much similarity in evaluator approaches and methods as practicable. The purpose of the review should not, however, be to encourage a particular outcome in any given case, or by extension a desired percentage of SVP findings over time.

Recommendation (5). The Office of Sexually Violent Predators (OSVP) should develop and implement a process to periodically compile and review the rates at which evaluators find individuals are sexually violent predators (SVP). For those evaluators who have unusually high or low rates of SVP findings over time, OSVP should review the evaluator’s previous evaluations to determine (1) whether the evaluator is using different methodologies and approaches that are unwarranted or (2) if there are other factors that explain the unusually high or low rates of SVP findings. The results of these reviews should be used to improve the process of evaluation over time.

Furthermore, the Virginia Center for Behavioral Rehabilitation (VCBR) estimates that about ten percent of the individuals that have been civilly committed have the diagnosis made by the SVP evaluator revised once they have been at VCBR. While this may occur because of the relatively short interview that SVP evaluators conduct, instances in which VCBR’s initial diagnosis differs from the SVP evaluator’s diagnosis can have serious implications. For example, an individual diagnosed with “paraphilia not otherwise specified” could be civilly committed based on that diagnosis. However, during the initial diagnosis once at VCBR it could be determined that there is not sufficient clinical evidence for that diagnosis. Neither OSVP nor VCBR has analyzed whether these diagnoses that are changed have been made by a single evaluator or several different evaluators.

There is no systematic process through which to inform the appropriate SVP evaluator(s) when diagnoses they made have been changed. Consequently, OSVP should work with VCBR to identify and assess instances in which the SVP evaluator diagnosis differs from the initial diagnosis made at VCBR. SVP evaluators that routinely make diagnoses that differ from the initial VCBR diagnosis should be made aware of these differences. OSVP should develop specific criteria to assess whether the evaluator has corrected any issues with their diagnostic approach and at what point the evaluator’s contract with the State should be terminated.

Recommendation (6). The Office of Sexually Violent Predators (OSVP) should review instances in which an individual's SVP evaluation includes a diagnosis that is subsequently changed during the initial diagnosis made once the individual is at the Virginia Center for Behavioral Rehabilitation. The purpose of the review should be to make the evaluator(s) aware of the difference and give them the feedback needed to correct any issues with their diagnostic approach in future evaluations. OSVP should develop specific criteria to assess whether the evaluator has addressed the issues and at what point the evaluator's contract with the State should be terminated.

COMMITMENT REVIEW COMMITTEE DELIBERATIONS HAVE VALUE, BUT RATIONALE FOR VOTES IS NOT SUFFICIENTLY DOCUMENTED

The CRC is the third and final step in the risk assessment process. After the Static-99 is administered and the SVP evaluation is complete, the CRC meets to vote whether an offender should be civilly committed, conditionally released, or fully released. The CRC recommendation is the last step before an offender's file is sent to the OAG. The CRC recommendation, however, is not binding on the OAG's decision about whether or not to petition the court that an offender is an SVP.

CRC Meets to Discuss Inmate Files and Vote for Civil Commitment, Conditional Release, or Full Release

The CRC meets to discuss each inmate whose score on the Static-99 meets the actuarial threshold and who has been reviewed by an SVP evaluator. The CRC in recent years has typically met for four to eight hours for a single day, every two weeks. The CRC considers paper files compiled by DOC staff that include the individual's criminal history, record during incarceration, Static-99 score, and SVP evaluation. Recently, the CRC has also had access during its meetings to the DOC online system that includes additional information about offenders.

The CRC members take between 15 and 20 minutes to review each file, then have a discussion. According to CRC members, the discussion can include requests for additional information and debate among members about whether certain aspects of the individual's file supports a particular recommendation. At the conclusion of the discussion, each CRC member says whether they vote for full release, conditional release, or civil commitment. The vote tally is then recorded. This sequence is repeated throughout the course of the meeting. Depending on the length of discussion for each file reviewed, the CRC typically handles eight to ten files in a given meeting.

CRC Membership Is Multi-Agency and Includes Different Perspectives Relevant to Making SVP Decision

The CRC includes three DOC staff, three DBHDS staff, and an OAG staff attorney. Based on JLARC staff interviews with the current CRC members, each has experience that appears relevant and useful to deciding whether an individual should be fully released, conditionally released, or civilly committed. This experience includes

- DOC staff with experience in offender assessment, counseling, and release and probation considerations;
- DBHDS staff with experience in sex offender assessment and treatment; and
- an OAG staff attorney with a legal perspective, understanding of the SVP statute, and experience in SVP trials.

All CRC members interviewed cited the importance of blending these different perspectives to have a substantive and well-informed debate about each individual they review. For example, a CRC member representing DOC indicated that whether someone had participated in the DOC Sex Offender Residential Treatment (SORT) program was a factor they considered when casting their vote. If the offender had successfully completed the program and had a positive record during incarceration, they were more inclined to consider voting for conditional release.

Supporting Rationale for Each CRC Member's Vote Is Neither Captured Nor Transmitted to OAG for Consideration

After each CRC vote, DOC staff transmits the CRC vote to the OAG with a brief cover memo. The memo includes several sections, including one entitled "Other Factors." The section notes any factors, in addition to the actuarial risk assessment score, SVP evaluation, crimes, and record during incarceration, that influenced the CRC's recommendation. These factors may include prior failure on probation or a lack of adequate treatment in prison. However, the memo does not specify how many CRC members used these factors to support their decision. It also does not make clear how each member who cited these factors voted, in particular whether the factor cited suggests civil commitment, conditional release, or full release. In addition, while certain factors likely are more compelling than others when making a decision, this is also not clarified in the information transmitted to the OAG.

The reasons used by each CRC member to determine his or her vote would seem relevant and useful to the OAG when deciding whether or not to petition the court. Such information, if provided, would convey to the OAG more information about both the intensi-

ty and nature of agreement or disagreement among the CRC members. While the OAG representative who sits on the CRC could potentially recall the details of each of the eight to ten cases reviewed each meeting, it does not appear that this information is systematically shared with other OAG staff attorneys. Even if it were shared, it is highly unlikely that the OAG representative on the CRC could always provide adequate or sufficient detail when recalling the CRC's deliberations that may have occurred weeks earlier.

Importantly, the information should be captured and conveyed in a way that does not identify CRC members ...

To more fully capture the potentially useful and relevant information from CRC deliberations, the CRC should record not only each member's vote, but also a brief rationale for each member's vote. This rationale, by member, should be transmitted to the OAG along with the cover memo and vote currently provided. Importantly, the information should be captured and conveyed in a way that does not identify CRC members by name or agency.

Recommendation (7). The Commitment Review Committee should record the reason(s) that each member used to determine his or her vote for civil commitment, conditional release, or full release. The Department of Corrections should then cite these reasons in the memo it currently uses to transmit an individual's file to the Office of the Attorney General.

VIRGINIA'S RISK ASSESSMENT PROCESS SHOULD BE MORE FLEXIBLE AND MORE CONSENSUS-BASED

Collectively, this chapter and Chapter 3 cite the need for improvements in the actuarial, SVP evaluation, and CRC steps of Virginia's risk assessment process. The recommendations made to facilitate each improvement are intended to strengthen each individual process step. However, implementing the recommendations made thus far will not address several systemic problems in the risk assessment process itself. JLARC staff have identified three such improvements that should be addressed by implementing a different risk assessment process that is more flexible and more consensus-based.

Process Relies Too Heavily on Actuarial Score to Determine Need for Further Assessment

The first improvement needed in the risk assessment process is to provide the flexibility to initiate the risk assessment process for a small number of offenders each year that may score below a specific actuarial risk assessment threshold. Currently, offenders meeting the threshold are reviewed further and those scoring below the threshold are released from prison. As discussed in Chapter 3, the process is built upon the false assumption that an offender scoring

below a “4” or “5” on the Static-99 is not a risk and does not have a mental abnormality or personality disorder that would make them an SVP. Chapter 3 underscored the (1) lack of predictive value that an actuarial risk assessment score has for a given individual and (2) that such instruments only assess risk for reoffense, not whether an individual has a mental disorder.

Both CRC members and OAG staff attorneys cited examples when they were aware of a highly dangerous, mentally unstable offender who had been convicted of a predicate crime but scored a 3 on the Static-99. Table 5 and the case studies in Chapter 3 cite several of these examples. Both CRC members and OAG staff indicated there are not many such examples, but even a few underscore the flaw in overly relying on actuarial instruments to begin the risk assessment process. One of the developers of the Static-99 makes this point as well, writing that the civil commitment decision is too important to not also apply some professional judgment.

Most other states consider actuarial scores as part of their risk assessment process, but do not exclusively rely on them to determine whether to proceed with further risk assessment. Other states have administrative or multi-disciplinary groups similar to the CRC, but they review criminal history, record during incarceration (including whether treatment was completed), along with the actuarial risk assessment score. The actuarial score is considered by these groups, but not used in isolation as a screening mechanism. For example, Florida uses a structured list of factors to conduct an initial review of offenders. The “checklist” has seven factors, which according to Florida staff were identified based on their experience to have a relationship with whether someone is likely to reoffend. These factors include the number of prior prison terms and several factors related to the nature of the offenses, including the number of victims and use of physical violence.

The actuarial score is considered by these groups, but it is not used in isolation.

Section 37.2-903.B of the *Code of Virginia* requires that the DOC director review and identify such prisoners ... “who receive a score of five or more on the Static-99 or a similar score on a comparable, scientifically validated instrument ...” If Recommendations 1 and 2 made in Chapter 3 are implemented and this language is removed, there will no longer be a statutory actuarial risk assessment threshold. This will allow a more flexible process to be developed, similar to one used in other states, recommended by those who develop actuarial risk assessment instruments, and as recommended in Recommendation 3.

Consequently, DOC and DBHDS should develop and implement new procedures that can be used to determine which individuals released from DOC each year warrant further review. The procedures should define how a designated actuarial risk assessment

instrument will be used as part of the risk assessment process, and also define what actuarial threshold and risk estimate will guide whether individuals should be reviewed further. The procedures should also define the criteria under which the threshold will be waived for individuals that score above or below the designated actuarial threshold. Examples of such criteria are provided later in this chapter.

Recommendation (8). The Department of Corrections should work with the Department of Behavioral Health and Developmental Services to develop and implement procedures to use an actuarial risk assessment instrument as part of the risk assessment process. The departments should also define the criteria under which (1) an individual receiving a score below a threshold should still be eligible for further review, and (2) an individual receiving a score above a threshold should not be eligible for further review.

SVP Evaluation Unnecessarily Influences CRC Deliberations, When CRC Can Use Its Expertise to Assess Other Factors

The second improvement needed is to not include the SVP evaluation in the information reviewed by the CRC. Doing so has the effect of unnecessarily “centering” the CRC around the SVP finding. JLARC staff interviews and data indicate that once an SVP evaluator finds an individual is an SVP, his chance of being civilly committed substantially increases. Since 2003, the CRC vote has mirrored the SVP evaluation finding approximately 80 percent of the time. Presenting the CRC members with the SVP evaluation may have the effect of unnecessarily centering a given CRC member towards a particular vote because of potential difficulty looking beyond the evaluation at other relevant factors.

Section 37.2-902.A of the *Code of Virginia* stipulates that the CRC “screen, evaluate, and make recommendations regarding prisoners and defendants.” Within this statutory direction, the executive branch has used the current approach of having the SVP evaluation performed prior to the CRC meetings and then considered by the CRC. However, nothing in the current statutory language would prevent reversing the order of the CRC deliberations and SVP evaluation.

Consequently, DBHDS and DOC should convene the CRC prior to the SVP evaluation. This would prevent the SVP evaluation finding from unnecessarily influencing the CRC deliberations and vote. This would then require the CRC members to rely upon their own expertise to address the non-clinical elements of deciding whether to vote for full release, conditional release, or civil commitment.

The removal of the SVP evaluation from the CRC's deliberations, however, will require the development of new operating procedures for the CRC. These procedures should indicate how the CRC will deliberate and what criteria it will use to make its recommendations absent the actuarial threshold and SVP evaluation. Given CRC members' relevant experience and perspective, the factors they might consider would include, at minimum,

- whether the nature and number of convictions suggests a demonstrated pattern of sexual violence;
- whether the individual's record during incarceration, including participation in treatment, suggests a willingness to manage tendencies for sexually violent behavior;
- whether the individual could be successfully managed if placed on conditional release—if a viable home plan were to subsequently be developed; and
- whether the individual's physical condition, health status, and/or age sufficiently minimize the risk of reoffense.

Recommendation (9). The Department of Corrections should coordinate with the Department of Behavioral Health and Developmental Services to develop new procedures for the Commitment Review Committee. The procedures should define what factors the committee will use as the basis for its deliberations and recommendations without access to the clinical sexually violent predator evaluation. Factors, at a minimum, might include a demonstrated pattern of sexually violent behavior; record during incarceration; whether the individual could successfully be managed on conditional release; and the individual's physical condition, health, and/or age.

Process Lacks Systematic Approach to Requesting Second SVP Evaluation When There Is Not Consensus Among the Actuarial Score, CRC Recommendation, and SVP Evaluation

The third needed improvement to the risk assessment process stems from an over-reliance on the results of a single SVP evaluation in certain circumstances, given the complexity and difficulty of predicting what someone might do in the future. According to several widely-cited risk assessment experts, the inherent limitations in both actuarial and clinical judgment require establishing checks in the system where possible. Given the serious ramifications of the civil commitment process for an individual's civil liberties, the State needs a more systematic approach to seeking a second SVP evaluation when there is no consensus among the actuarial risk assessment score, CRC recommendation, and SVP evaluation finding. In this respect, New Jersey's civil commitment program requests two independent SVP evaluations to ensure there is sufficient consensus about whether to proceed further.

The varying rates at which SVP evaluators in Virginia have found an individual to be an SVP further illustrate the need to, when there is not agreement, request a second SVP evaluation. The CRC periodically requests second SVP evaluations when it does not see written evidence of the clinical underpinnings the evaluator used to make his or her finding and diagnosis. Later in the process, the offender also has the opportunity to secure his own expert to conduct a second evaluation. Although there is no documentation of how frequently this occurs, interviews with OAG staff attorneys and SVP evaluators suggest it occurs fairly regularly. Nevertheless, the variation in defense attorneys and high rate of success the OAG has once it decides to petition (discussed in Chapter 5) necessitate a more structured approach to seeking a second SVP evaluation prior to the legal process beginning.

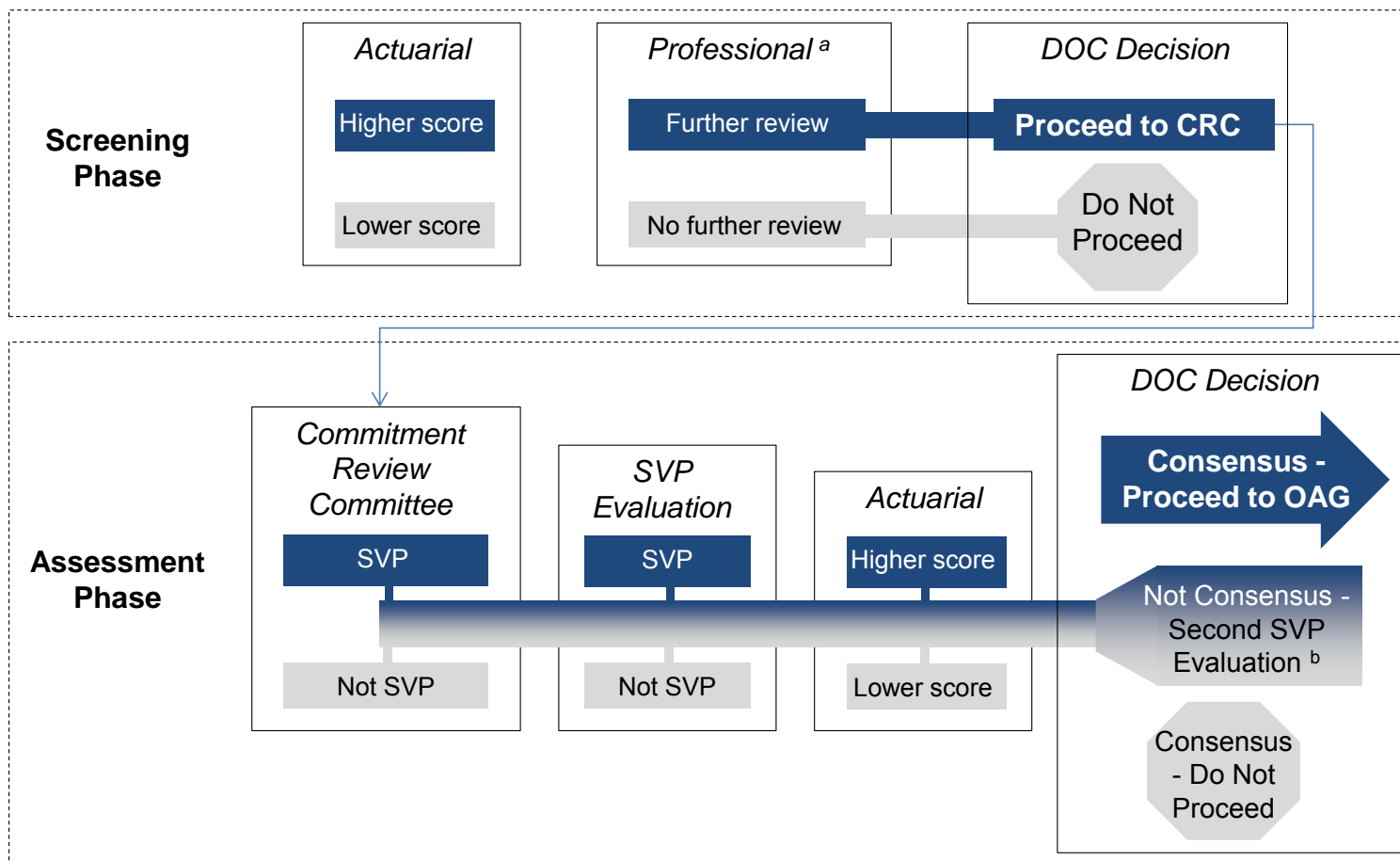
The current process does not sufficiently define the conditions under which more information should be collected in the form of a second SVP evaluation from a different evaluator. Consequently, DOC and DBHDS should coordinate to identify the conditions under which a second SVP evaluation is necessary. The conditions should include instances in which the actuarial risk assessment instrument score is above the threshold, the CRC votes that the individual should be civilly committed, yet the SVP evaluation finds the individual is not an SVP. Other conditions are shown in Table 9 at the end of this chapter.

Recommendation (10). The Department of Corrections and Department of Behavioral Health and Developmental Services should develop guidance about the conditions under which a second sexually violent predator (SVP) evaluation is necessary during the risk assessment process. At a minimum, a second evaluation should be conducted when there is not consensus among an actuarial score, Commitment Review Committee vote, and the first SVP evaluation. The second SVP evaluation should be conducted by a different evaluator than the one who conducted the first evaluation.

A More Flexible and Consensus-Based Risk Assessment Process Is Needed

To demonstrate how Virginia's risk assessment process could be changed, JLARC staff developed a different process. The process reflects the recommendations made in this report, and is intended to be more flexible and consensus-based. The process consists of a screening phase and an assessment phase (Figure 15). The screening phase includes an actuarial assessment and a more formalized professional review by DOC staff. The assessment phase includes a multi-disciplinary review by the CRC and an SVP evaluation in certain cases. DOC staff would then consider the individual's actuarial score, CRC vote, and SVP evaluation results to decide

Figure 15: Recommended Risk Assessment Process to Give State More Flexibility and Use Consensus to Determine Whether to Proceed



Note: Implementation of a process such as this would require addressing key implementation issues, including at what point consensus is reached and whether there is discretion in certain cases about the need for a second SVP evaluation.

^a Professional review step could override actuarial score during screening phase and select offenders to forward to the CRC.

^b A second SVP evaluation would be requested when there is not consensus among the CRC, SVP evaluation, and actuarial score.

Source: JLARC staff.

whether there is sufficient agreement to proceed and forward the individual to the OAG. If there is not sufficient agreement, a second clinical evaluation would be conducted by a different SVP evaluator.

The recommended process would provide at least two benefits when compared to the current process. First, the decision about whether to forward an individual’s file to the OAG for consideration, collect more information in the form of a second SVP evaluation, or allow the individual to be released at the end of his prison sentence would be based on consensus across three different assessment steps. The complexity of the decision and the uncertainty surrounding determining whether an individual might reoffend in the future necessitates a more consensus-based approach based on three largely separate and independent assessment steps. The recommended process has 11 possible combinations of agreement among the process steps (Table 9).

Second, the State would have more flexibility to determine when the time and expense of an SVP evaluation is necessary. The professional review conducted during the screening phase would identify two categories of individuals. The first category would include those who may score above the actuarial risk assessment threshold, but, for example, based on the professional review are medically compromised and would not represent a significant risk if released. The second category would include those who score below

Table 9: Possible Scenarios and Outcomes Using a More Flexible and Consensus-Based Approach

Phase	Process Steps and Scenarios			Outcomes
	<i>Actuarial</i>	<i>Administrative</i>		
Screening	Y	Y		Proceed - Forward to CRC
	Y	N		
	N	Y		
	N	N		Do Not Proceed - Release
Assessment	<i>Actuarial</i>	<i>CRC</i>	<i>SVP Evaluation</i>	Proceed - Forward to OAG
	Y	Y	Y	
	Y	N	Y	Second SVP evaluation
	Y	Y	N	
	N	Y	Y	
	Y	N	N	Do Not Proceed - Release
	N	Y	N	
N	N	N/A		

Note: Precedence is given to actuarial score when it conflicts with the CRC because literature suggests that, over time, actuarial risk assessments are more accurate than unstructured assessments, such as what the CRC conducts. When both actuarial and CRC agree that an offender is not an SVP during assessment phase, no SVP evaluation is requested.

Source: JLARC staff.

the actuarial risk assessment threshold, but based on the professional review seem to present a risk and should be reviewed further.

Implementing the recommended process would require addressing key details, including at what point consensus is reached and whether a second SVP evaluation is always required. Implementing the recommended process would also affect the workload associated with assessing the risk of offenders convicted of SVP predicate crimes as they near release from prison. Though the exact impact of the recommended changes on workload are difficult to estimate, it is likely that

- the transition to a more recent actuarial risk assessment instrument would at some point result in fewer individuals being moved forward in the risk assessment process;
- the creation of the more formalized professional review step and subsequent DOC decision points would require a small number of additional staff at DOC; and
- there would be additional time, workload, and cost associated with second SVP evaluations.

The potential impact of these process changes on the number of individuals who might be civilly committed is discussed in Chapter 9. This will depend, however, on how the process is implemented and how the OAG uses the additional information to determine whether or not to petition the court.

OAG Petitions Circuit Courts to Decide Whether Offenders Are SVPs

In Summary

The Office of the Attorney General (OAG) decides whether to petition a circuit court to find an individual an SVP. OAG staff attorneys primarily base their decision to petition on (1) whether the individual's convictions and history demonstrate a pattern of sexually violent behavior and (2) the SVP evaluation. Between 2003 and 2010, the OAG chose to petition the court for 421 individuals, which is about 60 percent of those eligible for civil commitment. The OAG staff attorneys are highly successful; courts have found the individual an SVP 89 percent of the time. The SVP trial is held in the circuit court of jurisdiction for the individual's most recent SVP predicate crime conviction. This leads to variation in the rates at which courts find individuals SVPs, as well as variation in the experience and zeal of court-appointed attorneys that defend individuals at SVP trials. Due to the complexity of SVP cases and relatively low volume of trials held in each circuit, additional educational opportunities for defense attorneys should be made available. Holding SVP annual review hearings in different circuits also creates certain logistical challenges that could be alleviated if annual reviews were consolidated in the Nottoway Circuit where the Virginia Center for Behavioral Rehabilitation (VCBR) is located. The feasibility of this consolidation should be further reviewed.

The mandate for this study directs JLARC staff to “examine current law and commitment practices ... and the impact of these factors on the projected numbers of individuals likely to be civilly committed.” At the conclusion of the risk assessment process discussed in Chapters 3 and 4, the Office of the Attorney General (OAG) is responsible for deciding whether to petition the circuit court. When the OAG decides to petition, a circuit court judge or jury finds whether the legal threshold of “clear and convincing evidence” has been met that an individual is an SVP. SVP trials are civil proceedings and, as mentioned in Chapter 1, are in contrast to criminal proceedings because of their forward-looking nature. One circuit court judge who has presided over SVP civil commitment trials characterized these forward-looking decisions as difficult because they are “educated guesses about future behavior.”

Because the Commitment Review Committee (CRC) recommendation is non-binding, the OAG is responsible for deciding, for each individual that scores at or above the actuarial threshold and is therefore eligible for civil commitment, whether to petition the circuit court. Though the CRC recommendation is non-binding and is not admissible in court, the OAG decision to petition the court has been consistent with the CRC's recommendation about 91 percent of the time. The division within the OAG which is responsible for

recommending whether to petition consists of six staff attorneys. If the OAG decides to petition, these staff attorneys represent the State at the trial seeking an SVP finding and either civil commitment or conditional release. These OAG attorneys also represent the State at subsequent annual review hearings.

OAG CONSIDERS SEVERAL KEY FACTORS WHEN DECIDING WHETHER TO PETITION COURT

OAG staff attorneys indicated they relied heavily on two factors when deciding whether to petition the court. The first was the nature of the original offense(s). OAG staff indicated they were more inclined to petition the court to civilly commit individuals who were convicted of an SVP predicate crime, or particularly multiple SVP predicate crimes, that demonstrated a pattern of violent, sexual behavior. Consistent with this practice by the OAG, the majority of individuals at VCBR under civil commitment had been convicted of more than one SVP predicate crime.

Several OAG staff attorneys indicated that they are not as likely to petition the court for individuals who were convicted of carnal knowledge and had no other charges or offenses. This would include, for example, a situation in which an 18-year-old was convicted of carnal knowledge for having consensual sex with a 14-year-old. OAG staff indicated that in these types of cases, there was not a pattern of violent or sexual behavior warranting treatment in civil commitment. This is consistent with the rate of civil commitment by predicate crime cited in Chapter 2, in which carnal knowledge had the lowest rate of civil commitment of all SVP predicate crimes.

In certain cases, OAG staff indicated that even just one predicate crime can be so severe that it indicates the offender is sufficiently disturbed to need extensive treatment after serving his prison sentence. A staff attorney cited the example of a man who organized and participated in the gang rape of an 80-year-old woman and also had a history of bestiality. In the attorney's opinion, the single predicate crime of rape along with the individual's other, non-predicate offenses, was sufficient to petition the court for civil commitment.

The second major factor that OAG staff attorneys rely on is the SVP evaluation. OAG staff attorneys indicated that because SVP evaluators almost always testify in court during the trial, it is very difficult to win a case if the SVP evaluator will not testify that he or she believes the individual is an SVP. Citing this dynamic, OAG attorneys explained they nearly always decide to petition based on the evaluator finding, with a few exceptions. OSVP data shows

that the OAG decision to petition the court was consistent with the original SVP evaluation about 82 percent of the time.

OAG staff attorneys described instances in which their decision to petition may not reflect the finding of the evaluator. For example, staff explained that the OAG may not petition in carnal knowledge cases (as described above) and also in some cases where an offender has a single offense even when the evaluator finds the respondent to be an SVP. Alternatively, there also have been a few instances in which the OAG staff believed the respondent was an SVP, even though the SVP evaluation did not concur.

Another, less influential factor that OAG staff attorneys cited was the individual's record in prison. They indicated that a history of sexual offenses or sexual acting-out in prison would be a secondary factor that would lead them to consider petitioning the court. Several attorneys cited examples of individuals attempting to rape other inmates in prison or purposefully masturbating in front of correctional officers, and noted that if these offenders cannot control themselves in the highly structured prison environment, it is unlikely that they will be able to control themselves if released into society.

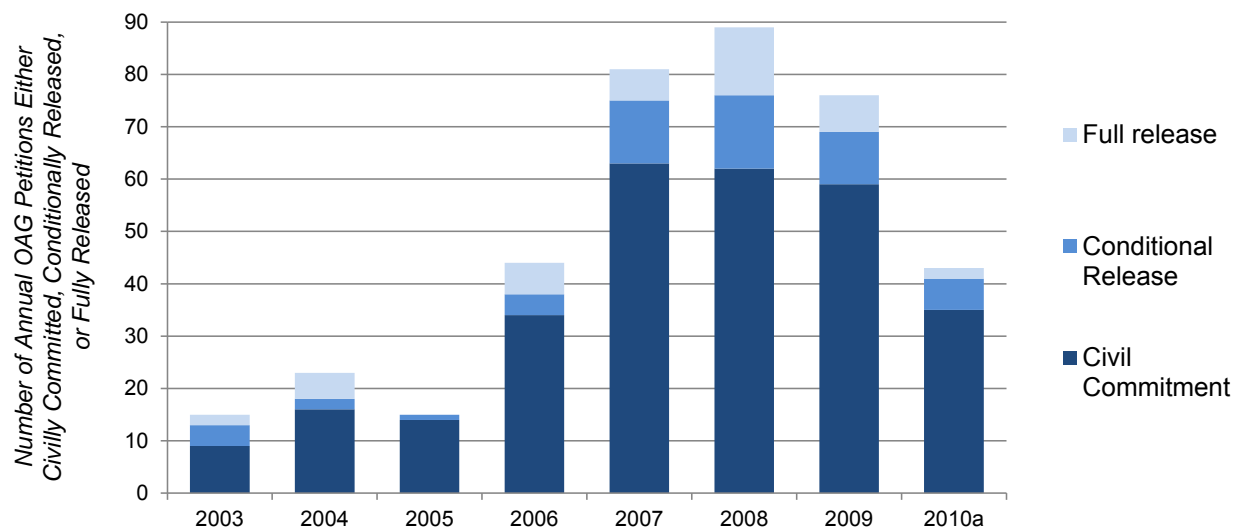
OAG staff attorneys acknowledged the inherent difficulties in predicting what people might do in the future. However, each OAG staff attorney indicated they were either "confident" or "very confident" they make the proper recommendation in each case based on the information available. Each attorney also believed in most cases they had sufficient information and time to make a sound, justifiable decision about whether or not to petition the court.

OAG PETITIONED TO CIVILLY COMMIT ABOUT 60 PERCENT OF INDIVIDUALS MEETING THE ACTUARIAL THRESHOLD; SUCCESS RATE IS HIGH WHEN IT CHOOSES TO PETITION

As noted in Chapter 1, about 17 percent of those released from DOC convicted of an SVP predicate crime scored at or above the actuarial risk assessment threshold between 2003 and 2010. During this same time period, the OAG chose to petition the court for 421 individuals. This represents about 60 percent of the 703 individuals who met the actuarial threshold and were therefore eligible for civil commitment.

Once the OAG chooses to petition the court, OAG staff attorneys are highly successful in persuading the court the individual is an SVP (Figure 16). From 2003 to 2010, 89 percent of the individuals for which the OAG has chosen to petition the court were either

Figure 16: When OAG Decides to Petition, Court Orders Civil Commitment in Vast Majority of Cases Each Year



^aPartial year data due to cases still pending.

Source: JLARC staff analysis of SVPTTracker database, 2011.

civilly committed or conditionally released. The OAG’s success has varied from year to year, ranging from between 78 percent in 2004 to 100 percent in 2005. OAG staff indicated that their relatively high rate of success is partly due to the earlier steps of the civil commitment process that screen out those individuals a court would be less likely to find to be SVPs.

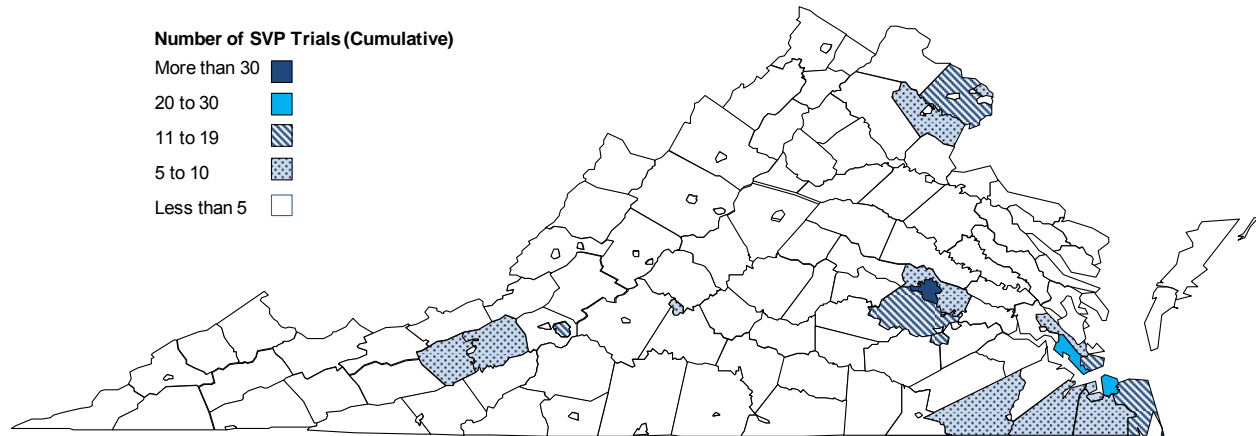
The OAG's rate of success is also likely due to the experience and knowledge of the OAG staff attorneys.

The OAG’s rate of success is also likely due to the experience and knowledge of the OAG staff attorneys. Most OAG staff attorneys specialize in trying SVP cases; this is in contrast to defense attorneys and judges for whom SVP cases represent a relatively small portion of their caseload. For example, between 2003 and 2010, the Richmond City Circuit Court concluded nearly 37,000 cases. The 35 SVP cases during the same time period represent less than one-tenth of one percent of the number of cases. The complexity of SVP cases, in particular the actuarial science and psychology that cases often contemplate, can also make it difficult to effectively try SVP cases on a periodic or limited basis.

HOLDING SVP PROCEEDINGS IN CIRCUIT COURTS CONTRIBUTES TO VARIATION IN RATES OF RELEASE AND DEFENSE

Through 2010, SVP trials had been held in 85 of Virginia’s 120 circuit courts. The majority of these 85 circuit courts, 65, have held fewer than five SVP trials (Figure 17). Of the remaining 20 circuit courts, 11 have held between five and ten trials. The Richmond

Figure 17: Most Circuit Courts Have Held Less Than Five SVP Civil Commitment Trials Through 2010



Source: JLARC staff analysis of SVPTracker data, 2011.

City Circuit Court conducted the most SVP trials, 35. The Newport News Circuit Court has held 25, and the Norfolk Circuit Court has held 23. The top ten circuit courts account for half of all the SVP trials that have been held in the State.

Circuit Courts With the Fewest SVP Trials Are Least Likely to Release Offenders

JLARC staff analyzed outcomes of SVP trials by circuit court to determine if any pattern exists based on urban or rural composition, region of the State, or the number of trials. Based on this analysis, circuit courts that have held the fewest number of trials find individuals to be SVPs at a higher rate compared to circuit courts with higher numbers of trials. Circuit courts that have held one or two SVP trials only released 2.9 percent of those tried (Table 10). In contrast, courts that have held three or more SVP trials found at least ten percent of those tried not to be SVPs and released them.

Table 10: Circuit Courts That Have Held Only One or Two SVP Trials Released Individuals at a Much Lower Rate Than Other, Higher Volume Circuit Courts

	Number of SVP Trials				
	1 to 2	3 to 5	7 to 12	18 to 19	25+
Number of releases at SVP trial	2	9	8	10	12
Total number of SVP trials	69	70	76	89	83
Percent of SVP trials in which individual is released	2.9%	12.9%	10.5%	11.2%	14.5%

Note: The groupings used for the number of trials were determined by having a roughly equal number of cases in each group.

Source: JLARC staff analysis of SVPTracker and DOC data, 2011.

...these factors that vary across circuit courts are not unique to SVP trials.

According to OAG staff, the most influential factors that vary across circuit courts and influence the trial outcome are those that are difficult to quantify. For example, certain judges may strongly believe in the value of the SVP statute and the need for treatment in civil commitment, and therefore may tend to civilly commit individuals at a higher rate. Other judges may believe that, despite the U.S. Supreme Court's opinion that civil commitment of SVPs is constitutional, the individual has served his prison sentence and should be released.

Furthermore, communities that comprise the various circuit courts may have slightly different thresholds for whether civil commitment is necessary. Some judges may lean towards believing that certain predicate crimes, such as carnal knowledge, do not warrant civil commitment. Judges in other communities may hear the nature of the original offenses and expert testimony and—erring on the side of caution—lean towards civil commitment. Importantly, these factors that vary across circuit courts are not unique to SVP trials.

Quality of Defense Individuals Receive at SVP Trials Can Depend on Experience and Zeal of Defense Attorneys in Circuit

During an interview with JLARC staff, one judge who has presided over several SVP trials remarked that “the quality of defense counsel, like any other case, is critical.” A defense attorney interviewed by JLARC staff concurred with the importance of the quality of the defense an individual receives during the SVP civil commitment process, acknowledging that the difficult nature of the cases and the expertise of the OAG staff combine to make it difficult to win release for someone during an SVP trial.

According to OAG staff attorneys, several circuit court judges, and a defense attorney interviewed by JLARC staff, the quality of defense that individuals receive at SVP trials can vary widely. Attorneys and judges alike indicated that, in their experience, many defense attorneys do provide an adequate defense during most trials. However, they also noted two circumstances in which defense attorneys provide a less than adequate defense.

Some Defense Attorneys Do Not Devote Sufficient Attention to Preparing an Adequate Defense During SVP Trials. According to attorneys and judges interviewed by JLARC staff, in certain cases, attorneys appointed by the court have not devoted the time and resources necessary to (1) understand the SVP statute and case law, (2) understand the actuarial science and psychology that will be at issue during the trial, (3) educate themselves about the nature of the original offenses, and/or (4) take the initiative to develop a viable home plan so an individual can be placed on conditional

release rather than civilly committed at VCBR. Any of these above deficiencies by the defense attorney can lead to an individual being civilly committed who might not otherwise have been with a stronger defense case.

Judges and attorneys interviewed by JLARC staff indicated there can be several reasons why a defense attorney may not devote the time and resources necessary to provide an adequate defense. The first reason is that, unfortunately, some attorneys are “clueless” or “incompetent.” The second reason is that the work required to prepare, along with the travel that may be required to the circuit court for the trial and subsequent annual reviews is, for some attorneys, not worth the amount they are paid by the circuit court (one attorney cited an example of doing \$11,000 worth of work and getting reimbursed by the court for \$5,000 because that was the highest reimbursement allowed). A third reason is that some defense attorneys base their entire case on arguing against the civil commitment statute and process itself, and never focus on defending their client based on the details of his specific case.

One attorney interviewed also indicated that, unfortunately, this dynamic is not unique to those who defend SVPs, but is something that can happen anytime there is a court-appointed attorney. Several judges emphasized that it is ultimately up to the judge to do his or her best to appoint not only an attorney who has experience, but also someone who will take the case seriously. These judges said it was also up to the judge to appoint another attorney if the one currently appointed does not appear to be sufficiently preparing to provide an adequate defense.

Learning Curve in SVP Cases Is Steep, Which Can Make It Challenging for Defense Attorneys With Limited Experience in SVP Trials. No data is centrally maintained about how much experience each attorney has who has defended an individual at an SVP trial. However, JLARC staff interviews suggest that it can be challenging for a defense attorney who is trying his or her first SVP case. One defense attorney noted, “I know I am much more effective now than when I first started.” This defense attorney underscored the complexity of most SVP trials because they involve actuarial science, clinical judgments made by psychologists, and the nuances of SVP statute and case law.

“if you are in a smaller locality, you may not get an attorney who knows what they are doing.”

As discussed above, the majority of circuits have held fewer than five SVP trials since 2003. In most circuits, therefore, it is less likely that circuit courts can appoint an attorney with much experience in SVP trials. One judge noted that “if you are in a smaller locality, you may not get an attorney who knows what they are doing.” An OAG staff attorney concurred with this, but indicated the situation is improving as more attorneys are becoming more famil-

iar with the SVP statute, case law, and other nuances as more cases are tried.

Attorneys interviewed agreed that the complexity and seriousness of SVP trials merited some level of increased educational opportunities for defense attorneys on how to adequately defend individuals in SVP trials. The Virginia Continuing Legal Education (CLE), sponsored by the Virginia State Bar and Virginia Bar Association, provides seminars and publications for attorneys wanting advanced or specialized information on a given legal topic. The fact that Virginia's SVP statute is relatively recent, the serious implications of the civil commitment process, and the complexity of actuarial and psychological issues involved in defending SVPs merits providing defense attorneys an opportunity for education in this area. To provide this education, Virginia CLE should offer a seminar for defense attorneys about the legal and psychological issues associated with SVP trials. The Office of Sexually Violent Predators should coordinate with Virginia CLE to develop the actuarial and psychological aspects of the seminar. The OAG should coordinate with Virginia CLE to develop the legal aspects of the seminar.

Recommendation (11). The Office of Sexually Violent Predators and the Office of the Attorney General should work with Virginia Continuing Legal Education to develop and offer a seminar for defense attorneys on the legal, actuarial, and psychological aspects of sexually violent predator trials.

HOLDING SVP PROCEEDINGS IN CIRCUIT COURTS CREATES LOGISTICAL CHALLENGES

In addition to variation in release rates and the quality of defense an individual may receive, holding SVP proceedings in the circuit court system also creates certain logistical challenges. These challenges apply to both the SVP trial and the subsequent annual reviews. Consolidating annual reviews at the Nottoway circuit where VCBR is located would be one way to lessen the burden of these logistical challenges on OAG staff attorneys and local sheriffs.

Holding SVP Proceedings Across Circuit Court System Requires OAG Travel and DOC or Sheriffs to Transport Inmates or SVPs

Because OAG staff are located in Richmond, an OAG staff attorney's schedule of SVP trials and annual reviews can require him or her to be in five different circuits—or more—in a given week. While the OAG does what it can to alleviate the travel burden, most OAG staff attorneys find themselves at times crossing Virginia to represent the State in various circuit courts. While the OAG only spent about \$19,000 on SVP-related travel last year, certain staff attorneys cited the logistical challenges of preparing for each

case when traveling so frequently. OAG staff attorneys also noted that these same logistical issues apply to local sheriffs who are required to transport patients at VCBR from Nottoway County to the circuit court where their annual reviews are held. OAG staff cited instances in which a trial or annual review had to be continued because either the OAG staff, inmate or patient, or defense attorney was not present because of some travel or communication-related issue.

These logistical challenges will only increase over time. Even if the number of SVP trials remains stable, the number of annual reviews will increase as the VCBR census increases. As of August 2011, there were 270 patients at VCBR, and the OAG, defense attorneys, and a local sheriff will to some degree be involved in each of their annual reviews. In terms of workload, the annual review for each of the 270 patients will mean that there could be more than one annual review for the 260 days (not including Saturday and Sunday) in a year. Holidays and other days when courts are not in session further increase the ratio of reviews compared to available days in a year. As the VCBR census increases, the number of annual reviews and the associated travel and logistical challenges will grow. This trend will be somewhat mitigated, however, as patients are at VCBR longer because annual reviews are held only bi-annually after a patient is at VCBR for five years.

Use of Videoconferencing Could Alleviate Logistical Concerns and Consolidating Annual Reviews Could Allow Judges and Attorneys to Specialize in SVP Issues

In an attempt to alleviate these logistical challenges as the rising VCBR census necessitates more annual reviews, the 2011 General Assembly passed HB 1698 which stated, “whenever practicable, the hearing for assessment shall be conducted using a two-way electronic video and audio communication system.” For this provision to address the logistical concerns cited above, (1) circuit courts must have video-conferencing capabilities and (2) judges need to use the capabilities. According to the Supreme Court of Virginia, about a third of the circuit courts have some level of video-conferencing capabilities. Given the recent nature of this change, it remains to be seen to what extent judges in these circuits conducting annual reviews will use the capabilities.

Only One State Holds Trials and Hearings Centrally

Though most states, like Virginia, have their SVP trials in various jurisdictions throughout the state, one state does not. Texas conducts its SVP trials and annual review equivalents in a single location.

The number of annual reviews now suggests that there is sufficient scale to consider consolidating the annual review process. Such a consolidation, however, would require weighing the potential financial and legal benefits and costs associated with consolidating annual reviews in Nottoway County (Table 11). The financial benefits would include a reduction in OAG and local sheriff travel costs and logistical challenges. There would also be the

Table 11: Potential Benefits and Costs of Consolidating SVP Annual Reviews in Nottoway Circuit Court

Category	Benefits	Costs
<i>Financial</i>	Reduce logistical issues and expenses that local sheriffs incur transporting patients between VCBR and circuit courts for annual reviews.	Cost of appointing a judge (or several part-time judges) to the Nottoway Circuit. ^a
	Reduce the logistical issues and travel expenses for OAG staff attorneys by having annual reviews in a consistent location about an hour's drive from Richmond. ^b	An assessment would be required of the existing space at the Nottoway County Courthouse. Additional space may be required and/or the use of current space may affect other proceedings.
<i>Legal</i>	Allow a single judge (or several part-time judges) to become expert in the SVP statute, case law, and criteria under which an individual can be released from VCBR.	Loss of a potentially important link to the jurisdiction of original conviction, including the attorney that represented the SVP during the commitment hearing.
	Potentially facilitate a less-dispersed contingent of court-appointed defense attorneys who can specialize in defense of SVPs.	

^a A full-time circuit court judge is authorized to be paid an annual salary of \$158,134. Payments into the Judges Retirement System would cost approximately \$46,000. Additional benefit costs would include payroll taxes and health insurance.

^b The OAG reported spending approximately \$19,000 on SVP-related travel in FY 2011.

Source: JLARC staff analysis.

benefit that the opportunity cost of OAG and VCBR travel time could be re-directed towards other activities. These benefits, however, would come at the financial costs associated with appointing a judge (or several part-time judges) to the Nottoway Circuit Court. A circuit court judge's salary and benefits total more than \$200,000. In addition, there could be additional capital costs if there is not sufficient capacity in the Nottoway County Courthouse to accommodate this increased caseload.

Given the relatively small magnitude of the financial implications, the potential legal benefits and costs would seem more applicable. The benefits of consolidating annual reviews in the Nottoway Circuit Court could include allowing a single judge (or several part-time judges) to specialize in SVP annual reviews, in particular the criteria under which a patient should be released from VCBR. An additional legal benefit would be that the relatively constant and predictable caseload in a single circuit could facilitate the development of a less-dispersed group of court-appointed defense attorneys with relevant expertise and experience. A potential legal drawback, however, would be the loss of an important link with the original circuit court and community, including the attorney who defended the SVP at the civil commitment trial.

The Supreme Court of Virginia should further assess the financial and legal issues associated with consolidating SVP annual reviews in the Nottoway Circuit. The assessment should consider the costs

of additional judge(s) and staffing and any modifications that would be required to the Nottoway County Courthouse. The assessment should also consider the benefits, including a less-dispersed group of defense attorneys with relevant expertise.

Recommendation (12). The Supreme Court of Virginia should further assess the financial and legal issues associated with consolidating sexually violent predator annual reviews in the Nottoway Circuit. The Supreme Court of Virginia should notify the Senate and House Courts of Justice committees whether or not it is feasible to consolidate the annual reviews by June 30, 2012.

SVPs Are Detained and Treated at VCBR to Reduce the Risk They Will Reoffend

In Summary

The Virginia Center for Behavioral Rehabilitation (VCBR) houses and treats sexually violent offenders civilly committed for inpatient treatment. Treatment at VCBR is intended to reduce the risk that SVPs will reoffend so that they can be more safely managed in the community. However, treating the disorders associated with sexual offenders does not eliminate the risk of recidivism, and the effectiveness of treatment varies by individual. VCBR mainly uses group psychotherapy to treat SVPs. Treatment at the facility is segmented into three phases with defined criteria to determine treatment progress and recommend conditional release. VCBR's program is consistent with treatment provided by other states and private practitioners, but it has evolved considerably with the growth of Virginia's SVP program. Certain program deficiencies have been addressed in recent years, but continued improvement depends on VCBR's census, budget, and staffing. SVPs have progressed through treatment at widely varying rates, with some demonstrating substantial progress over several years, and others showing little or no progress. Progress through VCBR's treatment program depends primarily on an individual's motivation to change and the severity of his clinical needs, making it difficult to predict how long an SVP will remain at VCBR.

The study mandate directs JLARC staff to review "treatment of sexually violent predators committed to the VCBR." The U.S. Supreme Court has ruled that civil commitment programs for sexually violent offenders are constitutional if treatment is the primary goal of detainment. The *Code of Virginia* requires that SVPs receive "control, care, and treatment" while under civil commitment.

TREATMENT FOR SEXUALLY VIOLENT OFFENDERS IS DESIGNED TO REDUCE THE RISK OF NEW OFFENSES

The goal of sex offender treatment programs is to reduce the risk that sexually violent offenders will commit new offenses. Treatment is designed to help offenders control their behavior by addressing the mental health and personality disorders associated with violent sexual offending. These disorders include sexual deviancies, antisocial and other personality disorders, anger management or impulse control problems, and chemical dependencies. Treatment for sex offenders is intended to lower the risk of new offenses so that the offender can be safely managed in the community.

Treatment Programs Focus on the Mental Health and Personality Disorders That Contribute to Sexual Offending

Cognitive-Behavioral Therapy

Cognitive-behavioral therapy (CBT) is a form of psychotherapy that seeks to change the thoughts and beliefs that support maladaptive behavior. Patients take an active role in the therapeutic process, learning and applying treatment concepts to their lives. CBT is used to treat a wide variety of mental health conditions, including mood, personality, and substance abuse disorders.

Treatment programs for sexually violent offenders generally consist of psychotherapy, with prescription medications used to treat mental health disorders where appropriate. The standard therapeutic approach for sex offenders is cognitive-behavioral therapy (CBT). CBT is used to help sex offenders identify the cognitive, emotional, and behavioral tendencies that contribute to their sexual offending, and learn strategies to change or cope with these tendencies. Treatment for offenders under civil commitment may be provided in a secure detention facility or in the community with supervision by a probation officer.

Group therapy is the most common way sexually violent offenders receive treatment. The group setting is preferred by treatment providers because it maximizes therapy hours, helps combat the secrecy associated with sexual offending, and allows offenders to benefit from the experiences of others. Group sessions are typically supplemented with “homework” assignments, such as journaling exercises, that must be completed outside the group. Individual therapy is used on a more limited basis, often to address specific issues that limit participation in group sessions or progress in treatment.

Treatment for sexually violent offenders is generally adapted to the risk level, clinical needs, and cognitive ability of the individual offender. For example, offenders that experience deviant arousal to children would receive therapy sessions to help them manage their arousal. For offenders with developmental or learning disabilities, the pace of treatment would be slower and therapeutic concepts would be simplified.

Most treatment programs are divided into phases and measure a sexually violent offender’s progress through the program. Periodic assessments are used to determine progress through treatment phases of a treatment program. Treatment providers monitor the offender’s participation in therapy sessions and look for positive changes in his thoughts, emotions, and behaviors. In secure facilities, civilly committed offenders are also monitored outside of therapy sessions by security staff assigned to resident living quarters. Secure facilities often provide for a gradual loosening of behavioral restrictions as the offender demonstrates progress in treatment.

Treatment Does Not Eliminate but May Reduce the Risk of New Sexual Offenses by Helping Sexually Violent Offenders Better Control Their Behavior

Sex offender treatment programs do not eliminate the risk that offenders will commit new sexual offenses. According to sex offender treatment providers, the mental health and personality disorders that contribute to sexual offending are unlikely to be eliminated through treatment. Instead, the goal of treatment is to reduce the risk of sexually violent offenses by (1) lessening the severity of these disorders and (2) giving offenders strategies and coping mechanisms to better control their behavior.

Sexually violent offenders often continue to struggle with the mental health and personality disorders that contribute to their sexual offenses, even as they demonstrate progress in treatment. The following case study illustrates how one SVP committed to VCBR struggled with deviant sexual impulses while completing the treatment program, but has nevertheless been conditionally released from the facility.

Case Study

Mr. L, 27, has three sex convictions involving females under the age of ten, including forcible sodomy and object sexual penetration. According to VCBR staff, he has been diagnosed with pedophilia and has a history of depression, anxiety, and self-esteem issues that have contributed to his sexual offending. Mr. L was found to be an SVP and committed to VCBR in January 2007. While at VCBR, he completed the treatment program but struggled with his arousal to children and acknowledged masturbating to deviant sexual fantasies. VCBR staff gave a “cautious recommendation” for conditionally releasing Mr. L, recommending he continue therapy to address his arousal issues and high-risk factors of boredom, loneliness, and isolation. Staff also recommended he have no Internet access or unsupervised contact with minors. His conditional release was approved by the court and Mr. L was discharged from VCBR in June 2011.

RESEARCH ON EFFECTIVENESS OF TREATMENT IS DIVIDED, BUT TREATMENT HAS BEEN ASSOCIATED WITH REDUCED RECIDIVISM

A key measure of the effectiveness of sex offender treatment programs is whether they reduce the risk of reoffending. Studies have yielded mixed results, with some concluding that participation in treatment lowers recidivism rates, and others concluding that the evidence is not clear. One researcher has characterized scientific opinion on the effectiveness of sex offender treatment as “divided.”

One researcher has characterized scientific opinion on the effectiveness of sex offender treatment as “divided.”

Some research tabulating the results of previous studies has found sex offender treatment to be *associated with* reduced recidivism levels. However, methodological problems make it difficult to determine if these reductions *resulted from* the treatment program or other factors, such as the motivation of the offender. Common methodological problems with these studies include

- a lack of random assignment of offenders to treatment and non-treatment groups because it is considered unethical to withhold treatment from sex offenders;
- small sample sizes that make it difficult to detect the statistical effects of treatment; and
- differences in offender populations and treatment programs that limit comparisons across studies.

In addition, few studies have focused on high-risk sex offenders with violent tendencies, making it difficult to apply research findings to the population treated through civil commitment programs.

The effectiveness of sex offender treatment programs may also be difficult to assess at the group level because treatment outcomes can vary by individual. According to both clinicians with Virginia's SVP program and private practitioners, the effectiveness of sex offender treatment depends heavily on the motivation and clinical needs of the offender. CBT requires active participation by patients and a willingness to work toward modifying their behavior. Offenders with more extensive or debilitating mental health and personality disorders face greater challenges to progressing through treatment.

VCBR'S TREATMENT PROGRAM HAS IMPROVED, BUT IMPROVEMENTS ARE AT RISK

The *Code of Virginia* requires the Department of Behavioral Health and Developmental Services (DBHDS) to "recommend a specific course of treatment and programs for provision of such treatment and... monitor the respondent's compliance with such treatment" (§37.2-908.F). The treatment program at VCBR has evolved with the growth of Virginia's SVP program. As the resident population has increased, VCBR has developed or revised policies and procedures to house and treat sexually violent offenders on a larger scale. In some cases, VCBR has also made programmatic or policy changes after the DBHDS Office of the Inspector General (OIG) documented deficiencies during the program's initial years of operation.

VCBR's Program Consists of Group Therapy, Treatment Phases, Tailored Treatment, and Procedures to Measure Progress

Treatment at VCBR is provided mainly in group therapy sessions using cognitive-behavioral and related therapeutic techniques. Throughout their commitment at VCBR, residents participate in a “core” therapy group that address a wide range of issues, including their progress in treatment and interactions with other residents. Residents also participate in a series of short-term topical therapy groups designed to address specific needs such as deviant arousal or poor anger management. Therapy groups at VCBR range in size from six to 12 residents and are led by one to two treatment staff.

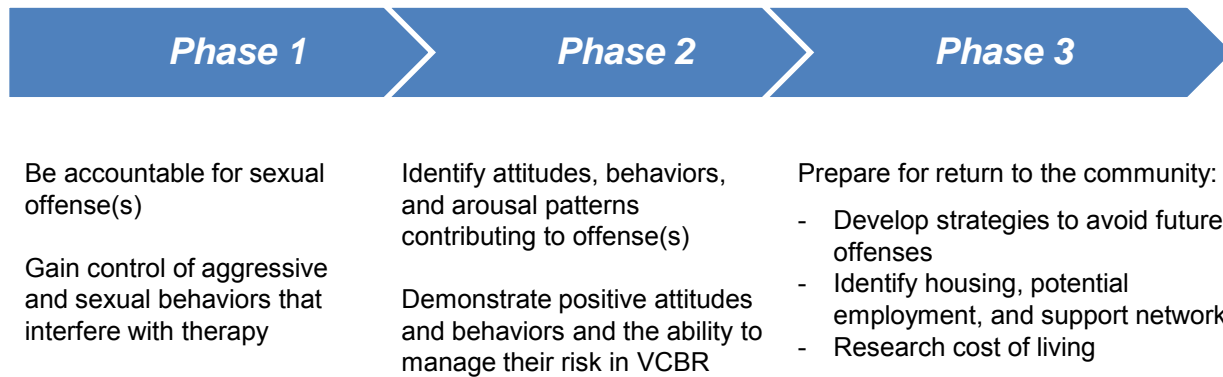
VCBR provides an average of eight to ten hours of group therapy per week.

VCBR provides an average of eight to ten hours of group therapy per week for residents, with a minimum of six hours. This includes four 90-minute sessions in the core group therapy, and an average of two to three topical groups that meet for one 1-hour session each week. Residents must spend additional time outside group sessions completing “homework” assignments reinforcing skills and concepts learned in therapy. The treatment provided by VCBR may also include

- psychiatric services to help manage the symptoms of depression, anxiety, and other disorders, including medication where appropriate;
- limited individual therapy for residents who choose not to participate in group sessions;
- adult education and vocational classes; and
- family and marital counseling to help family members support a resident's recovery.

Treatment Program at VCBR Is Comprised of Three Phases. The treatment program at VCBR is divided into three sequential phases, each with defined treatment goals (Figure 18). In phase one, treatment is intended to help residents become accountable for their sexual offenses and gain control over behaviors that interfere with treatment. Phase two of treatment focuses residents on developing insight into their offending patterns and demonstrating positive behaviors such as maintaining healthy relationships or avoiding unhealthy arousal patterns. Phase three is designed to help residents prepare for conditional release from VCBR. As an SVP progresses through these treatment phases, behavioral restrictions are lessened to allow for additional privileges and greater freedom of movement in the facility.

Figure 18: VCBR’s Treatment Program Is Divided Into Three Goal-Oriented Phases



Source: JLARC staff analysis of information from the Virginia Center for Behavioral Rehabilitation.

Treatment at VCBR Can Be Tailored to Meet the Individual Needs of SVPs. VCBR has developed policies and procedures to tailor its treatment services to meet the needs of individual residents. This process begins with an assessment of a resident’s clinical needs and recommendations for appropriate treatment. VCBR’s policy is to conduct initial assessments upon an SVP’s arrival at the facility, and a comprehensive psychological evaluation within seven days of admission. Comprehensive evaluations consist of

- a review of available DOC, DBHDS, court, and mental health records;
- a clinical interview with the offender; and
- testing of intellectual functioning and reading comprehension if recent test results are not available.

VCBR staff use this information to develop a written assessment of the resident that includes his mental health and personality disorders and recommendations for treatment while at VCBR. A key component of the treatment recommendations for a resident are specific topical therapy groups. VCBR’s resident handbook lists approximately 40 topical therapy groups to address the mental health and personality disorders that contribute to a resident’s violent sexual offending. SVPs are assigned to groups based on their comprehensive psychological evaluation and current treatment phase. Table 12 describes some of the more common topical therapy groups to which residents are assigned.

CBT treatment requires offenders to understand how their thoughts and behaviors contribute to sexual offending, and then use therapeutic concepts to modify these thoughts and behaviors. As a result, CBT treatment often must be modified for individuals with developmental or cognitive disabilities. At VCBR, treatment

Table 12: Therapy Groups Commonly Used at VCBR to Address the Mental Health and Personality Disorders of SVPs

Therapy Group	Description
Anger Management	Learning to recognize early signs of anger and intervene with calming techniques
Arousal Management	Learning to manage deviant sexual arousal
Thinking Errors	Identifying and changing the core attitudes and beliefs that support sexual offending and other criminal behavior
Relapse Prevention (I-VI)	Identifying internal and external risk factors for sexual offending, and developing effective coping responses
Victim Empathy (I-II)	Learning the concepts of empathy and applying them to victims of sexual offenses
Healthy Relationships	Identifying the components of healthy relationships
Transitions	Preparing a pre-discharge plan for conditional release, and identifying a realistic plan for housing, employment, and budgeting
Substance Abuse (I-IV)	Learning how substance use supports sexual offending, identifying risk factors for relapse, and developing coping responses
Anxiety and Depression	Learning about anxiety and depression, and exploring options for treating the debilitating symptoms

Source: Virginia Center for Behavioral Rehabilitation.

staff rely on the comprehensive psychological evaluation conducted at admission to identify offenders with such disabilities. These individuals are assigned to a “special needs” treatment program tailored to their level of intellectual functioning. Therapy groups in this track are shorter and use simplified vocabulary, more experiential exercises, and more concrete discussions. VCBR’s policy is to place special needs residents who appear vulnerable to more predatory residents in a separate living unit with higher levels of security staff. Criteria for evaluating readiness for conditional release can also be modified for these residents.

VCBR Has Developed Criteria to Measure Progress in Treatment and Readiness for Conditional Release. According to VCBR’s resident treatment handbook, sexual, behavioral, and emotional self-regulation is the cornerstone of treatment at the facility. A resident’s ability to effectively manage himself is “essential before he will be recommended for conditional release.” VCBR assesses the treatment progress of residents on a quarterly basis and as part of the annual court review (semiannual after five years). Treatment staff have developed criteria to determine when an SVP has completed a treatment phase and when conditional release should be recommended to the court. These criteria are contained in the facility’s treatment handbook provided to incoming SVPs.

Quarterly assessments are used to evaluate a resident’s treatment progress and determine advancement to the next treatment phase. Assessments are completed on a standardized form by the resident’s primary therapist using observation notes from therapy

group facilitators, incident reports from security staff, and personal contact with the resident. The results are provided to the resident and used by treatment staff to determine treatment recommendations going forward. Table 13 shows the key criteria residents must meet to complete each phase of treatment and the minimum period of time for which residents must demonstrate the required behaviors. An SVP could reach the third phase of treatment and begin planning for conditional release in 15 months if he met the phase one and phase two criteria.

As part of the court’s annual review of the need for civil commitment, the *Code of Virginia* requires DBHDS to provide the court with a re-evaluation of the resident’s condition and recommended treatment (§37.2-910.B). Annual reviews are completed by an independent unit of psychologists within VCBR using a standardized form that specifies criteria for conditional release and information sources to be used. VCBR staff rely on quarterly assessments, psychiatric and medical records, interviews with treatment staff, and an interview with the resident (if he cooperates) to complete reviews. When evaluating the feasibility of conditional release, VCBR staff consider evidence of risk factors shown through research to be associated with risk for future sexual offending. These factors include a resident’s management of deviant arousal; sexual, behavioral, and emotional self-regulation; consistent pro-social behavior; and substance abuse issues.

Table 13: SVPs Must Meet Criteria to Complete Each Treatment Phase at VCBR

Treatment Phase	Criteria	Minimum Time SVP Must Demonstrate Behaviors
<i>One</i>	<ul style="list-style-type: none"> Attend 95 percent of assigned groups and complete homework Acknowledge a sexual offense history generally consistent with official records Refrain from behaviors that interfere with therapy, such as physical aggression or sexual acting-out 	6 consecutive months
<i>Two</i>	<ul style="list-style-type: none"> Identify risk factors for their sexual offending and demonstrate the use of effective coping responses Complete polygraph examinations without deception Attend 98 percent of assigned groups and complete homework Consistently express anger in an appropriate manner and demonstrate an ability to delay gratification 	9 consecutive months
<i>Three</i>	<ul style="list-style-type: none"> Complete a “pre-discharge” plan that includes coping strategies for avoiding their risks for sexual offending Identify employment options and a support system Research cost of living and complete a realistic budget Consistently demonstrate behaviors from phase two 	No minimum period

Source: JLARC staff analysis of information from the Virginia Center for Behavioral Rehabilitation.

According to VCBR policy, to be recommended for conditional release a resident must

consistently demonstrate sufficiently sustained change in the thoughts, beliefs, attitudes, emotions, behaviors and sufficient management of sexual arousal, such that one could reasonably assume that, with continued treatment, the change could be maintained and his risk managed in the community.

VCBR policy requires residents to meet additional criteria for conditional release, including

- progressing through each treatment phase and making “significant” progress in phase three;
- exhibiting no deception in polygraph examinations on their sexual history and behavior at VCBR;
- completing a full year without “significant behavioral problems;”
- attending at least 98 percent of assigned therapy groups and completing all homework in a timely fashion; and
- articulating high-risk situations and risk management strategies with minimal prompting consistent with his ability.

Content and Structure of VCBR’s Treatment Program Is Similar to Treatment in Other States’ Civil Commitment Programs

VCBR’s treatment program described above is similar to treatment provided by other states with civil commitment programs for sexually violent offenders. According to a 2010 survey of the 20 states with civil commitment programs by the Sex Offender Civil Commitment Programs Network, all 16 states responding to the survey reported using CBT in group settings to treat offenders. Thirteen states provide a specialized treatment track for offenders with developmental or learning disabilities. A majority of survey respondents assess treatment progress on a quarterly basis. JLARC staff interviews with other states also found that many states structure their treatment program with phases and use defined criteria to determine advancement.

The amount of treatment provided at VCBR is also comparable to treatment levels in other states. At eight to ten hours of group therapy per week, Virginia provides more treatment than some states but less than others. The amount of group treatment provided through civil commitment programs in other states varies from 1.5 to 18 hours per week. The size of treatment groups at VCBR is also similar to, and in some cases smaller than, groups in

other states. Among survey respondents, group sizes averaged ten to 12 participants.

VCBR Has Addressed Many Concerns Cited by the DBHDS OIG, but Continued Progress Depends on Census, Budget, and Staffing

Since 2005, the DBHDS OIG has reviewed VCBR and the SVP program at least eight times. Early reports, completed when the program was relatively new, found that VCBR's treatment program was evolving with the steady growth in admissions to the facility. Relatively few concerns with the program were documented.

However, as VCBR's population expanded more rapidly, doubling from 30 to 60 between 2006 and 2007, OIG inspections found substantial problems with the treatment program. These included steep declines in the amount of treatment provided, increases in staff turnover and vacancies, and the lack of a shared understanding among VCBR staff that release to the community was the primary goal of treatment at the facility. However, subsequent reports by the OIG have found that VCBR has taken multiple steps to address many of these concerns (Table 14).

Until Recently, VCBR's Treatment Program Lacked Key Policies and Procedures. Until recently, VCBR lacked policies and procedures for identifying residents' treatment needs, tailoring treatment to meet those needs, and measurement of treatment progress. Management staff at the facility have implemented several initiatives to address these issues within the last year. VCBR began requiring a comprehensive psychological evaluation of residents upon admission. Staff modified topical therapy groups to accommodate residents with cognitive or developmental disabilities. Treatment phase goals and criteria for advancing were further clarified, and "tests" were developed to determine whether residents mastered concepts learned in group therapy. Treatment teams began providing security staff assigned to resident living units with basic information about each resident, including his mental health disorders and current treatment phase, as well as training on how to document residents' behavior.

Ongoing Challenges Place VCBR's Treatment Program at Risk. Despite improvements to its treatment program, VCBR faces ongoing challenges that place the program's progress at risk. The first challenge is continued growth in admissions to VCBR, which may strain the facility's ability to effectively treat and manage SVPs. Past admissions growth contributed to problems with the treatment program, as documented by the OIG. According to VCBR staff, in the future overcrowding could slow residents' progress

Table 14: VCBR Has Taken Multiple Steps to Address Findings of the DBHDS Office of Inspector General

OIG Finding	Steps Taken by VCBR to Address OIG Finding
Limited amount of treatment was provided	<ul style="list-style-type: none"> • Hired treatment director to coordinate treatment • Increased average treatment time from 2.5 hours per week in 2007 to eight to ten hours in 2011
Staff vacancies and turnover were high; staff training was inadequate	<ul style="list-style-type: none"> • Increased staffing in nearly all areas • Reduced turnover from 52 percent in FY 2007 to 28 percent in FY 2010 • Hired training coordinator and increased training offerings
No shared vision among staff of release as primary goal of treatment	<ul style="list-style-type: none"> • Updated treatment model to provide clear guidance to residents on treatment goals • Began providing training for staff on the treatment model
Oversight of VCBR by DBHDS was limited	<ul style="list-style-type: none"> • Created advisory council with representatives from DBHDS, OAG, DOC, VA Office of Human Rights, and private practitioners

Source: JLARC staff analysis of reports from the Office of the Inspector General for the Department of Behavioral Health and Developmental Services.

through treatment by limiting access to therapy groups and increasing group sizes. The use of double-bunking could increase the risk of physical violence, inappropriate interactions between residents, and the exploitation of vulnerable residents. Some residents have stated an intention to file legal challenges to the use of double-occupancy rooms. This is discussed more in Chapter 9.

A second challenge to VCBR’s treatment program is turnover and vacancy among staff. Concern about turnover and vacancy rates has been consistently noted in past OIG reports. Current management staff at VCBR have implemented several improvements to the treatment program in recent years, and turnover at this level could jeopardize these improvements. VCBR continues to struggle with high turnover among treatment and security staff, due in part to the challenges of a difficult resident population and the potential for higher salaries elsewhere. Anecdotal reports suggest staff turnover is being exacerbated by concerns that VCBR may be privatized in the near future. Turnover among treatment and security staff potentially slows the treatment process, as new staff must learn about the residents and residents must adjust to new treatment providers. Staff vacancies may limit the amount of treatment VCBR can provide for residents or its ability to track their treatment progress.

Finally, the treatment program at VCBR will likely be challenged by budgetary pressures, particularly as the size and cost of the SVP program grows. These pressures may exacerbate staff turnover and vacancies if program costs are managed by allowing higher staff-to-resident ratios or reducing salaries for treatment and secu-

riety staff. Budgetary pressures may also result in reduced amounts of treatment for residents.

SEXUALLY VIOLENT OFFENDERS AT VCBR PROGRESS THROUGH TREATMENT AT DIFFERENT RATES

Under Section 37.2-909.A of the *Code of Virginia*, DBHDS must provide control, care, and treatment for civilly committed SVPs “until such time as the respondent's mental abnormality or personality disorder has so changed that the respondent will not present an undue risk to public safety.” A key responsibility, therefore, of treatment staff at VCBR is evaluating an offender’s progress in treatment and determining when his disorders have changed sufficiently to allow for safe management in the community. However, due to the complex conditions of many residents, there are no standard guidelines at VCBR or among mental health professionals for how long it should take sexually violent offenders to progress through an inpatient treatment program.

Most VCBR Residents Have Multiple Convictions for Violent Sexual Offenses and Mental Health or Personality Disorders

The average age of current residents of VCBR is 45, and two-thirds are between the ages of 40 and 60. All but three SVPs since 2003 have been men. Civilly committed SVPs are approximately evenly divided between African-American and Caucasian ethnicities. About 16 percent of current VCBR residents have developmental disabilities and have been placed in the “special needs” treatment track.

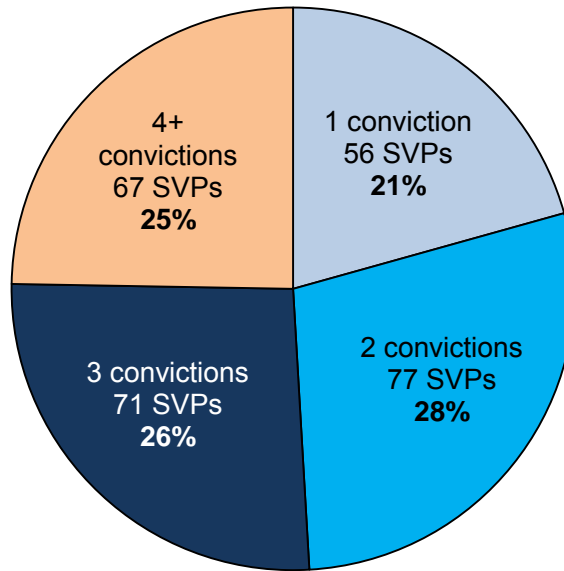
Most SVPs committed to VCBR are repeat violent sexual offenders. Nearly 80 percent of VCBR residents have had more than one such conviction, and approximately one-quarter have had four or more convictions (Figure 19). According to research, the number of actual *offenses* is likely much higher, given the secrecy surrounding many sexual offenses and the difficulties prosecuting them. One-third of SVPs have had at least one conviction for a sexual offense involving a child, and two-thirds have had at least one conviction in which they did not know the victim. As noted in Chapter 2, the most common sex convictions among civilly committed SVPs in Virginia are aggravated sexual battery, rape, and forcible sodomy. Offenders committed to VCBR may also have non-sexual convictions or charges on their criminal record.

A majority of residents at VCBR have more than one diagnosed paraphilia and a personality disorder.

SVPs civilly committed to VCBR are also likely to have multiple mental health and personality disorders related to their sexual offending history. According to VCBR staff, a majority of residents have more than one diagnosed paraphilia and a personality disorder such as antisocial or borderline personality (Table 15). The most common diagnoses are paraphilias. Treatment staff estimate

that approximately 30 percent of VCBR residents have a diagnosis of pedophilia, and nearly two-thirds have an unspecified paraphilia that includes attractions to adolescents or non-consensual sexual activity. Other diagnoses common among SVPs include chemical dependencies, depression, and anxiety. These conditions have not been actuarially shown to predict future sexual offending but may exacerbate the risk of committing sexual offenses, especially if not treated.

Figure 19: Nearly 80 Percent of VCBR Residents Have Multiple Convictions for Violent Sexual Offenses



Note: Based on 271 SVPs civilly committed to VCBR for which the total number of convictions for violent sexual offenses was available. This data was not available for 35 SVPs.

Source: JLARC staff analysis of SVPTracker data, 2011.

Table 15: Common Mental Health and Personality Disorders of VCBR Residents

Mental Health / Personality Disorder	Description
Paraphilia	Rare, unusual, or socially deviant sexual interests in persons, objects, or activities. Paraphilias include pedophilia, exhibitionism, voyeurism, frotteurism, sexual sadism, and forced sex.
Antisocial Personality Disorder	Characterized by abnormal ways of thinking and relating to others. Clinical symptoms include little regard for right or wrong, the law, or the rights of others; unstable lifestyle; and violence.
Borderline Personality Disorder	Characterized by instability in moods, relationships, self-image, and behavior.
Chemical Dependency	Common dependencies include alcohol, marijuana, and cocaine.

Source: JLARC staff analysis of information from the Virginia Center for Behavioral Rehabilitation and other sources.

SVPs Progress Through Treatment at Widely Varying Rates Depending on Their Motivation and Clinical Needs

Sexually violent offenders civilly committed to VCBR have demonstrated varying rates of progress through treatment. Figure 21 plots the most recent treatment phase and the number of years at VCBR for each of the roughly 300 SVPs committed to the facility since 2003. SVPs that have been at VCBR longer are likely to have progressed further in treatment. Approximately 80 percent of SVPs that have been at the facility four or more years have progressed beyond the first phase of treatment. Among residents with shorter stays of two to four years, approximately half have moved past the first phase. This percentage drops to fewer than one-third for residents at VCBR less than two years.

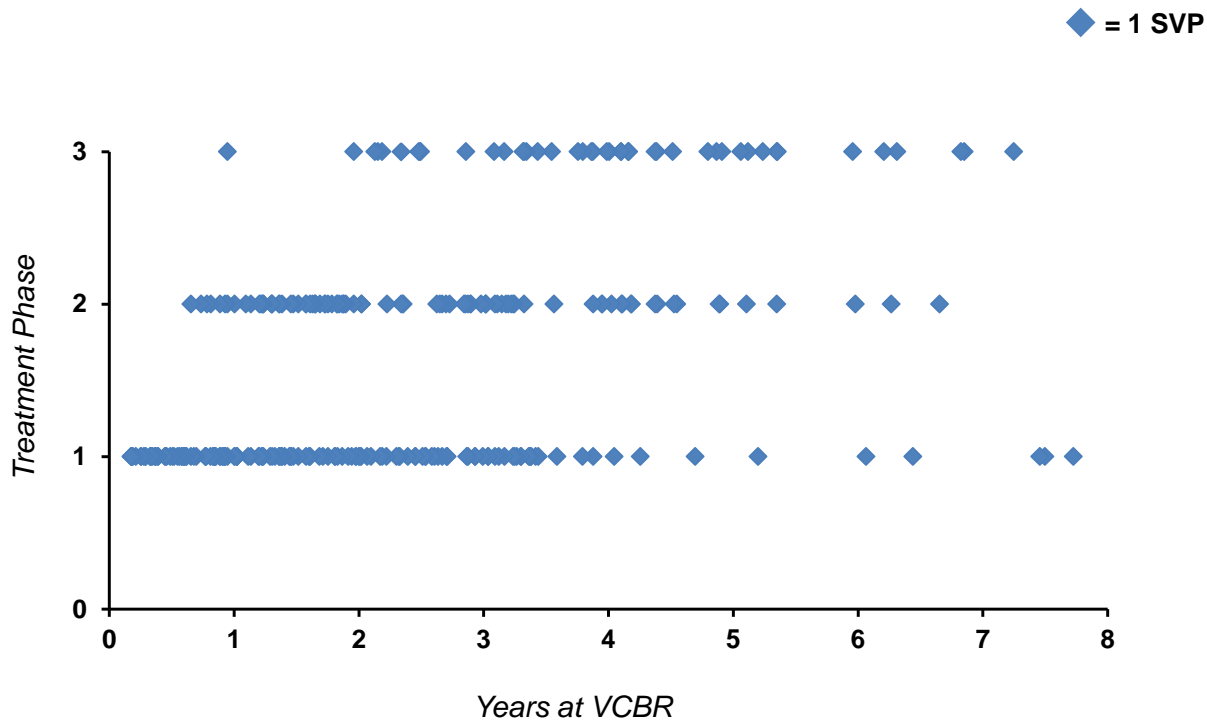
However, as Figure 20 illustrates, there is substantial variation in the rate of treatment progress at VCBR and the outcomes of treatment. Under current guidelines, residents can reach the final treatment phase and begin planning for release in as little as 15 months, but few SVPs have progressed through treatment at this rate. Nearly all residents have needed at least two years to reach the final treatment phase, but some have needed more than five years. Residents reaching phase two have progressed over a similarly wide range of time. In other cases, SVPs have demonstrated little or no treatment progress over a period of years.

Nearly Half of SVPs Have Demonstrated Moderate or Substantial Treatment Progress, but About 20 Percent Have Shown Limited Progress Over Several Years. Approximately 47 percent of the roughly 300 SVPs civilly committed since 2003 have shown some treatment progress by advancing past the first phase of treatment at VCBR (Figure 20). A total of 44 VCBR residents, or about 15 percent of SVPs, have reached the final phase of treatment and begun planning for their return to the community. Nearly half of these residents have been recommended for conditional release by VCBR staff. On average, SVPs have needed more than four years to complete treatment at VCBR and be recommended for conditional release. Nearly all have needed more than three years.

On average, SVPs have needed more than four years to complete treatment at VCBR and be recommended for conditional release.

Approximately one-third of SVPs at VCBR have demonstrated moderate progress in treatment by advancing as far as phase two. SVPs in the second phase of treatment have acknowledged their sexual offense history and exhibited greater control over their behavior. However, they have not demonstrated sufficient progress in understanding the risk factors that contribute to their sexual offending or developing effective coping responses. Residents advancing as far as phase two have required about 2.5 years on average to do so, though this has varied from more than six years to less than one.

Figure 20: SVPs Have Made Varying Degrees of Treatment Progress Over a Wide Range of Time at the Virginia Center for Behavioral Rehabilitation



Note: Based on the most current or last treatment phase and time at VCBR of 291 SVPs civilly committed to VCBR for whom data were available.

Source: JLARC staff analysis of data from the Virginia Center for Behavioral Rehabilitation.

A subset of sexually violent offenders at VCBR have made limited or no treatment progress despite being at the facility for several years. About 20 percent of SVPs have been at VCBR for two or more years but remain in the first phase of treatment. Half of these residents have been at VCBR more than three years, and in some cases more than five years.

Treatment Progress by SVPs Has Been Delayed by Lack of Motivation, Complex Clinical Needs, and an Evolving Treatment Program.

Several factors have contributed to the slow pace of treatment progress among some residents of VCBR. According to treatment staff at the facility, an individual’s motivation to change is the most important factor affecting their rate of progress in treatment. Residents that do not actively participate in therapy or work to change their behavior are unlikely to benefit from treatment.

About 11 percent of VCBR’s current population attends fewer than half of their group sessions or have refused to sign a consent form authorizing treatment. Because of the civil nature of the detainment, SVPs cannot be forced to participate in treatment. Most of

VCBR staff report that several residents have no interest in leaving the facility or working to change their behavior.

these residents remain in phase one of treatment after more than 18 months at VCBR. VCBR staff report that several residents have no interest in leaving the facility or working to change their behavior. Residents that participate in less than half of group sessions receive limited individual therapy to address any barriers to their participation, but they cannot be compelled to cooperate with treatment.

Treatment staff at VCBR also cite the severity of clinical needs as a factor that can hinder the treatment progress of some residents. SVPs with more severe mental health and personality disorders face greater challenges in progressing through treatment. Residents with severe personality disorders or sexual deviancies—or with multiple severe diagnoses—may struggle to control behaviors such as physical aggression and sexual acting-out. These behaviors can delay advancement from one treatment phase to the next and make conditional release unlikely.

The following case study illustrates how treatment progress has been slow for one SVP with severe clinical needs and inconsistent participation in therapy.

Case Study

Mr. T, 41, has one violent sex conviction for the rape and robbery of a mentally disabled woman in 1991. While in prison, he repeatedly exposed himself to a female correctional officer. Mr. T has an extensive mental health history that includes psychiatric hospitalizations, suicide attempts, chemical dependencies, anxiety, and depression. He has also been diagnosed with voyeurism and exhibitionism. Mr. T was admitted to VCBR in April 2008, and has advanced to the second treatment phase after more than three years in phase one. According to VCBR staff, he is generally accountable for his sexual offenses and accepts feedback in an appropriate manner. However, Mr. T's treatment progress has been slowed by limited participation in group therapy sessions and ongoing problems with his behavior. He attends only 75 percent of group sessions, and occasionally sleeps during sessions. His behavior has been impulsive at times, and he can be histrionic, threatening to swallow razor blades or broken light bulbs if not given something he wants.

A third factor delaying treatment progress for some residents is that (as documented by the DBHDS OIG) in the past VCBR's program has lacked adequate policies and procedures. According to treatment staff, the criteria for progressing through treatment and earning conditional release were unclear, likely causing some residents to become discouraged. Similarly, progress for residents with

cognitive disabilities was delayed because the program did not adequately assess the cognitive functioning of residents or provide needed accommodations for lower-functioning individuals. Many therapy groups were not modified for residents with cognitive disabilities, making it difficult for this population to understand and apply key therapeutic concepts.

The following case study illustrates how treatment progress can be slow for SVPs with developmental disabilities even when these disabilities are properly identified and accommodated.

Case Study

Mr. B, 40, has two convictions for violent sexual offenses, including aggravated sexual battery involving an underage female. He has a history of charges and convictions for sexual offenses going back to his 20's, including the sexual abuse of twin three-year-old girls, rape against his girlfriend, and indecent exposure. Mr. B has been diagnosed with pedophilia, adult antisocial behavior, alcohol dependence, and mild mental retardation. Neuropsychological testing also suggests the likelihood of brain damage. According to VCBR staff, Mr. B has had difficulty adjusting to the facility since arriving in 2006. He was placed in VCBR's specialized track for residents with developmental disabilities, but has made "no measurable treatment progress" and remains in phase one. He often skips therapy sessions, continues to deny responsibility for his sexual convictions, and exhibits sexual acting-out, physical aggression, and verbal abuse.

Other program deficiencies cited by the OIG, such as limited amounts of treatment and high staff turnover, may have also delayed treatment progress for some residents.

VARIED TREATMENT OUTCOMES MAKE IT DIFFICULT TO PREDICT HOW MANY SVPS MIGHT BE RELEASED IN A GIVEN YEAR

Under the *Code of Virginia*, SVPs should not be released from VCBR until their mental health and personality disorders have been effectively treated, and they no longer pose an undue risk to public safety. However, it is difficult to predict how quickly a given SVP will progress through treatment at the facility. As noted earlier, there is no standard timeframe for how long treatment should take, and treatment outcomes vary widely depending on an individual's motivation to change, the severity of his clinical needs, and other factors. As a result, it is difficult to predict how long SVPs will remain at VCBR or the number of SVPs that will be recommended for release in a given year. This adds to the challenge of

planning for future capacity needs at VCBR with a high degree of precision.

An additional challenge to predicting the size of VCBR's population is that completing the treatment program does not guarantee an SVP will be conditionally released. The decision to release an offender from VCBR is made by the circuit court, and the *Code of Virginia* requires judges to consider a variety of factors in addition to treatment progress when evaluating conditional release. As Chapter 7 discusses, a key factor in deciding whether conditional release is appropriate depends on whether an SVP has viable housing options in the community.

SVPs on Conditional Release Are Managed in the Community

In Summary

SVPs that do not require civil commitment at VCBR can be placed on conditional release and managed in the community. SVPs on conditional release must participate in outpatient treatment and are monitored by probation officers using GPS technology, field visits, and polygraph exams. Since 2003, 78 of the approximately 350 SVPs have been approved for conditional release by Virginia courts, including 21 after civil commitment at VCBR. Monitoring and supervision by DOC does not eliminate the risk of further violent sex offenses: three SVPs have been charged with a new sex offense while on conditional release, and one has been convicted. A lack of viable housing in the community is the primary impediment to conditional release when it is otherwise appropriate. SVPs have few housing options, mainly due to limited employment prospects and restrictions on where SVPs can live. Other states with civil commitment programs have attempted to make conditional release a more viable option by providing transitional housing assistance and intensive monitoring for SVPs in the community. Using these strategies to facilitate conditional release when housing is the only impediment can be more cost-effective than commitment at VCBR. However, further facilitating conditional release has benefits and drawbacks that require policy-makers to balance the cost of civil commitment, the risk of new sex offenses, and the civil liberties of SVPs.

The study mandate directs JLARC staff to review the SVP conditional release program administered by the Department of Behavioral Health and Developmental Services. The *Code of Virginia* provides for conditional release as a less restrictive alternative to civil commitment at VCBR. Conditional release is intended for sexually violent offenders who still meet the statutory definition of an SVP but whose risk of reoffending is low enough to be managed in the community with continued treatment and supervision. SVPs on conditional release are subject to court-approved conditions aimed at managing this risk.

VIRGINIA COURTS HAVE APPROVED 78 SVPS FOR CONDITIONAL RELEASE, INCLUDING 21 FROM VCBR

In Virginia, SVPs can be placed on conditional release directly from a Department of Corrections (DOC) facility without being civilly committed at VCBR, or after being committed at VCBR and receiving inpatient treatment. Section 37.2-912.A of the *Code of Virginia* requires a circuit court to place an SVP on conditional release whenever it determines that (1) he does not need secure inpatient treatment but does need outpatient treatment, (2) outpatient supervision and treatment are reasonably available, (3) there is reason to believe he will comply with the terms of conditional re-

lease, and (4) release does not present an undue risk to public safety. Section 37.2-912.A also includes factors the court *may* consider when evaluating the use of conditional release, including

- the nature of the predicate sexually violent offense, including the age and maturity of the victim;
- results from actuarial or diagnostic tests, and the likelihood of recidivism;
- the individual's past and present mental condition, and their response to treatment at VCBR or in other settings;
- living arrangements and potential employment if conditional release was approved; and
- the availability of transportation to ensure participation in treatment on conditional release.

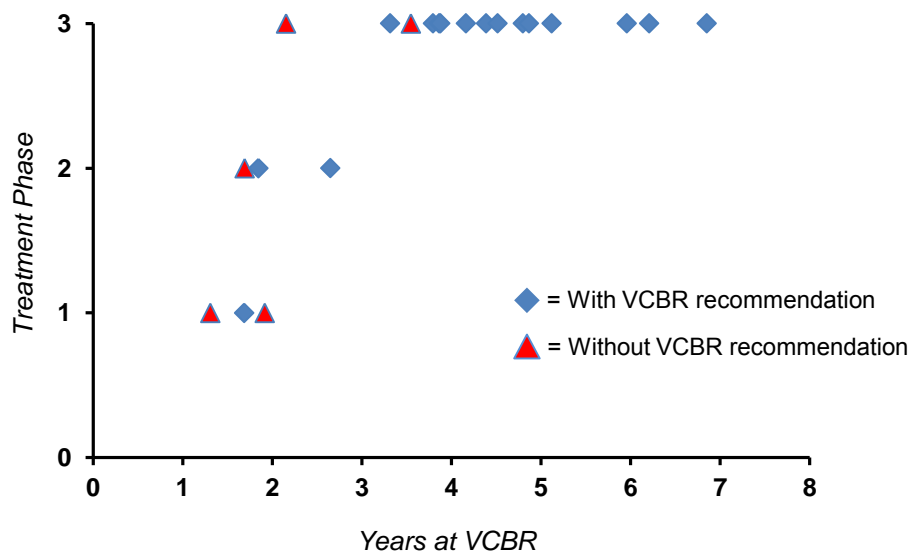
The *Code of Virginia* allows a circuit court to impose the conditions it deems will best meet an SVP's need for treatment and supervision on conditional release. Provisions of the *Code* also allow the court to modify or remove the conditions of release, or revoke conditional release and commit an SVP at VCBR if he is found no longer suitable for conditional release.

Since 2003, circuit courts in Virginia have approved a total of 78 SVPs for conditional release. Fifty-seven SVPs were conditionally released from a DOC facility rather than being civilly committed at VCBR. SVPs placed directly on conditional release represent about 15 percent of the approximately 350 SVPs found by circuit courts to meet the statutory definition of a sexually violent predator.

Circuit courts have also approved conditional release for an additional 21 SVPs that were civilly committed at VCBR. SVPs have been approved for release from VCBR after varying lengths of stay and treatment progress at the facility (Figure 21). Sixteen SVPs received a recommendation for conditional release from VCBR staff, generally after reaching phase three of the treatment program. The remaining five SVPs were released by a circuit court without a recommendation from VCBR while in various treatment phases.

The *Code of Virginia* does not require a recommendation from VCBR staff for a circuit court to approve conditional release from the facility, though it does require the court to consider how the SVP responded to inpatient treatment. Circuit courts may provide little explanation of their decision to approve conditional release or order civil commitment to VCBR. In practice, recommendations from VCBR staff on an SVP's readiness for conditional release

Figure 21: Courts Have Approved SVPs for Conditional Release From the Virginia Center for Behavioral Rehabilitation After Varying Lengths of Stay and Treatment Progress



Note: Data for conditional releases approved by circuit courts through July 2011.

Source: JLARC staff analysis of data from the Virginia Center for Behavioral Rehabilitation.

appear to play an important role in the court’s decision-making process. To date, only five SVPs have been approved for release from the facility without such a recommendation, while no VCBR recommendation for conditional release has been denied by the court. When VCBR does recommend conditional release, the *Code* requires a second evaluation of the need for commitment at VCBR by an independent licensed psychologist (§37.2-910.B).

DEPARTMENT OF CORRECTIONS MONITORS SVPs ON CONDITIONAL RELEASE

SVPs on conditional release are required to participate in outpatient treatment and subject to monitoring and supervision intended to reduce their risk of committing a new violent sex offense. Behavioral restrictions are designed to limit an SVP’s access to potential victims and the opportunity to commit new offenses. Monitoring and supervision by probation officers is used to ensure that the SVP is complying with the terms of his conditional release. Violations of conditional release terms can result in stricter terms or re-commitment (or commitment for the first time) to VCBR if approved by the court. Probation officers exercise significant judgment in determining how to address violations and when to seek court approval to modify or revoke conditional release.

Conditional Release Plan Contains the Terms of Release and a Home Plan Reviewed by DOC

The conditional release process begins with the development of a conditional release plan that contains the terms of release for each SVP. Plans are provided for the court's consideration whenever it evaluates the feasibility of conditional release, either during the commitment review process or during its annual (or biennial) review of SVPs committed at VCBR. Each plan includes an assessment of the SVP's risk for committing violent sex offenses on conditional release, and recommends treatment, monitoring, and supervision requirements to manage that risk. A key element of the conditional release plan is the SVP's proposed home plan and a description of how it affects his risk for reoffending.

Conditional release plans are developed by DBHDS with assistance from DOC probation officers. DBHDS staff rely on court and DOC records, the SVP evaluation from the commitment review process, and annual reviews by VCBR staff to assess an SVP's risks and needs on conditional release. VCBR staff work with the SVP to identify a proposed home plan for the conditional release plan. DOC staff investigate the proposed home plan, and may also provide comments on proposed monitoring and supervision requirements. DOC's investigation of a home plan involves visiting the proposed residence to verify its existence, and identifying any factors that increase the risk for new violent sex offenses. These factors include children living at or near the residence, the home's proximity to restricted zones such as schools or daycares, and evidence of drugs or alcohol in the home. The probation officer also interviews the family with whom the SVP will be living to gauge their willingness and ability to assist in monitoring them.

DOC Probation Officers Use GPS Technology, Field Visits, and Polygraphs to Monitor SVPs on Conditional Release

Under the *Code of Virginia*, responsibility for verifying an SVP's compliance with his conditional release plan is assigned to DBHDS or DOC if the offender has parole or probation obligations. The *Code* also gives DBHDS authority to contract with DOC for monitoring and supervision services. DBHDS has exercised this authority, and all SVPs on conditional release are overseen by DOC probation officers.

By statute, all SVPs on conditional release are monitored electronically with global positioning system (GPS) devices that transmit information in real time about the offender's location. DOC contracts with a private vendor for the GPS equipment and monitoring services, at a cost of \$6.50 per SVP, per day. SVPs on conditional release are required to wear an ankle bracelet and carry a transmitter that sends a satellite signal indicating their location.

This information can be displayed graphically and monitored to ensure the SVP does not enter restricted areas and complies with curfew requirements (Figure 22).

Active and Passive GPS Monitoring

Under 'active' GPS monitoring, information on an offender's location is transmitted and used in real time to identify violations. Under 'passive' GPS monitoring, information is reviewed retroactively, typically on a weekly or monthly basis. Violations may not be identified until well after they occur.

DOC uses an "active" form of GPS monitoring that allows it to identify violations in a more timely fashion than is possible under "passive" monitoring. DOC staff report the department does not have the resources to monitor GPS information in real time with staff. Instead, the GPS system generates an immediate alert notifying the probation officer that a violation has occurred, such as entering a restricted zone or tampering with the device. The probation officer is then responsible for determining the nature of the violation.

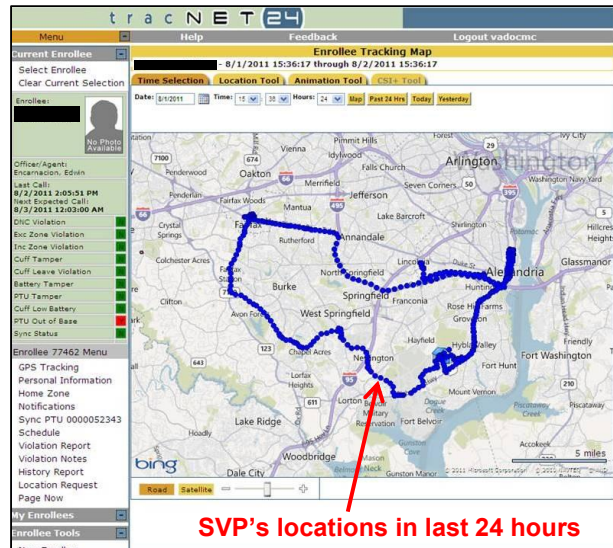
In addition to GPS monitoring, probation officers also use field visits and regular contact with the SVP, family members, treatment providers, and other persons knowledgeable about the offender to monitor SVPs on conditional release. SVPs are assigned to one of three standard DOC supervision levels that specify how often field visits must be conducted. SVPs begin on the highest level of supervision, and can move to less intense levels depending on their behavior and risk level.

Figure 22: All SVPs on Conditional Release Are Monitored With GPS Devices That Transmit Real-Time Information About Their Location

Transmitter and Ankle Bracelet



Monitoring Software



Source: DOC Department of Community Corrections.

Conditional release plans require probation officers to use a variety of other techniques to monitor SVPs in the community. The *Code of Virginia* requires probation officers to provide the court with a written report of the SVP's progress and adjustment to the community every six months. When first placed on conditional release, all SVPs undergo two polygraph exams per year to identify any deviant fantasies or prohibited behaviors. Depending on their risk level and offending pattern, SVPs may be required to undergo regular drug and alcohol testing and penile plethysmograph exams that measure their arousal to inappropriate stimuli. The total cost of managing an SVP on conditional release, including the cost of the probation officer, treatment, and GPS monitoring, is approximately \$22,000 per year.

Monitoring and Supervision Do Not Eliminate the Risk of New Sex Offenses on Conditional Release

Monitoring and supervision techniques can help minimize the risk that sexually violent offenders on conditional release will commit new violent sex offenses. In Virginia, conditional release plans are tailored to the risk level and circumstances of each SVP, and DOC probation officers use many of the techniques identified in literature and reported by other states with civil commitment programs. The "active" form of GPS monitoring is complemented by regular polygraph exams and field visits with the SVP and others knowledgeable about their behavior. According to DBHDS staff, the regular use of polygraph exams often leads an SVP to confess a violation because he assumes the exam will detect it.

However, monitoring and supervision of SVPs on conditional release does not eliminate the potential for new violent sex offenses. As discussed in Chapter 6, the mental health and personality disorders associated with sexual offending are chronic conditions that may be *managed* through treatment, but not *eliminated*. Field visits with the SVP, treatment providers, and family members can help probation officers identify "red flags" suggesting the likelihood of reoffense, but an SVP may be able to hide his actions. GPS monitoring also has limitations. While it allows a probation officer to verify that an SVP is obeying his curfew and avoiding restricted areas, it does not indicate what the SVP is doing or if anyone is with him. According to DOC staff, GPS monitoring is only effective for those offenders who do not want to reoffend, and "if an offender wants to reoffend, they can."

According to DOC staff, "If an offender wants to reoffend, they can."

RECIDIVISM DATA INDICATE THE RISK OF REOFFENSE ON CONDITIONAL RELEASE INCREASES OVER TIME

A large number of studies have attempted to quantify the rate at which convicted sex offenders commit new sexual offenses after incarceration. The likelihood of reoffense increases over time as of-

fenders have more opportunities to commit crimes. As a result, estimates of recidivism rates vary depending on the length of time sex offenders are monitored (Table 16). A study by the U.S. Department of Justice estimated that approximately five percent of convicted sex offenders were arrested for a new sex offense within three years. Studies appearing in peer-reviewed journals have tracked offenders over longer periods, ranging from three to six years on average, and estimated recidivism rates from ten to 20 percent. Recidivism estimates also tend to be higher when non-sex crimes or parole violations are tracked in addition to sex offenses. The higher recidivism rates found in studies by the Virginia DOC and the Virginia Criminal Sentencing Commission reflect the use of these broader recidivism measures.

The actual rate of new sex offenses among convicted sex offenders is likely to be substantially higher than published estimates. Most studies rely on official records indicating arrests, charges, or convictions for sex offenses, but official records may vastly underestimate the true number of these offenses. Due to the nature of sex offenses and the difficulty prosecuting them, many are not reported or do not result in a conviction. Sex offenders frequently acknowledge additional unreported offenses during the treatment process.

In Virginia, three of the 78 SVPs placed on conditional release since 2003 have been charged with a new sex offense.

To date, no studies have estimated recidivism rates for sexually violent offenders placed on conditional release through civil commitment programs. To estimate this rate, JLARC staff obtained recidivism data for Virginia and six other states with civil commitment programs. In Virginia, three of the 78 SVPs placed on conditional release since 2003 have been charged with a new sex offense, or four percent. All three SVPs had been civilly committed

Table 16: Research Suggests Recidivism Rates Vary With the Length of Time Sex Offenders Are Monitored and the Types of Crimes Tracked

Data Source	Recidivism Rate	Recidivism Measure
U.S. Department of Justice, Bureau of Justice Statistics ^a	5.3% (3 years)	Arrest for new sex offense
Peer-reviewed journals ^b	10-20% (3-6 years)	Mainly arrest or conviction for new sex offense
Virginia Department of Corrections ^c	12-17% (1 year)	Any parole violation resulting in an incarceration term
Virginia Criminal Sentencing Commission ^d	31-37% (5-10 years)	Arrest for any crime against a person, including sex and non-sex offenses

^a *Recidivism of Sex Offenders Released from Prison in 1994, 2003.*

^b *Journal of Consulting and Clinical Psychology; Criminal Justice and Behavior; Journal of Experimental Criminology.*

^c *State Responsible Population Trends, FY 2006 – FY 2010, 2011.*

^d *Assessing Risk Among Sex Offenders in Virginia, 2001.*

Source: JLARC staff analysis of literature on recidivism rates of sex offenders.

at VCBR. One of these SVPs completed treatment at the facility, was conditionally released in 2010, and was subsequently convicted of assault and battery after inappropriately touching minor females at a shopping mall. The other two SVPs were not convicted of a new sex offense because charges were dropped or they were found not guilty at trial. Recidivism data from the six other states indicated reoffense rates from zero to five percent. In Virginia and the other states, most violations of conditional release terms have been non-sexual in nature, such as entering restricted areas, violating curfew restrictions, or abusing drugs or alcohol.

Recidivism data for Virginia and the six other states suggests a moderate reduction in reoffense rates for offenders on conditional release. However, rates for civil commitment programs may be lower than in published studies because relatively few violent sex offenders have been conditionally released from secure facilities, many were only recently released, and offenders on conditional release generally receive more intensive monitoring and supervision than offenders that were never civilly committed. Lower recidivism rates for civilly committed offenders may also indicate that inpatient treatment programs help reduce the risk of recidivism.

LACK OF VIABLE HOUSING IS A MAJOR IMPEDIMENT TO CONDITIONAL RELEASE IN VIRGINIA

SVPs face significant challenges in transitioning back to the community on conditional release, including difficulty finding housing and employment. These challenges are particularly difficult for SVPs because they often have been in institutions for long periods and carry the label of sexually violent predator. SVPs often lack the educational, vocational, and basic living skills needed to maintain stable employment and housing on their own. Employment and housing options for SVPs are also limited because certain occupations and living arrangements increase the risk of new sex offenses.

SVPs Often Have Few Viable Housing Options in the Community

For many lower-risk SVPs, the most significant obstacle to being placed on conditional release is a lack of viable housing options in the community. As discussed above, an SVP's proposed housing arrangement is a key component of the conditional release plan for managing his risk to the community. To be viable, a housing plan should minimize an offender's risk for committing new violent sex offenses. An SVP's living arrangement must not place him in close proximity to potential victims, such as children or vulnerable adults. Home plans must comply with State residency restrictions that prohibit convicted sex offenders from living near schools, daycares, or parks. A viable home plan will also minimize an SVP's exposure to drugs or alcohol, high crime areas, and other environ-

mental influences that increase his risk for reoffending. These limitations significantly constrain the number of places an SVP can live.

Several additional factors can limit the housing options available to SVPs in the community. Most SVPs have poor employment and income prospects that make housing difficult to afford on their own. Employment options for SVPs are often limited by low education attainment levels, poor job skills, and restrictions in their conditional release plan that rule out certain occupations, such as a truck driver or school janitor. Some SVPs also may lack basic living skills such as how to use an ATM machine or apply for a job online. In addition, few landlords are willing to rent to a tenant with a history of violent sex convictions and severe mental health and personality disorders. Due to these factors, for many SVPs the only available housing option is with family. However, SVPs that have been institutionalized for long periods may no longer have family that are willing or able to provide free or low-rent housing.

Virginia Helps SVPs Attempt to Locate Housing, but Does Not Provide Housing Assistance or Solutions

Virginia provides only limited housing assistance for SVPs on conditional release. Staff at VCBR assist SVPs nearing the end of inpatient treatment by contacting landlords, group homes, and family members that might provide housing for the resident. However, the State's conditional release program does not include temporary or transitional housing facilities, and financial assistance is not provided for SVPs who cannot afford housing on their own. SVPs are responsible for proposing a viable housing option if they wish to be released from VCBR or placed directly on conditional release.

As noted above, the *Code of Virginia* allows circuit courts to consider an SVP's living arrangements in the community when evaluating the feasibility of conditional release (§37.2-912). Although judges may differ in the weight they attach to an SVP's home plan, circuit courts generally appear reluctant to approve conditional release when a viable home plan is not available. Staff with the Office of the Attorney General reported that the *Code of Virginia* requires that they argue against conditional release when a viable home plan is not available, even if the SVP is otherwise qualified for conditional release. Probation officers with DOC routinely note concerns with a proposed housing option when reviewing an SVP's conditional release plan.

The following case study illustrates how an SVP's proposed home plan could raise concerns for a probation officer and limit the feasibility of conditional release.

Case Study

Mr. B, 47, has two convictions for rapes involving female strangers ranging in age from 16 to 87. He was also cited for indecent exposure on two occasions during his incarceration, and further acknowledged engaging in multiple voyeuristic acts over a three-year period. Mr. B has been diagnosed with a paraphilia for non-consensual sex, voyeurism, multiple chemical dependencies, and a personality disorder involving antisocial traits. He was committed to VCBR in 2005 and is currently in the final phase of treatment. His most recent conditional release plan from April 2011 indicates Mr. B wants to live at his sister's home in Amelia County and work for a lawn service in Richmond. According to the DOC probation officer reviewing the plan, the home is in a rural area with no schools, day cares, or nursing homes nearby. However, during a home visit the officer noted several toys on the front porch, and expressed concern that the sister's grandchildren may occasionally visit the home or stay overnight. The officer also noted that Mr. B's sister is not employed, and supporting her brother could pose a financial hardship.

According to DBHDS and OAG staff involved in the commitment process, the lack of viable housing options for SVPs has contributed to court decisions to place SVPs at VCBR rather than on conditional release. DBHDS staff estimate that approximately five to 10 SVPs at VCBR could be placed on conditional release if appropriate housing were available in the community. Estimates of the size of this population have varied, largely because a lack of viable housing is often not the only reason a court civilly commits an SVP to VCBR or denies their request for conditional release.

SEVERAL STRATEGIES COULD MAKE CONDITIONAL RELEASE MORE VIABLE FOR SVPs IN VIRGINIA

Reintegrating individuals into the community is a challenge for civilly committed sex offenders and the broader offender population, both in Virginia and nationwide. Nearly all states with civil commitment programs for sexually violent offenders have difficulty placing offenders on conditional release, often due to a lack of suitable housing. For this reason, the use of conditional release nationwide remains relatively limited. However, some states have attempted to provide housing assistance and intensive supervision to make conditional release more viable for sexually violent offenders that do not require commitment at a secure facility. Virginia has also adopted strategies to help its general prison population make the transition from incarceration to the community. These approaches suggest strategies Virginia could consider to make conditional release more viable for SVPs at relatively low risk of reoffending and also help reduce census growth at VCBR.

Prisoner Release Strategy and Sex Offender Residential Treatment Program Not Sufficiently Leveraged

Two current DOC initiatives are not sufficiently coordinated with the State's SVP civil commitment program. Leveraging these initiatives could help address the barriers to being approved for conditional release. The first is the Virginia Adult Re-Entry Initiative (VARI), a strategic plan developed by DOC in 2010 at the direction of the Governor and the Secretary of Public Safety to strengthen DOC's current reentry programs. These programs are intended to help prepare offenders for reentering the community and address reentry challenges that contribute to recidivism. VARI followed an executive order by the Governor establishing the Virginia Prisoner and Juvenile Offender Reentry Council and tasking it with developing and implementing reentry strategies for State and local agencies and community organizations.

The VARI initiative undertaken by DOC has the potential to improve reentry services for prisoners in Virginia. The VARI strategic plan contained seven goals for improving these services, and 120 recommendations for implementing the plan. The reentry council has established workgroups to address many of the most common challenges facing prisoners, including housing, employment, and substance abuse. SVPs, who face many of these same challenges but with the added difficulty of the SVP label, could also benefit from the VARI initiative. However, according to DBHDS and DOC staff, SVPs are not currently incorporated into the reentry initiative. Including SVPs in this initiative could help address the barriers that prevent some SVPs from being placed on conditional release.

Recommendation (13). The Virginia Prisoner and Juvenile Offender Reentry Council should coordinate with the Office of Sexually Violent Predators and the Virginia Center for Behavioral Rehabilitation to include sexually violent predators in the prisoner reentry strategies it develops.

The second DOC initiative that could be better leveraged to benefit the SVP civil commitment program is the Sex Offender Residential Treatment (SORT) Program. SORT provides treatment and assessment services through an 86-bed unit at the Greensville Correctional Center. The program was designed to reduce recidivism rates among offenders at moderate to high risk of committing future sex offenses. SORT is voluntary for incarcerated sex offenders, who are screened by a referral counselor and, if approved, transferred to Greensville for treatment. The treatment program is similar to the sex offender treatment provided by other states with civil commitment programs and at VCBR.

SORT currently has limited capacity to treat eligible sex offenders, including those at risk for civil commitment at VCBR. DOC staff indicate that the SORT program's resources are generally not sufficient compared to the number of individuals in DOC serving time for an SVP predicate crime. SORT's capacity of 86 beds represents less than three percent of the roughly 3,500 individuals incarcerated for an SVP predicate crime. DOC staff estimate that about one-quarter of offenders eventually committed at VCBR have participated in the SORT program.

Expanding SORT and offering treatment to individuals before they are released from DOC could be a cost-effective and prudent approach to improving the viability of conditional release in Virginia. The costs of incarceration and conditional release are substantially lower than the cost of civil commitment. Under an expanded SORT program, offenders meeting the statutory criteria for SVP would be more likely to have completed a sex offender treatment program. If a viable home plan could be developed for these individuals, it is more likely they could be successfully managed on conditional release rather than being committed at VCBR. Expanding access to treatment in prison would also strengthen the civil commitment review process. An individual's response to prior sex offender treatment is an important and widely considered factor when evaluating the need for civil commitment. Several other states routinely consider this during their review process, and it is included in the procedures recommended by JLARC staff to guide deliberations by the Commitment Review Committee.

DOC staff cite several important considerations that need to be explored to determine whether expanding the capacity of SORT is cost-effective and feasible. A key consideration is determining how cost-effective SORT is compared to civil commitment, and how many individuals could realistically participate. According to DOC staff, the SORT program historically has not tracked the outcomes of program participants to determine its effectiveness in reducing recidivism rates among treated sex offenders. Program staff have recently begun developing a process to track outcomes for offenders released from the program in the past three years. There are also logistical issues regarding how to increase capacity at the Greensville location, and how to identify the offenders at greatest risk of civil commitment. Not all offenders serving time for an SVP predicate crime would voluntarily participate in SORT treatment, and some offenders may not meet SORT's current eligibility criteria.

DOC and DBHDS should coordinate to address these considerations and determine whether providing additional treatment to violent sex offenders during their incarceration—either by expanding SORT or through another program—is a feasible and cost-effective

way to make conditional release a more realistic alternative to civil commitment.

Recommendation (14). The Department of Corrections and the Department of Behavioral Health and Development Services should assess the feasibility of providing additional treatment to violent sex offenders while they are in prison. The assessment should consider whether this additional treatment would be a prudent and cost-effective way to make conditional release a more realistic alternative for certain sexually violent predators.

Some States Provide Transitional Housing and Intensive Supervision to Make Conditional Release More Viable

One advantage of conditional release is that it often costs less to manage a sexually violent offender in the community than in a secure facility. However, providing transitional housing assistance and intensive supervision can substantially increase the cost of managing an offender on conditional release. The cost of conditional release programs varies widely depending on the level of assistance and supervision provided, and may be lower, or even higher, than the cost of a secure facility. Some states have tried to minimize the cost of transitional housing by using existing facilities or co-locating it with an existing facility, such as a mental health hospital. Other states have provided funding to construct entirely new facilities. In some cases, the cost of a transitional facility is lower than a secure facility because a lower level of security is provided, requiring fewer security staff. In other cases, costs are substantially higher because intensive monitoring and supervision is provided when residents leave the facility.

Kansas Transitional Housing Facility

Kansas operates an eight-bed residential cottage on the grounds of a state hospital 60 miles south of Kansas City. Residents complete the final phases of inpatient treatment at the cottage by looking for employment and participating in outpatient treatment. Residents may be placed on conditional release or returned to the secure facility depending on their behavior at the cottage.

Some states with civil commitment programs for sexually violent offenders provide housing assistance for offenders that do not require commitment to a secure facility. At least five states operate transitional housing facilities that provide a less restrictive, more community-like setting for offenders that have made substantial treatment progress and are nearing conditional release from a secure facility. Facilities such as residential cottages and group homes are designed to help offenders gradually re-engage with the community by planning for housing, employment, and a support network if conditional release is approved by a court. Residents may have the opportunity for supervised or unsupervised outings in the community, depending on their treatment progress and risk level. Transitional facilities may also help treatment staff evaluate an offender's readiness for conditional release by allowing them to be observed in less-restrictive settings that resemble the community.

Some states also provide housing assistance and intensive supervision for sexually violent offenders in the community on conditional release. For example, in one state, some sexually violent offenders receive financial assistance from the state to rent an apartment. During the first year of conditional release, offenders may also be personally escorted by security staff when leaving their home for work or treatment sessions. Other states have actually purchased individual apartments or trailer homes for sexually violent offenders approved for conditional release.

At least two states have civil commitment programs that place most or all sexually violent offenders directly in community settings. Arizona places most civilly committed offenders in a treatment track that provides for gradually increasing involvement in the community. The program uses field surveillance and GPS to monitor residents during community outings. One former staff member with the program stated that monitoring an offender's behavior in community settings allows treatment staff to more accurately assess their recidivism risk than monitoring them in a secure facility.

Texas is the only state that places all civilly committed offenders in an outpatient treatment program. Offenders reside in halfway houses and receive three hours of group treatment per week from providers in the community. Offenders are permitted to leave their halfway house only for approved activities, such as work, treatment sessions, religious activities, or shopping. Supervision of offenders outside a halfway house includes active GPS monitoring and field surveillance, and may also include personal escorts. Violating the terms of commitment in Texas can result in third degree felony charges and incarceration. According to program staff, it costs the state an average of approximately \$27,000 per offender each year to house and treat civilly committed offenders in the community. To date, none of the committed offenders has been charged or convicted of a new sex offense.

Texas is the only state that places all civilly committed offenders in an outpatient treatment program.

Facilitating Conditional Release When Housing Is the Only Impediment Can Be More Cost-Effective Than Placement at VCBR

Based on other state's civil commitment programs and interviews with DBHDS staff, JLARC staff have developed two options that could facilitate increased use of conditional release. The first option is for the State to provide short-term financial assistance to help SVPs pay for housing, treatment, and health care costs on conditional release. DBHDS staff could administer funds on the SVP's behalf for a limited period, such as 12 to 18 months, to lower-risk SVPs deemed appropriate for conditional release if a viable housing option was available. The financial assistance would be

contingent on the SVP’s compliance with his conditional release terms.

According to DBHDS staff, assistance of approximately \$1,000 per month, or \$12,000 annually, would substantially help SVPs secure housing during the key transition period from civil commitment to conditional release. At a minimum, this would allow an SVP to look for a job while on conditional release, which presents fewer challenges than finding employment while at VCBR. When compared to the cost of being at VCBR, this would save approximately \$57,000 per SVP annually (Table 17). If five SVPs per year benefited from this program, this could save the State about \$283,000 per year. It is important to note that, according to DOC staff, the agency would need to hire additional probation officers if the number of SVPs on conditional release increased substantially. This would affect the cost of conditional release per SVP and the precise amount of savings compared to remaining at VCBR.

The second option is more involved, has start-up costs, and is more expensive than the first option. As part of its FY 2012 budget request, DBHDS developed an option to re-open a 48-bed facility in Petersburg to expand the capacity at VCBR. The facility was used by VCBR prior to the construction of the current facility in Nottoway, and is currently unused. Though this was not specifically what DBHDS requested, this facility could be re-opened with more limited staffing to provide transitional housing for SVPs in treatment phase III and nearing conditional release.

This second option would require approximately \$200,000 to re-open the facility, and an ongoing budget of approximately \$3-5 million. Ongoing operating costs at the Petersburg facility would depend on the amount of security and treatment provided, and could be higher or lower than the cost per SVP at VCBR. SVPs nearing

Table 17: Housing Assistance Could Make Conditional Release More Viable for SVPs Who Lack Housing but Are Otherwise Appropriate for Release

Housing Assistance	Annual Cost of Housing Assistance	Total Cost Per SVP on Conditional Release (Annual)	Per-SVP Savings Compared to Remaining at VCBR	Range of Annual Savings		
				Number of Additional SVPs Released		
				1	5	10
\$1,000 / month	\$12,000	\$34,214 ^a	\$56,684 ^b	\$56,684	\$283,420	\$566,840

^a Includes \$22,214 for the annual cost of monitoring and supervising an SVP on conditional release.

^b Assumes a per-SVP annual cost at VCBR of \$90,898.

Source: JLARC staff analysis.

conditional release may require less security and treatment than SVPs in earlier phases of treatment, resulting in lower staffing levels at the Petersburg facility. For example, starting with the proposed operating cost in the original DBHDS estimate, annual operating costs at Petersburg could be approximately \$3.4 million if staffing costs are assumed to be 66 percent lower than at VCBR. At full capacity, operating costs at the facility would then be about \$22,000 *less* per SVP than at VCBR. However, if staffing costs were assumed to be just 33 percent lower, the Petersburg facility would have an annual operating cost of \$5.4 million and cost about \$22,000 *more* per SVP than VCBR. Finally, the cost per SVP at the Petersburg facility or VCBR would increase if either facility is not operating at full capacity.

Reopening the Petersburg facility as a transitional housing facility could provide benefits for Virginia's SVP program even if it did not cost less than VCBR. For example, it could help SVPs prepare for conditional release by providing a more realistic setting in which to make housing and employment arrangements. Securing housing and a job may be more feasible for SVPs that can make supervised or unsupervised outings into the community. Reopening Petersburg would also provide a less-restrictive setting in which SVPs must demonstrate the ability to control their behavior. This could help treatment staff better evaluate an SVP's readiness for conditional release by allowing them to monitor residents in less restrictive environments.

Facilitating Conditional Release Has Benefits and Drawbacks

Regardless of cost, the strategies discussed above for facilitating conditional release in Virginia have potential benefits and drawbacks that must be carefully considered (Table 18). These strategies may make conditional release more viable for lower-risk SVPs, helping to alleviate growth in VCBR's census and costs. However, due to the challenges of reintegrating SVPs into the community, the strategies may result in only moderate increases in SVPs on conditional release and would increase the risk of new sex offenses in the community.

U.S. Supreme Court rulings on the civil commitment of SVPs give states wide latitude to design their programs as long as the purpose of commitment is to provide treatment. As a result, Virginia has some flexibility to determine the appropriate level of acceptable risk for new sex offenses by SVPs on conditional release. Whether the State expands its use of conditional release is a policy decision that depends on the balance between public safety, cost, and civil liberties. The State could give the highest priority to minimizing the risk of new violent sex offenses being committed, but

Table 18: Strategies to Facilitate Conditional Release Have Benefits and Drawbacks

Potential Benefits	Potential Drawbacks
May make conditional release more feasible for SVPs that do not require commitment at VCBR	May only moderately increase SVPs on conditional release because SVPS face multiple challenges to reintegrating
May provide savings by placing more SVPs in lower-cost settings	May result in more violent sex offenses committed by SVPs on conditional release
May help alleviate capacity constraints at VCBR and reduce the need for double-bunking or building additional SVP facilities	May provide only limited savings depending on the level of assistance and monitoring, and the extent to which VCBR's operating costs are fixed or variable

Source: JLARC staff analysis.

this approach is likely more costly and will deprive a greater number of offenders of their civil liberties. Alternatively, the State could minimize the cost of civil commitment—in dollars and lost civil liberties—by placing more SVPs on conditional release, but this approach poses a higher risk of new violent sex offenses being committed.

VCBR's Costs Are Within the Range of Other Facilities, but Higher Than Florida's Privatized Facility

In Summary

During the 2011 General Assembly, concern was raised about the costs of the Virginia Center for Behavioral Rehabilitation (VCBR). Since 2005, VCBR's appropriations have increased 320 percent, though its census has increased 1,374 percent. For FY 2011, VCBR was appropriated about \$91,000 for each of its 269 patients. Based on comparisons made by JLARC staff, VCBR's cost and staffing per patient are lower than two similar Department of Behavioral Health and Developmental Services (DBHDS) facilities, but higher than two similar DOC facilities. VCBR's cost and staffing per patient were also within a range of selected other state SVP facilities. Collectively, these analyses suggest that VCBR is not an outlier in terms of its costs or staffing. In mid-2011, DBHDS received an unsolicited proposal from a private company requesting that the State consider privatizing VCBR to reduce costs. If DBHDS decides to proceed with the process, Virginia's previous experience with privatization of information technology services and Florida's experience with privatizing its civil commitment program both hold valuable lessons. Florida's privatized program costs substantially less per patient than Virginia's, in part due to a facility that permits lower staffing levels. If DBHDS decides to proceed with considering the privatization of VCBR or a future facility, it should consult with Florida to learn about its specific contract requirements and provisions, including how a facility can be designed and operated to minimize costs and staffing levels.

During the 2011 General Assembly Session, concern was raised about the rising cost of the Virginia Center for Behavioral Rehabilitation (VCBR). The concern stemmed from the rapid growth of the VCBR budget, and also the perception that VCBR was spending too much for each SVP. During this review, two vendors submitted unsolicited privatization proposals to operate VCBR at lower cost.

VCBR COSTS PER PERSON ARE GENERALLY DECLINING AND WITHIN A RANGE OF OTHER FACILITIES

The study mandate directed JLARC staff to "examine the costs of providing for the civil commitment of sexually violent predators at VCBR, including an analysis of security and treatment staff ratios ..." To address this aspect of the mandate, JLARC staff analyzed VCBR appropriations and expenditure data. Staff also collected expenditure, census, and staffing information from several peer facilities in Virginia and other states.

VCBR's Census Has Increased More Than Its Appropriations

From FY 2005 to FY 2011, VCBR's appropriations increased from \$5.8 million to \$24.4 million. During this time, the census at VCBR

increased from approximately 17 SVPs to 269 SVPs as of August 1, 2011. This growth in appropriations and the VCBR census has come at a time of volatile and generally declining State revenues.

While both appropriations and the VCBR census have substantially increased, they have not increased at the same rate. VCBR's census increased by 80 percent from 2005 to 2006, then continued to steadily increase through 2010. Partial-year data for 2011 indicates the increase is continuing, though perhaps at a slower rate. In contrast, appropriations to VCBR remained virtually the same from FY 2005 to FY 2006, increased moderately in FY 2007, then nearly doubled in FY 2008. Appropriations then moderately increased again in FY 2009, before slightly dropping in FY 2010. FY 2011 appropriations increased substantially, by about 54 percent. This inconsistent rate of increase is not surprising given Virginia's biennial budget process and the effect of start-up costs for the program being incurred during the program's early years.

The VCBR census has increased more than four times as much as VCBR appropriations during the time period. Since 2005, the VCBR census has increased 1,374 percent (Table 19). During the same time period, appropriations to VCBR increased 320 percent.

Table 19: VCBR Census Has Increased Four Times As Much As VCBR Appropriations

	2006	2007	2008	2009	2010	2011	2011 to 2006 Increase
Census % Change	80%	68%	77%	59%	43%	20% ^a	1,374%
Appropriations % Change	0.02%	23.3%	93.6%	17.9%	-2.9%	53.5%	320%

^a Reflects partial-year data.

Source: JLARC staff analysis of Appropriation Acts and DBHDS data.

Cost Per Patient Can Be High and Volatile for New Programs Like VCBR, but VCBR's Has Generally Been Declining

The above census growth has placed a premium on efficiently using the appropriations VCBR is given each year. However, a series of Department of Behavioral Health and Developmental Services Office of Inspector General (OIG) reports found that there was limited oversight of VCBR and a lack of understanding about financial management and basic accounting. More recently, the OIG has noted improvement in both these areas. Nevertheless, there has been continued concern about the cost of the civil commitment program and how efficiently VCBR is operating. Several subcommittee meetings and media reports have used VCBR's cost-per-patient figure to illustrate what is perceived to be the high cost of Virginia's civil commitment program.

However, as shown in Table 20, the cost-per-patient figure is highly volatile for a new program such as Virginia’s civil commitment program. During the initial years of the program’s operation, the fixed costs associated with starting the program were spread over a relatively small VCBR census. This resulted in a very high cost per patient. For example, in FY 2005, VCBR was appropriated the equivalent of \$331,749 per patient. However, as noted above, the VCBR census has grown much faster than VCBR appropriations. This has had the effect of steadily reducing the appropriations per patient. Using the mid-point census thus far during 2011, VCBR has been appropriated \$94,442 per patient.

Table 20: Appropriation Per VCBR Patient Is Volatile and Is Declining

	2005	2006	2007	2008	2009	2010	2011
Census (midpoint during year)	17.5	31.5	53	94	149.5	214.5	258 ^a
Appropriations (millions)	\$5.8	\$5.8	\$7.2	\$13.9	\$16.4	\$15.9	\$24.4
Appropriations / Per Patient	\$331,749	\$184,346	\$135,121	\$147,463	\$109,304	\$74,009	\$94,442

^a Reflects partial-year data.

Source: JLARC staff analysis of Appropriation Acts and DBHDS data.

VCBR’s Cost Per Patient Is Lower Than Peer DBHDS Facilities and Higher Than Peer DOC Facilities

The above downtrend in the cost-per-patient figure will likely continue to the extent the VCBR census increases beyond its intended capacity of 300. This dynamic, along with the volatility in the early years of the program, illustrates that the cost-per-patient figure should not be used in isolation when comparing VCBR’s spending to similar facilities. However, the same subcommittee meetings and media reports noted above compared the VCBR cost-per-patient figure to the DOC-wide average cost-per-inmate figure, which was \$24,024 in FY 2010.

Though such comparisons to VCBR should not be used in isolation given how volatile the VCBR census has been, JLARC staff collected cost information from two DOC facilities and two DBHDS facilities to provide a frame of reference for those who wish to use the cost-per-patient figure. Rather than using the \$24,024 DOC average cost for all facilities and community corrections operations, JLARC staff worked with DOC and DBHDS staff to identify “peer” facilities with similar missions. Four peer facilities were chosen:

- Indian Creek Correctional Center (Indian Creek), which is a medium security prison that provides intensive, long-term substance abuse treatment services;
- Marion Correctional Center (Marion), which has multiple levels of security and is a mental health hospital;

- Southside Virginia Training Center (SVTC), which provides health and rehabilitation services for individuals with intellectual disabilities; and
- Central State Hospital (CSH), which administers a forensic and civil treatment program. Services range from short-term re-entry programs to long-term intensive programs for the most seriously mentally ill.

VCBR's expenditures per patient are substantially less than SVTC and CSH (Table 21). In contrast, they are more than six times higher than Indian Creek's and about one-third more than Marion's expenditures per patient. This suggests that VCBR is not necessarily an outlier in terms of expenditures. However, the slightly different missions, physical layout, and extent of shared services somewhat limit the analytical usefulness of the comparison.

Table 21: VCBR's Cost Per Patient Is Lower Than DBHDS and Higher Than DOC Facilities

	DBHDS ^a			DOC	
	SVTC	CSH	VCBR	Marion	Indian Creek
Annual Expenditures (FY 2011)	\$71,991,778	\$48,226,529	\$24,451,645	\$13,896,475	\$14,239,867
Census (August 1, 2011)	236	225	269	202	994
Expenditures / Patient or Inmate	\$305,050	\$214,340	\$90,898	\$68,794	\$14,326

^a VCBR shares certain security and administrative services with Piedmont Geriatric Hospital. SVTC provides certain administrative and other services for Central State Hospital and Hiram W. Davis Medical Center.

Source: JLARC staff analysis of DBHDS and DOC expenditure and census data, 2011.

VCBR Staffing Per Person Is Higher Than Peer DOC Facilities, but Lower Than Peer DBHDS Facilities

The majority of VCBR's costs are for the salaries and benefits of staff. To provide insight into how these drivers of each facility's costs compare, JLARC staff also collected staffing numbers from the same four facilities used for the above cost comparison. Several conclusions can be drawn by comparing the total staffing per patient or inmate figures:

- The staffing devoted per patient or inmate declines when going from a voluntary, care-driven setting at SVTC to a correctional setting at Indian Creek.
- The largest single component of staffing for the three DBHDS facilities are the quasi-security / treatment staff known as either Resident Services Assistants (RSA) or Direct Service Associates (DSA).
- The largest single component of staffing for the two DOC facilities is security staff.

- Indian Creek’s larger size suggests that, even when controlling for the number of inmates, it benefits from substantial economies of scale when compared to the other facilities.

In terms of specific staffing ratios, VCBR’s security ratio is about half of Marion’s, yet twice as much as Indian Creek’s (Table 22). VCBR security staff indicate that there are two reasons why their ratios are higher than Indian Creek. The first reason is VCBR’s physical layout, which uses 12, 25-person living units, requiring security staff per unit when compared to a facility like Indian Creek that has security staff watching far more inmates at once in larger living units.

The second is the difference between civil commitment and incarceration. In DOC facilities, the primary objective of security is inmate control. In contrast, VCBR tries to maintain a similar level of control, but without being so overt. VCBR believes this is important to facilitate a “culture of treatment,” rather than punishment. The DOC focus on inmate control can include dogs and perimeter gun towers, while the treatment focus at VCBR is not consistent with these security strategies used in prisons. VCBR security staff noted that without these other security strategies used in prisons, their only strategy when a situation escalates is to have enough security staffing to handle it. One VCBR staff member noted the need for sufficient security staffing, recalling, “I was in some situations where it was downright dangerous and it could have gotten out of hand very quickly.”

“I was in some situations where it was downright dangerous and it could have gotten out of hand very quickly.”

In terms of treatment staffing ratios, VCBR’s treatment ratio is lower than SVTC’s and CSH’s. This reflects the group therapy approach at VCBR, which contrasts with more individualized

Table 22: VCBR Staffing Per Person Is Higher Than DOC, but Lower Than DBHDS Facilities

	DBHDS ^a			DOC	
	SVTC	CSH	VCBR	Marion	Indian Creek
Security	0.07	0.06	0.38	0.75	0.18
Treatment	0.17	0.24	0.14	0.08	0.01
Resident Services Assistants	N/A	N/A	0.45	N/A	N/A
Direct Services Associates	2.38	1.82	N/A	N/A	N/A
Managerial / Administrative / Other (Medical, Physical Plant & Operations, etc.)	0.73	0.30	0.13	0.10	0.03
<i>Total Staffing / Patient or Inmate</i>	<i>5.24</i>	<i>3.16</i>	<i>1.23</i>	<i>1.12</i>	<i>0.23</i>

^a VCBR shares certain security and administrative services with Piedmont Geriatric Hospital. SVTC provides certain administrative and other services for Central State Hospital and Hiram W. Davis Medical Center.

Source: JLARC staff analysis of DBHDS and DOC staffing and census data, 2011.

services provided at SVTC. SVTC and CSH both rely heavily on DSAs for many tasks that are essential, such as assisting residents with daily life activities. Similarly, VCBR relies heavily on RSAs who perform similar tasks that are important to both maintaining security and facilitating treatment. At VCBR, RSAs help with minor dispute resolution to prevent situations from escalating into larger security issues. VCBR also has RSAs complete observation notes based on their experience watching patient behavior outside of treatment sessions. VCBR treatment staff use these observation notes when evaluating treatment progress.

VCBR’s Cost and Staffing Are Within a Range of Selected Other State SVP Facilities

Due to potential legal challenges, state SVP programs generally do not publicize current census, cost, and staffing information. As a result, JLARC staff were not able to obtain this information from all the other 19 state SVP programs. However, JLARC staff coordinated with the Sex Offender Civil Commitment Programs Network to conduct interviews with other state staff and obtain access to a series of white papers that were under development during the JLARC study. Based on this information, and data obtained directly from one state, data from five other states were compiled to serve as a point of comparison for Virginia’s cost and staffing. The specific states are not being identified because of the sensitive nature of the information.

As shown in Table 23, in terms of Virginia’s cost per patient compared to selected other states, VCBR spent more than two states and less than three other states. The range across these six states, including Virginia, was between \$38,300 and \$140,909. Variation in cost per patient can be due to many factors, including the age of the program, the design and number of facilities that are used to house SVPs, and whether transitional housing assistance is provided. These factors, and the breadth of the range (which varies by 370 percent), underscores the difficulty in using cost-per-patient comparisons. Yet, based on this relatively small sample, Virginia does not appear to be an outlier in terms of spending per SVP under civil commitment.

Table 23: Virginia’s Cost Per Patient Is Within a Range of Selected Other States’ SVP Programs

	State A	State B	Virginia	State C	State D	State E
Census	678	215	269	152	618	308
Budget (millions)	\$26.0	\$14.4	\$24.5	\$16.1	\$67.4	\$43.4
Budget / Census	\$38,300	\$66,799	\$90,898	\$105,921	\$109,061	\$140,909

Source: JLARC staff analysis of white papers by other state SVP programs for the Sex Offender Civil Commitment Programs Network, 2011 and analysis of data provided by other states.

Similarly, VCBR’s staffing per patient was substantially above one state, slightly above one other state, and slightly below another state’s program (Table 24). VCBR’s staffing was below a fourth state and substantially below the fifth state. The range across these six states was 0.42 to 2.28 staff per patient. This wide range, which varies by 540 percent, again illustrates the difficulty in using staffing-per-patient comparisons. However, as with cost per patient, Virginia does not appear to be an outlier in terms of staffing per patient.

Table 24: Virginia’s Staffing Per Patient Is Within a Range of Selected Other States’ SVP Programs

	State A	State D	Virginia ^a	State B	State E	State C
Census	678	618	269	215	308	152
FTE	282	761	339	272	530	346
FTE / Census	0.42	1.23	1.26	1.27	1.72	2.28

^a FTE and FTE / census figures for VCBR vary from information provided earlier in this chapter because information from white papers varies slightly from information collected by JLARC staff several months later.

Source: JLARC staff analysis of white papers by other state SVP programs for the Sex Offender Civil Commitment Programs Network, 2011 and analysis of data provided by other states.

PRIVATIZATION COULD LOWER COSTS, BUT ADVISABILITY DEPENDS ON SPECIFIC PRIVATIZATION ARRANGEMENT

In mid-2011, DBHDS received an unsolicited proposal from a company requesting that the State consider privatizing VCBR. The company submitted the proposal under the Public Private Education Facilities and Infrastructure Act (PPEA). DBHDS began a preliminary review of the proposal, during which time a second company also submitted a proposal. DBDHS decided to wait to determine whether to proceed until this JLARC staff review was completed given that the design of the program itself, and therefore the requirements that would need to be met by a private company, could change.

Virginia’s Previous Experiences With Privatization Provide Lessons Learned Applicable to Decision Whether to Privatize VCBR

The 2010 JLARC staff report *Review of Information Technology Services in Virginia: Final Report* identified lessons learned from the privatization of the State’s information technology services in 2004 (Exhibit 1). Some of these lessons are applicable to the decision about whether to privatize VCBR. For example, public-private partnerships should only be considered after the State has identified its specific needs and requirements. The specific requirements for privatizing VCBR would need to be clearly defined, including whether the private company would be responsible for managing

Exhibit 1: State's Experience With Information Technology Services Contract Provides Lessons for Future Public-Private Partnerships

1. Using a public-private partnership should be an informed and thoroughly considered decision.
2. Public-private partnerships should only be used when specific needs have been identified.
3. Vendor's prior experience on similar projects is a critical factor.
4. An effective contract is critical to the success of public-private partnerships.
5. Partnerships may not produce financial benefits and may limit budget flexibility.
6. Legislative role should include financial auditing and performance evaluation of partnerships.

Source: JLARC staff report, *Review of Information Technology Services in Virginia: Final Report*, 2010.

the entire facility, or only certain functions such as security and/or treatment.

Other lessons learned from privatization of the State's information technology services also apply. For example, the State's changing information technology needs placed a premium on having an effective contract. Northrop Grumman, the private company that provides the State's information technology services, has frequently asked the State to amend the contract because certain assumptions it used to determine its fees proved incorrect, or have changed since the company and State agreed to the terms of the contract. The request to amend the contract in most cases resulted in agencies paying more than originally anticipated for information technology services.

The dynamic, and likely continually growing population at VCBR, would also require an effective contract based on correct and mutually agreed-upon assumptions. An effective contract to privatize VCBR would, at minimum,

- clearly delineate whether the State or the private company is responsible for the costs associated with the current population and facility, or the future population and any additional capacity that may be required;
- include clearly defined service levels and staffing ratios;
- stipulate the standards for patient progression through treatment and standards for possible conditional release; and

- allow active State oversight and include both incentives and penalties for the company based on meeting service levels and standards.

Finally, unlike the decision to privatize certain services, such as information technology or building maintenance, the profit motive that can be effective in private sector operations should be carefully considered in context of the State's SVP civil commitment program. The incentive to make a profit tends to encourage efficiency and quick decision-making that often results in lower costs. However, the same profit motive could supersede treatment and safety considerations and lead to individuals being moved through treatment and then recommended for release before they are ready.

Florida's Experience With Privatization Also Highlights Several Lessons Learned

Virginia's SVP evaluations are performed by outside experts on a contract basis and DOC contracts with a private company to conduct monitoring of those on conditional release. Most states, in fact, conduct certain elements of their civil commitment process through similar contractual arrangements. Florida, however, is the only state that has privatized its entire SVP civil commitment facility. Florida's experience with privatization highlights several important lessons that Virginia should contemplate before deciding whether to proceed with considering privatizing VCBR.

Florida's initial experience with privatization emphasizes the importance of having clearly-defined requirements before privatizing a facility. The early years of the privatization experience were challenging because the program design—and by extension the state's expectations of the vendor—were still being refined. This led to some difficulties with the first company chosen and Florida subsequently selected a different company in 2006. According to Florida staff, the current contract now has more specific requirements and sets specific and measurable expectations for the private company. The contract includes defined staffing ratios and requires the company to provide ten hours of sex offender-specific treatment per week. The contract also requires the company to submit a monthly report to the state detailing any issues during the last month. The company is required to address issues identified in the monthly report, and is subject to financial penalties if these issues are not addressed. The company does not control the commitment eligibility process, and must therefore accept and treat everyone referred by the program.

Florida is currently experiencing another situation that also highlights the importance of an effective contract. Its current contract compensates the company a defined amount for each resident. The

company submitted its proposal based on the assumption that the number of residents would increase at a certain rate. However, the number of residents has not increased as quickly as the company projected because of changes Florida made to its civil commitment eligibility process. Consequently, the company has requested a higher rate of compensation per resident. As a compromise, Florida is in the process of subsidizing a portion of the company's costs by paying directly for certain staff.

Finally, Florida staff also cited the loss of control over daily operations that comes with the contractual arrangement. This is inherent with any contract, and illustrates the importance of having an effective contract that can endure over time or be revisited as necessary. Florida staff noted that there can sometimes be different expectations about appropriate strategies, such as the use of restraints to administer medications. They noted the importance of continual oversight and communications to identify these differences, discuss them, and come to an acceptable resolution.

Florida's Privatized Facility Costs Substantially Less Per Patient Than VCBR

Despite some challenges, Florida staff report that its privatized facility is very cost-effective when compared to other state facilities that are not privatized. Among the states compared earlier in Table 23, Florida had the lowest cost per patient at about \$38,300 annually (State 'A'). This amount is substantially lower than Virginia's current cost per patient of about \$90,900, and lower than other states interviewed by JLARC staff. Florida staff reported its facility budget in FY 2011 was just under \$26 million. The facility can house up to 720 SVPs, and as of September 2011 had 678 SVPs, including 153 detainees awaiting an SVP determination by a court.

Florida SVP Detainees

In Florida, offenders awaiting an SVP determination from a court are detained at the state's SVP facility. Detainees are not able to participate in sex offender specific treatment, but receive all other treatment and medical services at the facility.

Staff with Florida's SVP program believe privatizing its facility has helped make the program cost-effective. According to staff, Florida's facility—which was constructed as part of its privatization—is more cost-effective than if operated by the state. The facility was designed to include features aimed at minimizing operating or maintenance costs, such as an energy-efficient cooling system.

Other design features were intended to reduce staffing needs. The installation of cameras in multiple locations, and a radial layout of dormitories that permits direct observation of four to five wings from a central control room, have helped minimize security staffing requirements. These design features partly account for why staffing ratios at Florida's facility are substantially lower than at VCBR (Table 25). For example, the security staffing ratio at the

Florida facility is less than half the security staffing ratio at VCBR. Total staffing per patient at Florida’s facility is about one-third of staffing at VCBR.

Table 25: Staffing Per Patient at Florida’s Privatized Facility Is About One-Third of Staffing at VCBR

	VCBR	Florida Privatized SVP Facility
Treatment	0.14	0.07
Security	0.38	0.15
Resident Services Assistants	0.45	0.12
Managerial / Administrative / Other	0.25	0.07
<i>Total Staff / Patient</i>	1.23	0.42

Notes: Staff / patient ratios do not equal totals due to rounding. ‘Other’ includes medical, food service, and plant operations staff. Staffing ratios based on the number of filled or full-time equivalent positions.

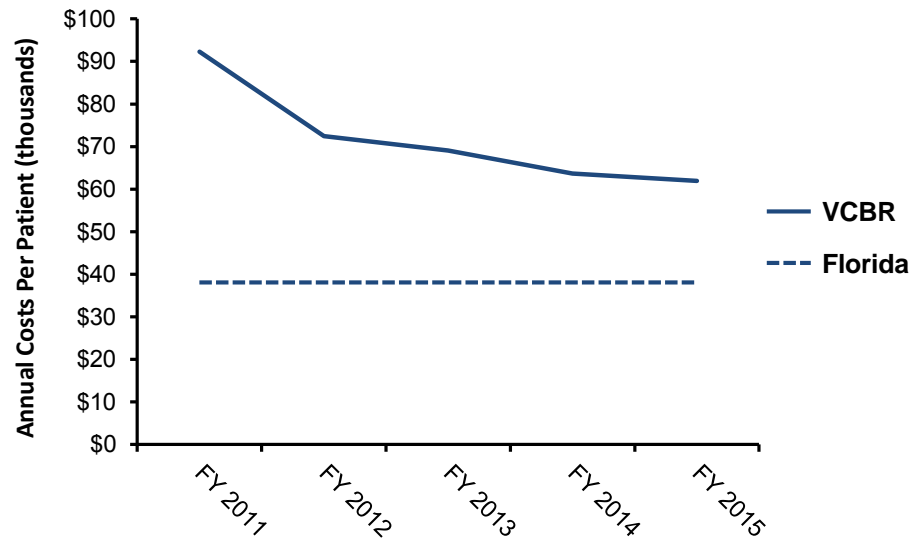
Source: JLARC staff analysis of staffing and census data from DBHDS and the Florida Department of Children and Families.

VCBR’s cost per patient is expected to decline moving forward, but will likely remain higher than costs at Florida’s privatized facility (Figure 23). As discussed above, costs per patient can be high for new programs such as VCBR, and generally decline with census growth as fixed costs are spread over a larger population. DBHDS staff project that costs per patient at VCBR will decline to just under \$62,000 annually when the facility reaches its maximum capacity of 450 SVPs. The decline occurs because DBHDS projects its budget will rise by 14 percent over this period, while the number of patients will increase more than 70 percent as double-bunking is implemented. Given this decline in costs per patient, it is also likely that staffing ratios at VCBR will fall by some amount.

Although privatization has the potential to lower the cost of Virginia’s SVP program, it may not be feasible to privatize this VCBR facility in Nottoway County and achieve the same staffing ratios or costs as Florida’s facility. The physical layout of VCBR includes 12 separate dormitory wings that would be more difficult for security staff to monitor from a central location. As a result, compared to Florida’s facility, VCBR likely requires a higher level of security staffing to provide comparable security levels. This would limit the savings resulting from privatizing VCBR. However, if the State chooses to construct a second facility in the future, its layout and other features could be designed to achieve Florida’s staffing levels and costs.

Other staffing levels at Florida’s facility may be more feasible for VCBR to achieve, though the impact of staff reductions in these

Figure 23: VCBR's Cost Per Patient Is Projected to Decline, but Will Likely Remain Higher Than Florida's Facility



Notes: VCBR's cost per patient for FY 2011 is based on the actual budget and census at the facility. Florida's cost per patient is assumed to remain constant at \$38,500.

Source: VCBR budget and census projections from DBHDS and data from the Florida Department of Children and Families.

areas on VCBR's treatment program is unclear. For example, the ratio of RSAs to patients in Florida's facility is about one-quarter the number at VCBR. RSAs comprise more than one-third of VCBR's total staff, so reducing RSA staff levels would lower program costs. However, VCBR indicates that RSAs play important security and therapeutic roles, and a substantial reduction in their number may affect the quality of the treatment program at VCBR or the rate at which SVPs progress through treatment. The precise impact of lower staffing ratios is difficult to predict because JLARC staff did not compare the quality of treatment at VCBR to the treatment at Florida's facility, and there is no defined standard for RSA staffing levels.

Whether privatization would make sense for Virginia—either for VCBR or a future facility—depends on the specific requirements that DBHDS defines and the provisions of the specific proposals. These requirements could include the specific services to be provided by a company, minimum staffing ratios in the facility, and contractual incentives and penalties for exceeding or missing defined service levels. However, Florida's experience has several useful lessons available to Virginia should the State choose to proceed with privatization. These lessons, along with the substantially lower costs of Florida's privatized facility when compared to Vir-

ginia, suggest that Florida state staff can be a valuable resource if DBHDS decides to proceed with the PPEA process or considers privatizing a future facility.

Recommendation (15). The Department of Behavioral Health and Developmental Services should consult with state staff at the Florida sexually violent predator program if it decides to proceed with considering privatizing the Virginia Center for Behavioral Rehabilitation in Nottoway County, or a future facility. The consultation should address the specific requirements and provisions of Florida’s contract, including how a facility can be designed and operated to minimize costs and staffing levels.

VCBR Census Will Likely Increase and Commitment Decisions Will Always Be Speculative

In Summary

As VCBR approached its intended capacity of 300 SVPs, the Governor made several proposals during the 2011 General Assembly to increase capacity. Funding was provided to retrofit VCBR's single resident rooms to allow double bunking, which will increase VCBR's capacity to 450 SVPs. This approach will reduce the 87 square feet in these single-resident rooms to 43.5 feet per person. These rooms will be similar to Virginia prison cells and other state civil commitment program facilities that use double bunking. VCBR security and treatment staff have expressed concern about the negative impact of double bunking. The approach will likely increase incidents requiring additional security and disrupt treatment progress for certain SVPs. As the VCBR census continues to increase, its new capacity of 450 SVPs with double bunking will again soon be insufficient. Implementing the changes recommended in this report will most likely slow the rate of VCBR's growth, allowing the State to add less capacity and at a later date. However, the VCBR census will likely still increase. Furthermore, civil commitment decisions will continue to be speculative and weight public safety over individual civil liberties.

The impetus for the study mandate was the request by the Department of Behavioral Health and Developmental Services (DBHDS) for funding to add capacity to VCBR as the number of individuals under civil commitment continues to grow. The findings, options, and recommendations in this report are collectively intended to result in a more effective civil commitment program. Due to the inherent growth of civil commitment programs, however, the State will likely need to continue to examine the capacity of the current facility and the implications of having an SVP civil commitment program.

VCBR IS BEING RETROFITTED TO FACILITATE DOUBLE BUNKING

As VCBR neared its intended capacity of 300 SVPs, DBHDS made several proposals during the 2011 General Assembly to increase the available capacity to house SVPs. No funds were made available to construct an additional facility, so DBHDS began planning to accommodate additional SVPs by double bunking them at VCBR. Funding was provided to retrofit VCBR's resident rooms to increase capacity up to 450 SVPs.

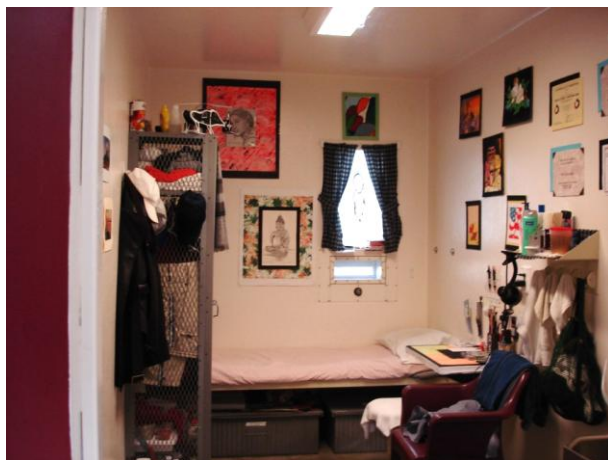
VCBR Is Retrofitting 150 Single Resident Rooms to Accommodate an Additional 150 SVPs

Double bunking is the practice of housing two individuals in a single room. Given that the resident rooms were not built to accommodate two people, VCBR is retrofitting the single-resident rooms. The retrofitting will consist of two primary changes. The first change is that a second bunk will be hung on the wall above the bed that is currently in place (Figure 24 B). VCBR is installing a ladder so that the second resident can climb into bed. The second change will be the addition of a second metal storage cabinet to hold the second SVP's belongings. VCBR staff indicated they are also addressing how to accommodate the increased ventilation and electricity needs of two people living in the same area. Other than these changes, the resident room will remain the same size and the toilet and sink will face the bunks.

In July 2011, DBHDS released a progress report on its plan to house additional SVPs at VCBR. The report indicates that VCBR will retrofit enough resident rooms, expand kitchen capacity, and share additional services to accommodate another 150 SVPs. DBHDS has also developed a double occupancy policy that establishes an admission screening committee to screen new SVPs to determine their suitability for double bunking. The committee will review criteria including the individual's record during incarceration, cognitive abilities, and medical complications.

Figure 24: VCBR Is Retrofitting Single Resident Rooms to Accommodate Double Bunking

*A: Example "Single Bunk"
VCBR Resident Room*



*B: Example of VCBR Resident Room
Retrofitted For "Double Bunking"*



Source: VCBR staff photos.

The primary goal of this new committee is to reduce the likelihood of incidents and violence between SVPs sharing a room. This is particularly important given the wide range of intellectual abilities and predatory tendencies at VCBR. VCBR staff note that there are some residents with cognitive disabilities that can easily be preyed-upon by more intelligent, psychopathic predators. Housing these types of individuals together could very likely result in one SVP assaulting and victimizing the other SVP sharing his room.

VCBR staff have also held monthly meetings with the VCBR resident advisory council regarding the status of double bunking. The meetings have served to inform residents about how double bunking will be implemented and when it will occur. The meetings, according to VCBR, have also served as a way to receive input from residents as the double bunking plan has been developed.

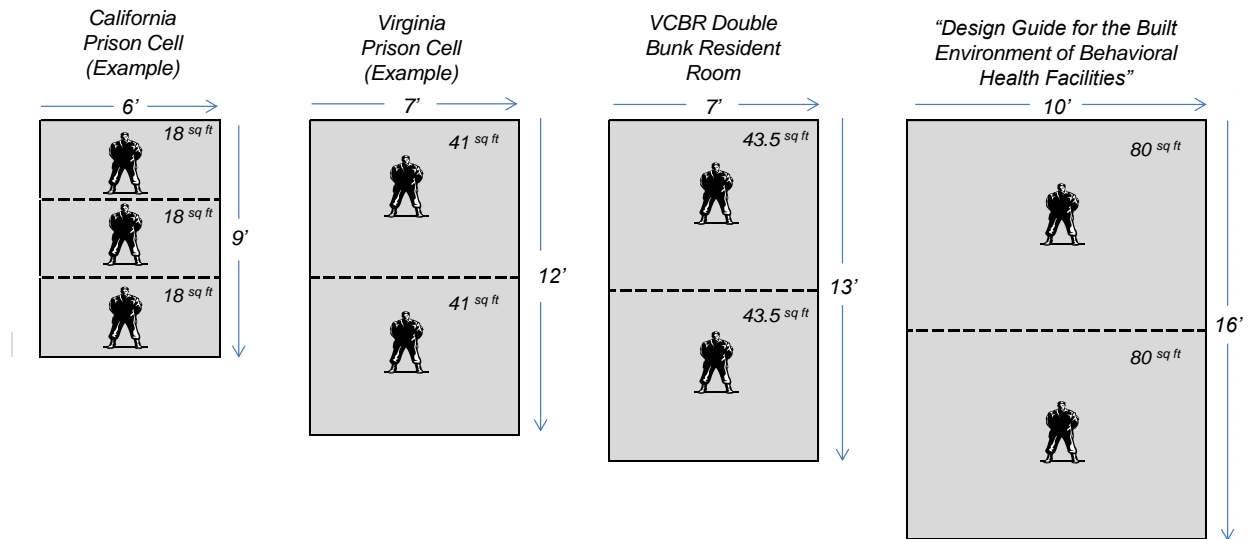
DBHDS reports that no lawsuits have been filed to date in Virginia regarding the plan to double bunk SVPs at VCBR. However, DBHDS and the OAG received a letter signed by six SVPs stating they will sue the State as double bunking is implemented. It is unclear from this letter what applicable legal standard would be used as the basis for the lawsuit. In addition, SVPs are using the resident complaint process to file complaints to VCBR administrative staff about double bunking. DBHDS reports that residents have also made verbal threats towards VCBR staff about making weapons or harming other residents.

No Clear, Enforceable Standard Appears Applicable for Square Footage per Individual In Civil Commitment

Currently, no enforceable standards seem to dictate how much square footage an individual under civil commitment should have available. In correctional settings, however, courts have compelled states to release individuals because of overcrowded conditions. For example, the U.S. Supreme Court recently upheld a lower court ruling ordering California to lower its prison population to reduce overcrowding and preserve a “standard of decency.” At the time, California’s 33 prisons were operating at 200-percent capacity. In certain cases, three prisoners were housed in a 6-by-9-foot cell originally designed to house one prisoner (Figure 25).

Virginia’s prisons, according to DOC staff, use double bunking extensively. Most Virginia prison cells in which double bunking is used range in size from 73 square feet to 82 square feet. DOC staff indicate that the newer prisons for males double bunk two individuals in a cell that is between 80 and 82 square feet. This results in about 41 square feet for each prisoner in the shared cell. However, comparisons between prison cell dimensions and civil commitment

Figure 25: VCBR Square Footage Is Less Than Design Standards but Similar to a Virginia Prison Cell and More Than a California Cell Ruled Inadequate by U.S. Supreme Court



Note: Dimensions and square footage are approximate. Dimensions multiplied, then divided in half may not equal square footage per person shown due to rounding.

Source: JLARC staff analysis of information from VCBR, Virginia DOC, California state prison system, and *Design Guide for the Built Environment of Behavioral Health Facilities*, 2007.

resident rooms may be of limited relevance given the different goals and priorities of correctional and treatment facilities.

VCBR's resident rooms are approximately 7 feet by 13 feet, providing about 87 square feet of space for a single resident. Housing two SVPs in these rooms will reduce the available square footage per person by half, down to 43.5 square feet of space in each resident room. Residents also have access to additional space in a common area with seating. Though there does not appear to be a specific standard for civil commitment settings, the National Association of Psychiatric Health Systems publishes a guide for behavioral health facilities. The guide, which is more applicable to a hospital or care-based setting, cites the standard of 100 square feet per patient or 80 square feet in semi-private rooms. The double-bunk resident rooms at VCBR will provide just more than half of this square footage per person.

Several Other States Use Double Bunking, but Cite Challenges

The practice of double bunking in civil commitment programs is not widespread. However, several other states use the practice, at least periodically. For example, Illinois has used double bunking for its civil commitment program since at least 1999. Illinois staff noted that, like Virginia, the Illinois facility was not originally in-

... 38.5 square feet of space per person, which is slightly lower than VCBR's 43.5 square feet.

tended for double bunking but was retrofitted. The rooms are approximately 11 feet by 7 feet, providing a total of 77 square feet of space. Illinois' double-bunking practice results in 38.5 square feet of space per person, which is slightly lower than VCBR's 43.5 square feet.

Illinois staff noted that double bunking was not an ideal practice, presents a variety of logistical challenges, and requires close coordination. The official indicated that as double bunking becomes more pervasive within a facility, it becomes more of a challenge because there are certain SVPs that should not be housed together in the same room. To manage the room assignment process, the Illinois' facility has a committee, similar to the one recently created by DBHDS.

New Jersey uses double bunking as well, and like Illinois, characterized it as not preferable. In contrast to Illinois and Virginia, however, New Jersey double bunks in an open room dormitory setting, not cells or individual living units. New Jersey's dormitories were designed to hold 30 beds, but were increased to hold 60 beds. New Jersey staff indicated that double bunking can present both security and treatment challenges. New Jersey staff emphasized that crowded living situations can increase the stress level in the facility and interfere with treatment progress for certain types of SVPs.

VCBR Staff Cite Concern About Negative Impact of Double Bunking on Security and Treatment

VCBR security staff expressed concern about a potential increase in incidents that will need to be controlled as double bunking is implemented. These incidents can include violence between SVPs or violence from an SVP towards a VCBR staff member. During the first seven months of 2011, VCBR indicates there have been a total of 160 reported incidents inside VCBR, including

- 4.9 incidents of aggression per month between SVPs;
- 6.4 incidents of aggression per month from an SVP towards VCBR staff; and
- 11.9 incidents of aggression per month from an SVP towards an object, such as destroying property.

These incidents, especially the aggression between SVPs, will almost certainly increase under double bunking. It is also likely that additional security staff may be necessary in certain circumstances to quell this increased aggression.

VCBR treatment staff expressed concern that these incidents will disrupt treatment sessions. They also expressed concern that the

... while double bunking will expand capacity, it may increase the number of SVPs needing to be housed at VCBR.

environment will likely increase the stress level for certain residents, which will slow or even impede their progress through the treatment program. The potential disruptions as double bunking occurs will most likely result in a smaller number of SVPs progressing through treatment and being released from VCBR each year. As a result, while double bunking will expand capacity, it may increase the number of SVPs needing to be housed at VCBR.

VCBR CENSUS WILL INCREASE, BUT TIMING OF ADDITIONAL CAPACITY NEEDS DEPENDS ON PROGRAM CHANGES

Given that there appears to be a legal, short-term solution to VCBR's capacity problems, it may not be necessary at this time to build an additional SVP facility. However, as the VCBR census continues to increase, its new capacity of 450 SVPs with double bunking will also soon be insufficient. To provide the General Assembly some insight into (1) how much additional capacity might be needed, and (2) when it will need to be available, JLARC staff have projected the VCBR census using two sets of assumptions.

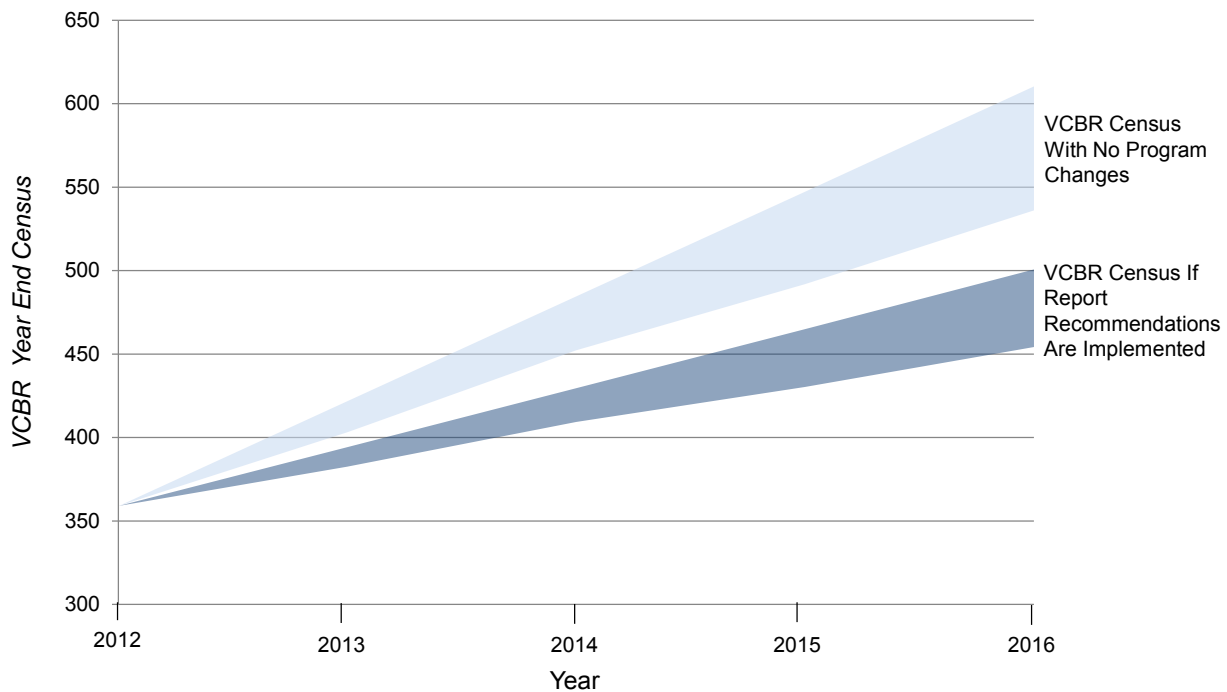
Implementing Report Recommendations Would Likely Slow the Rate of Growth at VCBR

If no changes are made to Virginia's civil commitment program, in particular the risk assessment process, the program will likely continue to grow at its current rate. DBHDS is required to project the rate of growth and does so using point estimates. However, the variability in the rate of civil commitment each year suggests that ranges are more reasonable. Consequently, JLARC staff used data from DOC and OSVP to calculate a likely range for the VCBR census if no changes are made to the civil commitment program. These calculations result in a likely range for the VCBR census of between 536 and 610 residents by 2016 (Figure 26).

A variety of factors contribute to the growth of the census at VCBR, however, no one factor contributes to the population growth as greatly as the rate at which offenders are referred for further review during the risk assessment process. As noted in Chapter 3, since Virginia adopted the Static-99 in 2006, 24 percent of offenders have met the threshold and been referred for further review. However, more recent versions of the instrument make it likely the offenders are lower risk than believed when Virginia adopted the Static-99 and score of "5."

Recommendations in this report would likely reduce the referral rate, and consequently the rate of civil commitment. In particular, these include recommendations in Chapter 3 to facilitate moving to a newer risk assessment instrument and score when deemed appropriate. To a lesser degree, the referral rate could also be lowered by the recommendation in Chapter 4 to allow professional

Figure 26: Report Recommendations Would Most Likely Slow VCBR's Rate of Growth



Notes: Both projection ranges are based on historical rates in the commitment review process. The range of each estimate is due to differing forecasts of SVPs entering the review process. Implementing report recommendations assumes a change to the use of the Static-99R with a threshold score of a "6," and an additional five percent of released offenders scoring below that threshold being forwarded for further review. Both estimate ranges assume a three percent annual release rate from VCBR.

Source: JLARC staff analysis.

staff the flexibility to not refer high scoring offenders based on factors not captured by the risk assessment instrument. This, however, would be somewhat mitigated by the flexibility to also refer offenders who score low on an actuarial risk assessment instrument.

JLARC staff estimate that implementing the report recommendations could reduce the referral rate from 24 percent down to 15 percent. The 15 percent estimate is based on (1) using an updated risk assessment instrument and threshold score, and (2) additional referrals of offenders who score below an actuarial threshold yet are still determined through a professional review to potentially pose a high risk. This 15 percent referral rate would be consistent with other states' rates of referral. For example, recent audits of the California and Minnesota SVP programs placed their referral rates at 15 and 13 percent, respectively. Virginia's actual referral rate, however, would vary depending on how and to what extent JLARC recommendations are implemented and the actual design of the new risk assessment process.

Based on a 15 percent referral rate, JLARC staff calculate the VCBR census to likely be in the range of 454 to 501 SVPs by 2016. (Figure 26). The calculation uses the same VCBR census figures for 2012 as the first calculation because even if this report's recommendations were implemented expeditiously, the substantial length of the civil commitment process means the impact of the changes would not be seen in the VCBR census until the last few months of 2012.

Both estimates assume that each year, about three percent of the SVPs at VCBR will be released. This is an optimistic, though still realistic, assumption based on historical data from VCBR. The treatment program now appears stable and if it remains so, individuals will likely move through the program somewhat more quickly, which could increase how many SVPs are released each year. However, progress could be slowed by the potential negative effect that double bunking will have on treatment progress.

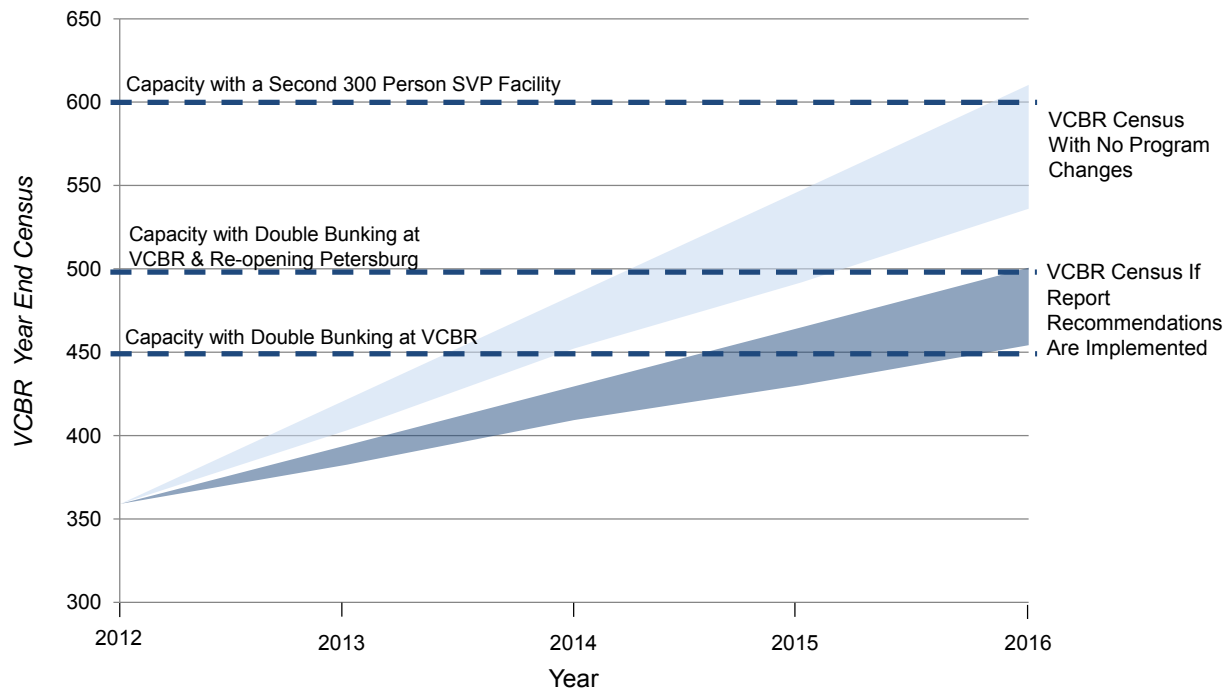
Even if growth is slowed through changes in the program, it appears likely that new civil commitments will continue to outpace the number of SVPs released from VCBR each year. Using the census projection without program changes, 19 percent of the VCBR population would need to be released each year to stabilize the population in the near term. This would be nearly 70 releases per year and is six times the above assumption of three percent based on recent experience. Using the census projection that includes the report recommendations, about 11 percent of the VCBR population would need to be released. This would be more than 40 SVPs a year and is almost four times the current assumption. To the extent that additional transition assistance strategies are implemented as discussed in Chapter 7, the rate at which SVPs are released from VCBR could increase. Given that the average SVP at VCBR is 45 years old, deaths will likely not have a significant impact on reducing the census in the near term.

Report Recommendations Would Likely Result in Less Additional Capacity Being Needed—And at a Later Date

Even with double bunking at VCBR, additional capacity will be necessary. If no changes are made and the current rate of growth continues, VCBR's capacity of 450 could be insufficient as early as sometime during 2013 (Figure 27). If the number of SVPs increases at the high end of the projected range, the second 300-bed facility as proposed by DBHDS (assuming double bunking were then stopped at VCBR) could be insufficient to handle the demand by 2016.

If the report recommendations are implemented expeditiously, the rate of growth would slow such that the 450 SVP capacity at VCBR

Figure 27: Decision About (1) By How Much and (2) When to Expand Capacity Depends on Whether Program Changes Are Implemented



Notes: Both projection ranges are based on historical rates in the commitment review process. The range of each estimate is due to differing forecasts of SVPs entering the review process. Implementing report recommendations assumes a change to the use of the Static-99R with a threshold score of a “6,” and an additional five percent of released offenders scoring below that threshold being forwarded for further review. Both estimate ranges assume a three percent annual release rate from VCBR.

Source: JLARC staff analysis

could be sufficient through mid-2014 at the high end of the range, or even 2016 at the low end of the range. However, even with these changes, additional capacity will still be necessary, though it is less than if no changes are made--and the decision to add capacity can be deferred for several years.

The breadth of the ranges illustrated above underscores the difficulty of precisely predicting how rapidly the VCBR census will increase. DBHDS’ recent experience illustrates the challenges with accurately projecting future capacity needs. DBHDS initially projected VCBR would reach its 300-person capacity during the summer of 2011. However, because the rate of civil commitment dropped in 2010 and appears to have also dropped thus far in 2011, VCBR is now projecting it will not have to begin double bunking until 2012. The dynamic nature of these projections necessitates that VCBR continue to make its annual projections of the VCBR census and update the General Assembly on a quarterly basis about its plans for additional capacity.

VIRGINIA'S CIVIL COMMITMENT DECISIONS WILL ALWAYS BE SPECULATIVE AND WEIGHT PUBLIC SAFETY OVER INDIVIDUAL CIVIL LIBERTIES

While 20 states including Virginia have civil commitment programs for SVPs, 30 states do not have such programs. This lack of uniformity nationwide is reflective of the weighty and complex policy issues and trade-offs associated with the decision to have an SVP civil commitment program. These issues include individual civil liberties, the use of public funds, and public safety.

Virginia's Civil Commitment Program Substantially Limits Civil Liberties of an Individual Based on Potential He Might Reoffend in the Future

While the decision to civilly commit certain sexually violent offenders after they have served their prison sentence increases public safety, it raises civil liberties issues for two reasons. First, the State is confining an individual based on the possibility that he might commit a crime in the future, but not for a crime that he has already committed. Second, actuarial science and expert opinion are not able to predict with a high degree of precision whether a given individual will reoffend if released from prison.

Individuals who are civilly committed under the SVP program have already served their prison sentence for crimes, yet are being confined again for crimes that they might commit in the future. This confinement is for an extended period of time, which in certain instances could be for the rest of their life. While those civilly committed do receive treatment during their confinement, they are in a highly-secured facility without many liberties enjoyed by free individuals.

The decision to confine these individuals is further complicated by the reality that their likelihood of reoffense if released cannot be predicted with a high degree of precision. The decision-making process is much different than the typical criminal proceeding in which a judge or jury seeks to make findings of fact about (1) what happened and (2) who is responsible. As a result, in a criminal proceeding, findings can be made with a relatively high degree of certainty. In contrast, the task of predicting future behavior that is required in these civil commitment hearings is often much more speculative.

SVP Finding Results in Costs of Providing Treatment, Secure Confinement, Then Monitoring During Conditional Release

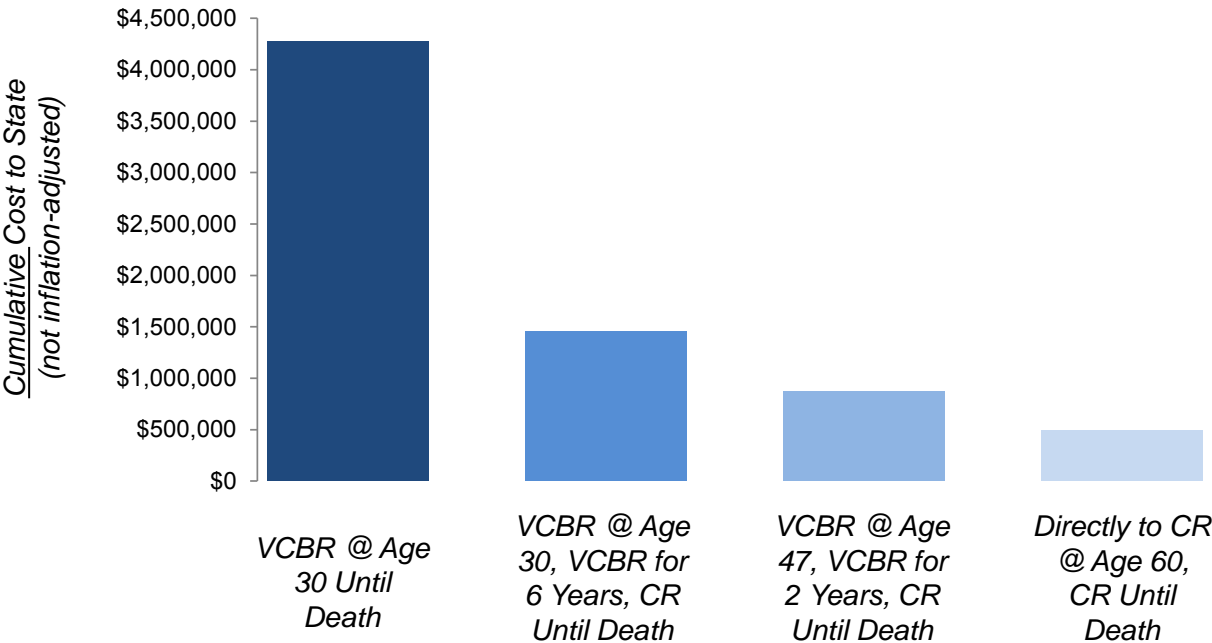
The decision to label an individual as an SVP and commit him imposes a substantial cost on the State. Once the court finds an offender an SVP, the State will be financially responsible for him to

Once the court finds an offender an SVP, the State will be financially responsible for him to some degree until he dies.

some degree until he dies. The *Code of Virginia* currently assumes that SVPs on conditional release will be monitored by DOC for their entire lives (though one can petition the court for release). This, along with the high cost of confinement and treatment during civil commitment, results in substantial public funds being required for SVP programs.

As shown in Figure 28, the exact amount of public funds for a given SVP will vary depending on (1) the age at which he is convicted of an SVP predicate crime, (2) how long he serves in prison, (3) whether he is committed to VCBR and for how long, and (4) how long he lives after being placed on conditional release. Using historical sentencing data and experience with VCBR and conditional release thus far, JLARC staff calculated the State’s cost using four realistic scenarios. The higher cost scenario could be an individual convicted at age 22, serving eight years in prison, then being civilly committed to VCBR at age 30 and never progressing through the treatment program. In such a scenario, the State would spend about \$4.3 million. A lower cost scenario could be an individual who is convicted at age 30, serves 30 years in prison, then is found an SVP but is sent directly to conditional release. In this scenario, the State would spend about \$489,000.

Figure 28: The Court Finding an Individual an SVP After Release From Incarceration Commits the State to Substantial Costs for the Rest of the Individual’s Life



Note: CR, Conditional Release.

Source: JLARC staff scenarios based on DOC and DBHDS sentencing and expenditure data, and U.S. Social Security Administration life expectancy tables.

Civil Commitment Virtually Eliminates, and Conditional Release Moderately Reduces, the Risk of Reoffense

The major benefit of the State's civil commitment program is that it further protects the public by reducing the opportunity for those offenders convicted of SVP predicate crimes to commit new offenses against the public. As is discussed in Chapter 7, data suggests that about one in 20 sex offenders reoffend after three years, and that figure increases to between one in 10 and one in five beyond several years. The estimate of reoffenses increases over longer time periods. During the time an individual is civilly committed, his chance of reoffense against the public is virtually zero unless he escapes from the facility (which has not happened at VCBR). After being treated and then placed on conditional release, data from VCBR and other state's civil commitment programs indicates between zero and one in 20 individuals reoffend by committing another sexual or violent crime, though over varying periods of time. This data suggests there is a moderate decrease in the chance an individual will reoffend while being monitored on conditional release. It is important to note that multiple studies cite that sexually violent crimes are under-reported, so these estimates of reoffenses likely underestimate the actual number of sexually violent acts that are committed.

Though not an expressed benefit of the program, the State's civil commitment program also provides rehabilitation benefits to some SVPs. Certain individuals do progress through VCBR and leave with (1) a better understanding of their violent sexual tendencies and (2) strategies to reduce the likelihood they will act on those tendencies in the future. These individuals have a better chance of living the rest of their lives more productively than they otherwise would have.

Civil Commitment Decisions Will Always Be Speculative and Weight Public Safety Over Individual Civil Liberties

The recommendations presented in this report are intended to improve Virginia's civil commitment process. These improvements will primarily be

- better prioritization of available civil commitment resources towards the highest risk offenders; and
- greater confidence in the civil commitment decision based on consensus across multiple, more independent steps.

However, even with these improvements to the process, the decision to civilly commit an offender based on the potential he might reoffend in the future will continue to be speculative. As noted in Chapter 3, even a relatively high risk violent sex offender is more

likely to not be convicted again if released. For example, offenders that score a “9” on the Static-99R were caught about 30 percent of the time reoffending. This means that 70 percent—or the majority of the time—offenders with this score would not have been convicted. Importantly, this does not mean they did not commit additional sex offenses that were either not reported or did not result in convictions.

Given this likelihood that even higher risk offenders may not always be caught and convicted, the entire civil commitment process itself prioritizes public safety in the form of preventing potential reoffenses over an individual’s civil liberties. Deciding whether this is appropriate depends on how policy-makers weigh these two important, yet competing, priorities. Whatever civil commitment process is used, it will continue to have this dynamic because of the difficulty predicting what an individual will do in the future.

However, based on the case studies presented throughout this report, there are clearly some individuals who are sufficiently dangerous to justify placing them under civil commitment. The majority of SVPs at VCBR have multiple convictions for violent sexual crimes in combination with mental health or personality disorders. The objective, therefore, of a civil commitment process should be to use the most accurate and current means available to prioritize public resources towards treating the individuals most likely to re-offend. When implemented in this manner, civil commitment programs do provide value by attempting to proactively deal with the individuals who would otherwise be released into society and likely reoffend.

JLARC Recommendations:

Review of the Civil Commitment of Sexually Violent Predators

1. The General Assembly may wish to amend §37.2-903.B of the *Code of Virginia* to remove the reference to “a score of five or more on the Static-99 or a similar score on a comparable, scientifically validated instrument designated by the Commissioner, or a score of four or more on the Static-99 or a similar score on a comparable, scientifically validated instrument.” (p. 40)
2. The General Assembly may wish to amend §37.2-903.B of the *Code of Virginia* to direct the Department of Behavioral Health and Developmental Services to choose a current and scientifically-validated actuarial risk assessment instrument to identify individuals that merit further assessment as a possible sexually violent predator. The statute should give qualified professionals the authority to designate the instrument, develop a threshold score as a guideline, and deviate from the threshold when justified. (p. 40)
3. The Department of Behavioral Health and Developmental Services and the Department of Corrections should identify a current and scientifically-validated actuarial risk assessment instrument to use in Virginia’s civil commitment process for sexually violent predators. The agencies should report to the House Health, Welfare, and Institutions; House Appropriations; Senate Rehabilitation and Social Services; and Senate Finance Committees by June 30, 2012 which instrument will be used, which threshold score will be used to determine the need for further review as a possible sexually violent predator, and the estimated risk of reoffense associated with this score. The agencies should report biennially to the General Assembly whether they intend to continue to use the same instrument or a different one, as well as the reasons for, and implications of, the decision. (p. 40)
4. The Department of Behavioral Health and Development Services, Department of Corrections, and Office of the Attorney General should develop a process and standards that determine under what conditions the State should stop using the current instrument and begin using another actuarial risk assessment instrument. (p.42)
5. The Office of Sexually Violent Predators (OSVP) should develop and implement a process to periodically compile and review the rates at which evaluators find individuals are sexually vio-

lent predators (SVP). For those evaluators who have unusually high or low rates of SVP findings over time, OSVP should review the evaluator's previous evaluations to determine (1) whether the evaluator is using different methodologies and approaches that are unwarranted or (2) if there are other factors that explain the unusually high or low rates of SVP findings. The results of these reviews should be used to improve the process of evaluation over time. (p. 49)

6. The Office of Sexually Violent Predators (OSVP) should review instances in which an individual's SVP evaluation includes a diagnosis that is subsequently changed during the initial diagnosis made once the individual is at the Virginia Center for Behavioral Rehabilitation. The purpose of the review should be to make the evaluator(s) aware of the difference and give them the feedback needed to correct any issues with their diagnostic approach in future evaluations. OSVP should develop specific criteria to assess whether the evaluator has addressed the issues and at what point the evaluator's contract with the State should be terminated. (p. 50)
7. The Commitment Review Committee should record the reason(s) that each member used to determine his or her vote for civil commitment, conditional release, or full release. The Department of Corrections should then cite these reasons in the memo it currently uses to transmit an individual's file to the Office of the Attorney General. (p. 52)
8. The Department of Corrections should work with the Department of Behavioral Health and Developmental Services to develop and implement procedures to use an actuarial risk assessment instrument as part of the risk assessment process. The departments should also define the criteria under which (1) an individual receiving a score below a threshold should still be eligible for further review, and (2) an individual receiving a score above a threshold should not be eligible for further review. (p. 54)
9. The Department of Corrections should coordinate with the Department of Behavioral Health and Developmental Services to develop new procedures for the Commitment Review Committee. The procedures should define what factors the committee will use as the basis for its deliberations and recommendations without access to the clinical sexually violent predator evaluation. Factors, at a minimum, might include a demonstrated pattern of sexually violent behavior; record during incarceration; whether the individual could successfully be managed on conditional release; and the individual's physical condition, health, and/or age. (p. 55)

10. The Department of Corrections and Department of Behavioral Health and Developmental Services should develop guidance about the conditions under which a second sexually violent predator (SVP) evaluation is necessary during the risk assessment process. At a minimum, a second evaluation should be conducted when there is not consensus among an actuarial score, Commitment Review Committee vote, and the first SVP evaluation. The second SVP evaluation should be conducted by a different evaluator than the one who conducted the first evaluation. (p. 56)
11. The Office of Sexually Violent Predators and the Office of the Attorney General should work with Virginia Continuing Legal Education to develop and offer a seminar for defense attorneys on the legal, actuarial, and psychological aspects of sexually violent predator trials. (p. 68)
12. The Supreme Court of Virginia should further assess the financial and legal issues associated with consolidating sexually violent predator annual reviews in the Nottoway Circuit. The Supreme Court of Virginia should notify the Senate and House Courts of Justice committees whether or not it is feasible to consolidate the annual reviews by June 30, 2012. (p. 71)
13. The Virginia Prisoner and Juvenile Offender Reentry Council should coordinate with the Office of Sexually Violent Predators and the Virginia Center for Behavioral Rehabilitation to include sexually violent predators in the prisoner reentry strategies it develops. (p. 101)
14. The Department of Corrections and the Department of Behavioral Health and Development Services should assess the feasibility of providing additional treatment to violent sex offenders while they are in prison. The assessment should consider whether this additional treatment would be a prudent and cost-effective way to make conditional release a more realistic alternative for certain sexually violent predators. (p. 103)
15. The Department of Behavioral Health and Developmental Services should consult with state staff at the Florida sexually violent predator program if it decides to proceed with considering privatizing the Virginia Center for Behavioral Rehabilitation in Nottoway County, or a future facility. The consultation should address the specific requirements and provisions of Florida's contract, including how a facility can be designed and operated to minimize costs and staffing levels. (p. 121)

Study Mandate

Item 30 H, 2011 Appropriation Act

"H.1. The Joint Legislative Audit and Review Commission (JLARC) shall undertake a comprehensive review of the civil commitment of sexually violent predators at the Virginia Center for Behavioral Rehabilitation (VCBR) and the conditional release program administered by the Department of Behavioral Health and Developmental Services.

2. The review shall examine current law and commitment practices related to the treatment of sexually violent predators currently committed to the VCBR, including convictions and time served for predicate crimes; the screening and assessment process for identifying those individuals who could be eligible for civil commitment as sexually violent predators, including the use of the current risk assessment instrument; the commitment review process; and the impact of these factors on the projected numbers of individuals likely to be civilly committed.

3. In addition, the review shall examine the current policies and practices of other states' programs for the involuntary civil commitment of sexually violent predators and conditional release programs and determine how those policies and practices compare to the current program operated in Virginia. The review shall also examine the costs of providing for the civil commitment of sexually violent predators at VCBR, including an analysis of security and treatment staff ratios, and the provision of other services. The review shall also include any cost-effective, best practices identified in other state civil commitment programs.

4. The Department of Behavioral Health and Developmental Services, the Department of Corrections, the Virginia Criminal Sentencing Commission, the Virginia Crime Commission and the Office of the Attorney General shall provide, upon request, technical assistance as needed to JLARC during this review.

5. For the purpose of completing this review, JLARC staff are authorized to possess, copy, and use all records, including records under seal, from all state and local courts, clerks, departments, agencies, boards, and commissions, including but not limited to: the Department of Corrections, the Department of Behavioral Health and Developmental Services, the Office of the Attorney General, offices of attorneys for the Commonwealth, Virginia State Police, local police and sheriffs' departments, the Department of Juvenile Justice, court services units, community services boards, state and local departments of social services, and probation and parole districts. Upon request, the records, documents, notes, recordings or other information of any kind shall be provided to JLARC staff within 20 days of receiving such request.

6. The Commission shall provide a final report to the Governor and the General Assembly no later than November 30, 2011."

Research Activities and Methods

JLARC staff conducted the following major research activities during this review:

- structured interviews with State agency staff, third-party SVP evaluators, researchers and practitioners in the field of sexually violent offenders, and circuit court judges that have presided over SVP proceedings;
- quantitative analysis of (i) a comprehensive database of all individuals reviewed for civil commitment since 2003; (ii) prison population data from the Department of Corrections (DOC); and (iii) expenditure and staffing data for the Virginia Center for Behavioral Rehabilitation (VCBR) and peer State facilities;
- case studies of selected SVPs civilly committed at VCBR;
- reviews of other states' civil commitment programs for sexually violent offenders;
- site visits to VCBR;
- reviews of the research literature on risk assessment, treatment, and recidivism rates for sexually violent offenders.

STRUCTURED INTERVIEWS

To obtain information about the civil commitment of sexually violent predators (SVP) in Virginia, JLARC staff conducted structured interviews with State agency staff responsible for implementing the program. JLARC staff also conducted interviews with third-party SVP evaluators under contract with the State, researchers and practitioners in the field of sexually violent offenders, and circuit court judges that have presided over civil commitment proceedings.

State Agency Staff

JLARC staff conducted structured interviews with State agency staff responsible for administering Virginia's civil commitment program for SVPs. These agencies were the Department of Behavioral Health and Developmental Services (DBHDS), the Department of Corrections (DOC), and the Office of the Attorney General (OAG).

Interviews were conducted with staff from the Office of Sexually Violent Predators (OSVP) within DBHDS, and the Sex Offender Screening and Assessment (SOSA) unit of DOC. These interviews addressed key aspects of Virginia’s civil commitment program, including the

- role of each agency in implementing the program;
- risk assessment and commitment review process;
- conditional release process and strategies for facilitating release when an SVP has progressed through treatment at VCBR;
- evolution of the civil commitment program from 2003 to the present; and
- aspects of the program that are working well and areas in need of improvement.

To understand the process used by the Commitment Review Committee (CRC) to evaluate the need for civil commitment, JLARC staff conducted structured interviews with six of the seven current CRC members. Staff interviewed CRC members regarding the process used to evaluate offenders for civil commitment, the primary factors considered during this process, and their experience on the CRC.

JLARC staff also conducted interviews with VCBR staff to understand the facility’s role in detaining, treating, and conditionally releasing SVPs. Interviews were conducted with VCBR’s current management team, including the director of the facility and the directors of treatment, security, and forensic assessment. To supplement these interviews, JLARC staff also reviewed policies and procedures for key operations at VCBR.

Finally, JLARC staff conducted structured interviews with seven attorneys in the SVP Division of the Office of the Attorney General, including the Division’s director. Interviews focused on the OAG’s process for determining if it will petition the court for civil commitment, when it will seek conditional release, and the primary factors considered in making these decisions. OAG staff were also asked to provide insight into how circuit courts determine the need for civil commitment or readiness for conditional release.

Third-Party SVP Evaluators

JLARC staff invited each of the ten third-party SVP evaluators currently under contract with DBHDS to participate in a structured interview. Staff subsequently conducted interviews with six of these evaluators. Topics discussed during these interviews included the evaluator’s qualifications and experience in assessing

sexually violent offenders, the process and criteria used to determine whether an offender is an SVP, and their level of confidence in this determination.

Researchers and Practitioners in the Field of Sexually Violent Offenders

JLARC staff conducted interviews with researchers and practitioners in the assessment and treatment of sexually violent offenders. Staff interviewed leading researchers in the field of actuarial risk assessments for sexually violent offenders, including the creators of the Static-99 and Static-99R. These interviews were used to understand the advantages and disadvantages of using actuarial risk assessments to evaluate sexually violent offenders for civil commitment, and the appropriateness of Virginia's current risk assessment processes. JLARC staff also gained insight into the treatment of SVPs through interviews with sex offender treatment providers in other state civil commitment programs and in private practice in Virginia.

Circuit Court Judges

To gain insight into civil commitment trials and subsequent court hearings, JLARC staff conducted structured interviews with five circuit court judges that have presided over SVP civil commitment proceedings. Jurisdictions were chosen in part because they were among the courts in which the most civil commitment proceedings have occurred since 2003. The interviews were designed to solicit judges' general impressions and opinions about the civil commitment process for SVPs. JLARC staff obtained additional insight into the court's role in the civil commitment process by interviewing a defense attorney that has represented SVPs during civil commitment proceedings.

DATA ANALYSIS

Much of the data analysis conducted by JLARC staff during this review involved data on each individual reviewed for civil commitment in Virginia since 2003. These data described each individual's progression through the commitment review process, and if committed at VCBR, their progress in treatment and conditional release from the facility. JLARC staff also obtained offender release data from DOC's Research and Management Services (RMS) unit, as well as expenditure and staffing data for VCBR and other State "peer" facilities.

Comprehensive Database of All Offenders Reviewed for Civil Commitment in Virginia Since 2003

JLARC staff assembled and analyzed a comprehensive database on all individuals convicted of an SVP predicate crime and evaluated

for civil commitment since 2003. The database was assembled in three stages. First, JLARC staff obtained from OSVP its SVP-Tracker database, which includes extensive information about each offender that meets the actuarial score threshold and is further reviewed for civil commitment as an SVP. Key elements of SVPTracker include demographic information, details of each offender's predicate crime and criminal history, and the outcome of each phase of their commitment review.

Second, JLARC staff incorporated into SVPTracker elements of SOSA's database on offenders released from DOC with a conviction for an SVP predicate crime. Key data obtained from the SOSA database included the prison release date and actuarial assessment score for each offender. These data were incorporated into SVPTracker by matching the DOC identification number and other identifying characteristics of offenders. Samples of the combined database were then given to OSVP to confirm its accuracy and resolve any discrepancies.

Third, JLARC staff obtained from VCBR data describing the treatment progress of each SVP admitted to the facility since 2003. Staff incorporated the following data into its comprehensive database using the SVP's name and other identifying information:

- the treatment track to which the individual was assigned at VCBR (standard, special needs, limited participation);
- the date of admission to VCBR and (if applicable) date of discharge;
- the current or (if discharged) last treatment phase;
- the current status of each SVP (for example at VCBR, on conditional release, in a DOC facility, or deceased); and
- whether conditional release was recommended by VCBR staff; and
- whether an SVP was charged with, or convicted of, a new SVP predicate crime while on conditional release.

JLARC staff conducted several analyses using the comprehensive database described above. Staff analyzed the rates at which offenders progressed through the major stages of the commitment review process. Specifically, staff analyzed the rates at which offenders

- met the actuarial threshold;
- were found an SVP by a third-party SVP evaluator, including how this varied by individual evaluator and over time;

- were recommended for civil commitment, conditional release, or full release by the CRC;
- were prosecuted by the OAG;
- were found an SVP and committed to VCBR or placed on conditional release by a circuit court, including how this varied across circuit courts.

JLARC staff also used the comprehensive database to analyze the treatment progress of SVPs after being committed at VCBR, including the length of time at the facility and the time needed to complete treatment and be approved for conditional release. Finally, JLARC staff analyzed the recidivism rate for SVPs placed on conditional release, either after receiving treatment at VCBR or instead of commitment at the facility.

Numbers published in this report may not exactly reflect those that have been published elsewhere for several reasons. First, all measurements pertaining to rate of time were done by assigning offenders to the year in which they were released from DOC. Since the civil commitment process can be initiated in one year and finish in a later year, the base year were assigned to each offender to standardize any measurement of the process over time. In addition, the SVPTracker database does not have complete information on several offenders that have started the risk assessment process, yet have not completed the commitment review process in its entirety. Finally, OSVP did not exist until 2006, so offenders that progressed through the process before that time may not be fully or accurately captured as records were updated at a later date.

Prison Population Data from DOC

The RMS unit of DOC conducted numerous data analysis functions for JLARC staff during this review. RMS staff provided the following analyses for offenders convicted of SVP predicate crimes:

- whether the sentence awarded for an SVP predicate conviction was parole-eligible or subject to Truth-in-Sentencing requirements;
- the length of sentence awarded and the amount of the sentence actually served; and
- historical release data and future release forecasts.

Expenditure and Staffing Data for VCBR and Peer State Facilities

To provide a frame of reference for expenditure and staffing levels at VCBR, JLARC staff compared levels at VCBR to four “peer” State facilities. Staff worked with DBHDS and DOC staff to identify facilities with reasonably similar missions. Staff then collected

detailed expenditure and staffing data for two DOC and two DBHDS facilities:

- Indian Creek Correctional Center, which is a medium security prison that provides intensive, long-term substance abuse treatment services;
- Marion Correctional Center, which has multiple levels of security and is a mental health hospital;
- Southside Virginia Training Center, which provides health and rehabilitation services for individuals with intellectual disabilities; and
- Central State Hospital, which administers a forensic and civil treatment program, and provides services ranging from short-term, quick re-entry programs to long-term intensive programs for the most seriously mentally ill.

JLARC staff subsequently developed per-person expenditure and staffing figures for VCBR and the four peer facilities.

CASE STUDIES OF SELECTED SVPs AT VCBR

To supplement its analysis of SVPs civilly committed at VCBR, JLARC staff obtained detailed case study information for ten SVPs admitted to the facility since 2003. SVPs were chosen to reflect the larger VCBR population in several areas, including their length of stay at the facility, treatment progress, age, Static-99 score, and number of sexually violent convictions. VCBR staff provided written descriptions of each SVP's criminal and mental health history (including diagnosed mental health and personality disorders), treatment recommendations and progress at VCBR, and the reasons why conditional release has or has not been recommended.

REVIEWS OF VIRGINIA'S AND OTHER STATES' CIVIL COMMITMENT PROGRAMS FOR SVPs

JLARC staff reviewed civil commitment programs in other states to determine how Virginia's SVP program compares to policies and practices nationwide. To obtain an overview of the 19 other civil commitment programs, JLARC staff reviewed the results of the 2010 annual survey of state civil commitment programs by the Sex Offender Civil Commitment Programs Network (SOCCPN). The survey addressed key aspects of state civil commitment programs, including the treatment provided at secure facilities and their use of conditional release.

JLARC staff conducted more extensive reviews of civil commitment programs in 11 of the 19 other states. Program staff with nearly all 19 states were invited to participate in structured inter-

views about their civil commitment programs (Pennsylvania was excluded because its civil commitment program is only for juveniles). JLARC staff selected states for review based on the type of civil commitment program, any unique policies or practices, and their willingness to be interviewed. The 11 states reviewed were:

- Arizona
- Florida
- Illinois
- Kansas
- Missouri
- Minnesota
- New Jersey
- New York
- Texas
- Washington
- Wisconsin

Reviews of other state civil commitment programs focused on how they compared to Virginia in key areas, including the commitment review and risk assessment process, the treatment provided at secure facilities, and the use of conditional release as a less restrictive alternative. JLARC staff reviewed other states' statutes, policies, and guidelines for these program areas, and conducted structured interviews with program staff for nine of the 11 states reviewed. For selected states, JLARC staff also obtained data on the number of sexually violent offenders committed at secure facilities, placed on conditional release, or charged or convicted of a violent sex offense after conditional release.

SITE VISITS TO VCBR

JLARC staff made two visits to VCBR during this review. The purpose of these visits was to view the facility and observe its operations and residents. During the first visit, staff toured the facility and viewed

- a residential living unit, or “pod,” that houses residents;
- individual resident rooms, including single-bunked rooms and a room retrofitted for double-bunking;
- common areas accessible to residents within their pod, such as recreational and instructional rooms;
- group treatment classrooms; and

- a medical and nursing center.

To better understand the treatment provided for SVPs, during a subsequent visit to VCBR, JLARC staff observed a 60-minute group treatment session conducted by a VCBR therapist for eight residents.

REVIEW OF RESEARCH LITERATURE

JLARC staff reviewed the research literature in several areas related to civil commitment programs for sexually violent offenders. Literature reviews were conducted in the following areas:

- actuarial risk assessment instruments and other evaluation methods for sexually violent offenders;
- the effectiveness of cognitive-behavioral therapy and related methods for treating convicted sex offenders;
- recidivism rates for convicted sex offenders, including factors that influence these rates; and
- U.S. Supreme Court rulings and other case law on the constitutionality of civil commitment programs for sexually violent offenders.

SVP Predicate Crimes and Statutory Sentence Ranges

Table C-1: SVP Predicate Crimes and Statutory Sentence Ranges

Code Section	Crime	VCC Code	Penalty	Mandatory Minimum
18.2-61	Rape*			
18.2-61(A,ii)	Intercourse w/victim thru mental incapacity/helplessness	RAP-1128-F9 ^a	5Y-Life (I) ^b	
18.2-61(A,i)	Intercourse with victim by force, threat or intimidation	RAP-1129-F9	5Y-Life (I)	
18.2-61(A,iii)	Intercourse with victim under age 13	RAP-1130-F9	5Y-Life (I)	
18.2-61(A,iii)	Intercourse w/ victim under age 13 w/kidnapping, burglary, wounding	RAP-1150-F9	25Y-Life (I)	25Y
18.2-61(A)	Spouse by force, threat, etc.	RAP-1141-F9	5Y-Life (I)	
18.2-61	Rape, forcible—Type not clear from record	RAP-1162-F9		
18.2-67	Forcible sodomy*			
18.2-67.1(A)	By force, threat, mental incapacity / helplessness victim age 13+	RAP-1132-F9	5Y-Life (I)	
18.2-67.1 (A,1)	Spouse by force, threat, etc.	RAP-1142-F9	5Y-Life (I)	
18.2-67.1 (A,1)	Victim under age 13	RAP-1133-F9	5Y-Life (I)	
18.2-67.1 (A,2)	Victim under age 13 with kidnapping, burglary, wounding	RAP-1151-F9	25-Life(I)	25Y
	Sodomy, forcible—Type not clear	RAP-1165-F9		
18.2-67	Object Sexual Penetration*			
18.2-67.2(A,2)	By force, threat, intimidation or via mental incapacity/helplessness	RAP-1135-F9	5Y-Life (I)	
18.2-67.2(A)	Spouse, by force, threat, etc.	RAP-1143-F9	5Y-Life (I)	
18.2-67.2(A,1)	Victim under age 13	RAP-1136-F9	5Y-Life (I)	
18.2-67.2(A,1)	Victim under age 13, with kidnapping, burglary, wounding	RAP-1152-F9	25Y-Life (I)	25Y
18.2-67.2	Object sexual penetration—Type not clear from record	RAP-1166-F9		
18.2-67.3	Aggravated Sexual Battery*			
18.2-67.3(A,4,b)	Force, threat, intimidation with serious injury	RAP-1146-F9	1Y-20Y(II)	
18.2-67.3(A,4,c)	Force, threat, intimidation with threat of weapon	RAP-1147-F9	1Y-20Y(II)	
18.2-67.3(A,2)	Through the use of mental incapacity or helplessness	RAP-1144-F9	1Y-20Y(II)	

Code Section	Crime	VCC Code	Penalty	Mandatory Minimum
18.2-67.3(A,3)	Parent/grandparent etc., with child age 13 to 17	RAP-1148-F9	1Y-20Y(II)	
18.2-67.3(A,1)	Victim under age 13	RAP-1121-F9	1Y-20Y(II)	
18.2-67.3	Aggravated sexual battery—Type not clear from records	RAP-1159-F9	1Y-20Y(II)	
18.2-31(1)	Capital murder in commission of abduction with intent to defile			
18.2-31(1)	Abduction, in commission of capital murder	MUR-0913-F1	Life-Death(I)	
18.2-31(1)	Abduction, in commission of capital murder (accessory before the fact)	MUR-0980-F2	20Y-Life(I)	
18.2-31(5)	Capital murder with sexual assault			
18.2-31(5)	Capital murder during rape, sodomy, object penetration or rape	MUR-0914-F1	Life-Death (I)	
18.2-31(5)	Capital murder (accessory before the fact) during rape, sodomy, object penetration or attempt	MUR-0982-F2	20Y-Life(I)	
18.2-32	1st or 2nd degree murder when present w/ intent to rape, forcible sodomy or inanimate or animate object sexual penetration			
18.2-32	First degree non-capital murder	MUR-0925-F2	20Y-Life (I)	
18.2-32	Second degree non-capital murder	MUR-0935-F9	5Y-40Y(I)	
18.2-48(ii)	Abduction with sexual intent			
18.2-48(ii)	Abduction of person with intent to defile	KID-1004-F2	20Y-Life(I)	
18.2-48(iii)	Abduction of child under 16 with intent for concubinage or prostitution			
18.2-48(iii)	Abduction of child under 16 years of age for concubinage or prostitution	KID-1003-F2	20Y-Life(I)	
18.2-63	Carnal Knowledge/Statutory Rape No Force			
18.2-63(A)	Age of Victim 13,14	RAP-1124-F4	2Y-10Y(II)	
18.2-63(B)	Consenting victim age 13,14—accused minor 3+ years older	RAP-1123-F6	1Y-5Y	
18.2-63(B)	Consenting victim age 13,14—accused minor < 3 years older	RAP-1119-M4	Fine	
18.2-64.1	Carnal Knowledge of minor in care by caregiver			
18.2-64.1	Person providing service under purview of court, corrections	RAP-1125-F6	1Y-5Y(II)	
18-54 & 18.1-44	Rape 1950 Code	N/A	N/A	

* denotes a predicate crime from before 2006 expansion of predicate crimes.

^a The letter that appears as the digit 8 of the VCC denotes “F” for felony offense and “M” for misdemeanor offense. The number that appears as digit 9 indicates the class of felony or misdemeanor, i.e., a VCC code ending in F4 denotes a Class 4 Felony.

^b (I) appearing in the penalty column denotes a “Category I” offense with a maximum penalty of 40 years or more. (II) appearing in the penalty column denotes a “Category II” offense with a maximum penalty of less than 40 years.

Source: Virginia Crime Codes (VCC) Manual, Virginia Criminal Sentencing Commission.

Static-99 Coding and Scores

The Static-99 is a series of ten questions that, when answered, result in a score between “0” and “12.” The Static-99 asks questions in the ten areas summarized in Table D-1 on the following page. Each question, except for one, presents a binary choice in which the offender receives either one point or zero points. “Prior sex offenses” is the only area that is an exception, as it can be scored from zero to three. The Static-99 is an actuarial instrument based on empirically validated risk factors. Answering the questions on the Static-99 yields a numerical score that is associated with a risk estimate for each offender. That score is then translated into probability estimates of future sex offense reconviction over a five-, ten-, and 15-year time period.

The Static-99 can be administered by users without any clinical training. However, developers of the instrument recommend that users should receive a training session by a certified Static-99 trainer before using the instrument. The Static-99 is administered through a file review, and no in-person interview with the individual being assessed is necessary. Comprehensive descriptions and coding rules are provided for each risk factor in a Static-99 workbook.

Table D-1: Static-99 Risk Factors and Scoring Codes

Question	Risk Factor	Codes		Score
1	Young	Aged 25 or older		0
		Aged 18–24.99		1
2	Ever lived with lover for at least two years?	Yes		0
		No		1
3	Index non-sexual violence: any convictions	No		0
		Yes		1
4	Prior non-sexual violence: any convictions	No		0
		Yes		1
		<u>Charges</u>	<u>Convictions</u>	
5	Prior sex offense	None	None	0
		1-2	1	1
		3-5	2-3	2
		6+	4+	3
6	Prior sentencing dates (excluding index offense)	3 or less		0
		4 or more		1
7	Any convictions for non-contact sex offenses	No		0
		Yes		1
8	Any unrelated victims	No		0
		Yes		1
9	Any stranger victims	No		0
		Yes		1
10	Any male victims	No		0
		Yes		1
Total Score		Add up score from individual risk factors		0-12

Source: Static-99 Workbook, Hanson et al.

Limitations of Actuarial Risk Assessment Instruments

As discussed in Chapter 3, Virginia’s risk assessment process is flawed. Two of the reasons cited for the flawed process are that

- ARAIs have predictive value for groups of offenders, but cannot precisely predict an individual’s actual risk of reoffense; and
- evolution in ARAI science has caused the current instrument and threshold score being used in Virginia to become out-of-date.

Appendix E addresses the research and data behind these two issues in a more comprehensive manner.

ACTUARIAL RISK ASSESSMENTS HAVE A LOW DEGREE OF CONFIDENCE WHEN PREDICTING WHETHER A SINGLE PERSON WILL REOFFEND

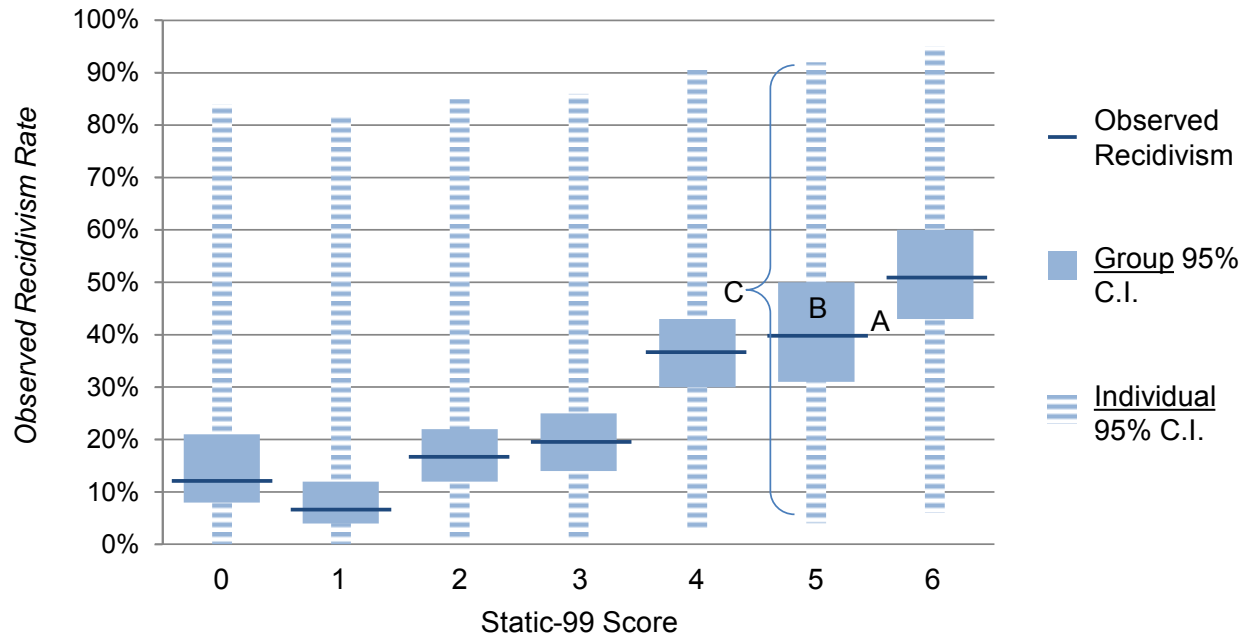
ARAIs separate offenders into groups of similar score categories or risk levels. The risk estimate corresponding to each score is empirically based because it is calculated from the proportion of people with a certain score from a sample of sex offenders who reoffended during a follow up period. Often, however, the group recidivism estimate for any given score falls short in trying to predict the future behavior of a single offender.

Not Every Offender Scoring a “5” on the Static-99 Presents the Same Amount of Risk

Figure E-1 shows the predictive accuracy of group estimates and individual estimates for Static-99 scores, as found by one study. 40 percent (line labeled “A” in Figure 13) of the offenders that scored a “5” on the Static-99 in the study sample reoffended during a follow-up period. Using this rate of reoffense and the number of offenders with a score of “5” in the sample, there is a 95 percent level of confidence that the actual rate of recidivism for the group that scores a “5” on the Static-99 would be between 31 percent and 50 percent (shaded area labeled “B” on Figure E-1).

The observed risk estimate (“A”) and group confidence interval (“B”) summarizes the group reoffense characteristic for those scoring a “5” on the Static-99, but does not describe each individual within the “5” group with the same precision. In fact, nearly all

Figure E-1: Static-99 Is Moderately Predictive For Groups of Sex Offenders; But Can Be Far Less Predictive for a Single Individual



Source: Steven D. Hart, Christine Michie, and David J. Cook "Precision of Actuarial Risk Assessment Instruments" British Journal of Psychology, 2007.

individuals in the group *do not* have an actual risk estimate of 40 percent. Instead, the individuals are distributed among varying degrees of risk, both above and below the group average (“A”).

Though there is no real alternative, the use of a group estimate to predict individual behavior results in a dramatic loss of accuracy. As a result of the observed reoffense rate and sample size of offenders scoring a “5” in the study, researchers can be 95 percent confident that the actual risk estimate for those with the score falls between 4 percent and 92 percent. This extremely wide individual confidence interval is depicted by the dashed lines, labeled “C” extending both above and below the group estimate (“B”) in Figure E-1.

Individuals With A STATIC-99 Score of “5” Are Not Necessarily Higher Risk Than Individuals With a Score of “4”

A second limitation that is inherent with ARAIs is the overlap of both group and individual risk estimate ranges between Static-99 scores. As shown previously in Figure E-1, the extremely wide range of individual 95 percent confidence intervals associated with each STATIC-99 score span a nearly identical range of possible risk. With such small difference between these confidence intervals, it becomes virtually impossible to definitively say that an of-

fender receiving one score is more risky than an offender scoring a lower score, and vice versa.

This is readily apparent considering how similar the 95 percent confidence intervals are for individuals with various scores on the Static-99. For example, an individual scoring a “5” on the Static-99 may have a risk estimate ranging from 4 percent to 92 percent, while an individual scoring a “4” has a risk estimate of between 3 percent and 91 percent. These two confidence intervals are nearly identical, making it unclear whether a given individual scoring a “5” presents more or less risk than an individual scoring a “4.”

RISK ESTIMATES PERIODICALLY CHANGE AS ACTUARIAL SCIENCE EVOLVES

The developers of the Static-99 have conducted additional research on the instrument since 2006. Their findings led to evolution in the items, scoring, and risk estimates for the Static-99. First, in 2008 the developers released updated absolute risk estimates for the Static-99 based on additional findings regarding the instrument. In addition, relative risk estimates were published for the first time during this update.

In 2009, the Static-99 further progressed with the development of the Static-99R. The Static-99R is based on larger and more representative samples. Dr. Karl Hanson, one of the developers of the Static-99, informed JLARC that the new instrument

- includes further research in which items are better related to predicting offense;
- improved the definitions of each item used;
- created sub-scales to score different types of offenders; and
- developed a more sophisticated approach to incorporating age, especially for offenders over 60.

Like the 2008 updates to the Static-99, the Static-99R also had new absolute and relative risk estimates associated with each score.

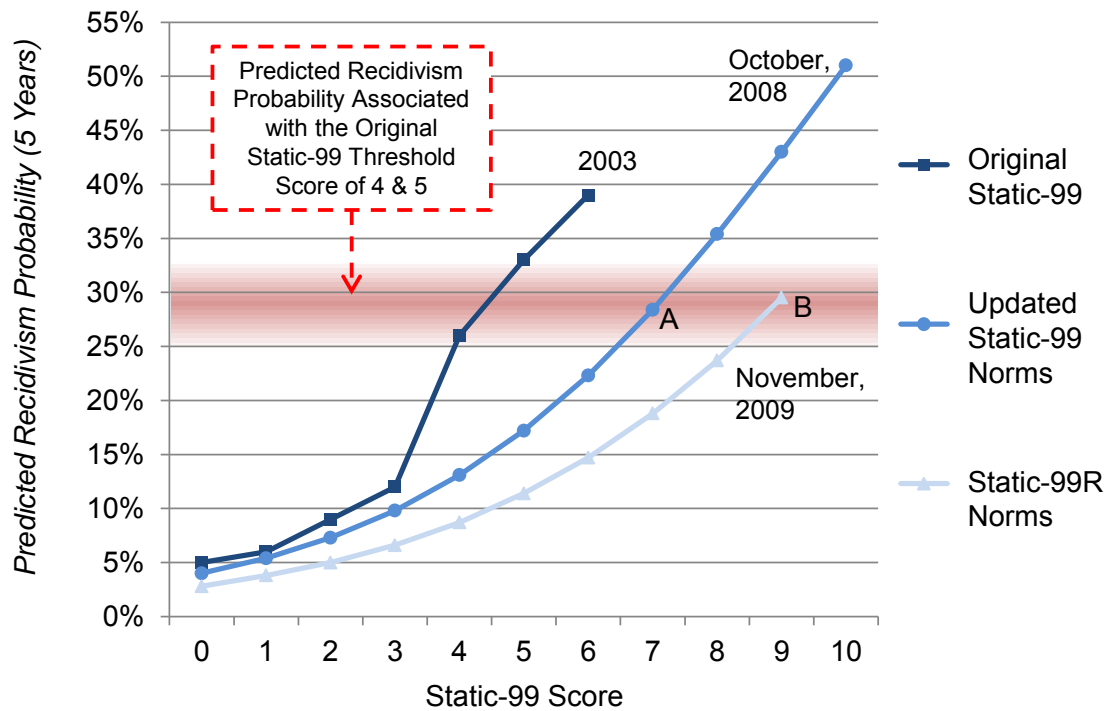
Absolute Risk Estimates Associated With Each Score Have Decreased As More Research Has Been Conducted

Figure E-2 shows how the STATIC-99 absolute risk estimates have changed since the STATIC-99 and its scores were originally developed. Each change has resulted in substantive adjustments to the absolute risk estimate associated with each score. The shaded area in Figure 14 ranging from 26 percent to 32 percent depicts the absolute risk estimates captured by the threshold score of “4” and “5”

Absolute and Relative Risk

The absolute risk estimate is an estimate of how likely an offender scoring a particular score on the Static-99 is to reoffend in a specified follow up period. A relative risk ratio is the amount of reoffense risk offenders with a particular score present when compared to a group of offenders with another score. Using an absolute recidivism estimate, one can state that an offender scoring a “5” on the Static-99R has an 11.4 percent chance of recidivating in the next five years, while using the relative risk ratio one can say that offenders scoring a “5” are more than two times as likely to reoffend as offenders scoring a “2.”

Figure E-2: Risk Scores Change as Actuarial Risk Assessment Instruments Evolve



Note: Risk estimates for the updated Static-99 are for the complete sample and risk estimates for the Static-99R are for the routine sample.

Source: "Static-99 Coding Rules," "Reporting Static-99 in Light of New Research on Recidivism Norms," and "Static-99R Evaluators' Workbook." R. Karl Hanson, Leslie Helmus, Amy Phenix, and David Thornton.

according to original Static-99 risk estimates (represented by the dark line). As shown at point “A”, using new estimates for the Static-99 published in 2008, a score of “7” would have the level of risk comparable to the estimates that guided Virginia’s current statutory threshold.

As with the new norms for the Static-99, the Static-99R includes absolute risk estimates that are lower than the original Static-99 norms, especially for offenders scoring “4” or over. As shown by point “B” in Figure 14, the level of risk captured by the 2006 threshold score of 4/5 would require an offender to now score approximately a “9” on the Static-99R; a score that few offenders achieve.

Developers of the Static-99 Now Emphasize Relative Risk Estimates, Which Also Fluctuate as the Instrument Evolves

The creators of Static-99 now place emphasis on relative risk ratios in addition to the absolute risk estimates. Creators of the Static-99 include relative risk ratios because they are more stable across samples than the absolute recidivism rates. This stability is seen across differing follow-up periods and different samples. Therefore,

while groups of offenders scoring a “5” may have different absolute recidivism estimates *between* different samples, the offenders scoring a five will most likely be close to twice as likely to reoffend as offenders scoring a “2” across all samples.

Table E-1 below shows the relative risk ratios for the version of the Static-99 that was available when the instrument was cited in the *Code of Virginia*, the updated risk estimates for the Static-99, and the Static-99R risk estimates. Relative risk ratios use the score of “2” to represent the “typical” sex offender, and weighs risk of other scores compared to those scoring a “2.” The dramatic rise in the relative risk for the scores of “4” and “5” seen in the original Static-99 has not been replicated in further research. The current Virginia threshold of “5” captures offenders that, at the time the law was enacted, were shown to be 3.67 times as likely as a typical offender to recidivate in the next five years. A similar relative risk ratio would not be achieved until a score of approximately “7” on newer versions of the instrument (Table E-1).

Table E-1: 5-Year Relative Risk Ratios for Newer Versions of the Static-99 Differ from the Version Currently Used in Virginia

Score	Original Static-99	Updated Static-99	Static-99R
0	.56	0.44	0.59
1	.67	0.68	0.77
2	1.00	1.00	1.00
3	1.33	1.41	1.31
4	2.89	1.89	1.71
5	3.67	2.42	2.23
6	4.33	2.96	2.91
7		3.44	3.80
8		3.81	4.96
9		4.04	6.48
10			8.47

Note: The original Static-99 with old norms did not include relative risk ratios. These ratios were calculated by JLARC using absolute recidivism estimates and input from Dr. Karl Hanson.

Source: Static-99 R Evaluators Workbook.

"Reporting Static-99 in Light of New Research on Recidivism Norms." By Hanson, Helmus and Thornton.

Developers Introduced Base Rates With the Static-99R to Differentiate Risk Estimates Among Various Subsets of Sex Offenders

Developers of the Static-99 have attempted to improve Static-99R absolute risk estimates by using base rates. Base rates are multiple lists of risk estimates that are derived from subsets of the instrument’s overall sample. The subset samples are groups of offenders with similar characteristics, such as offenders that received treatment while incarcerated or offenders with mental

disorders. These subsets include a routine sample, the preselected for treatment sample, the high risk/need sample, and a non-routine sample.

The Static-99R instructs practitioners to assign an offender to the base rate group that the offender most closely resembles to obtain the absolute risk estimate that best describes the offender. Absolute risk estimates are provided for each base rate group in Table E-2. The developers of the Static-99R acknowledge that assigning an offender to a base rate group has proved challenging for practitioners, and they have yet to complete the scientific paper further explaining this classification.

Table E-2: Static-99R Provides Separate Absolute Risk Estimates for Different Samples of Offenders

Score	Routine Sample	Preselected for Treatment Sample	High Risk/Need Sample	Non- Routine Sample
-3	1%	2%	-	2%
-2	2	2	-	3
-1	2	3	5%	4
0	3	4	7	5
1	4	6	9	7
2	5	7	12	9
3	7	10	16	12
4	9	12	20	15
5	11	16	25	20
6	15	20	31	25
7	19	25	38	31
8	24	31	45	37
9	30	38	52	44
10	-	-	60	52

Note: Absolute risk estimates are five-year sexual recidivism rates.

Source: Static-99R Evaluators Workbook.

Individuals Assessed Since Updates to the Static-99

A score of “5” on the Static-99 risk assessment instrument is used as a threshold in Virginia’s risk assessment process. Offenders scoring “5” or above (4 for certain crimes) are eligible for further review by an SVP evaluator and the Commitment Review Committee. Individuals that score below this threshold are released from DOC at the end of their prison sentence.

Appendix F details the calculations used for the assumptions presented on page 38 in Chapter 3. JLARC is not recommending a particular actuarial risk assessment or score to be used as a threshold in the SVP screening process. Rather, the calculations in Chapter 3 and Appendix F are meant to illustrate the impact that evolving actuarial science could potentially have on the number of offenders being forwarded for further and the risk level associated with those offenders. Furthermore, Virginia’s inclusion of a particular instrument and score in code means that Virginia will most likely be using an out-of-date instrument and threshold score because further research continues to be published and reviewed.

THE STATIC-99 INSTRUMENT AND ITS RISK ESTIMATES HAVE EVOLVED SINCE VIRGINIA BEGAN USING THE STATIC-99 AND THRESHOLD SCORE OF “5” IN THE SCREENING PROCESS

When Virginia adopted the Static-99 and threshold score of “5” in 2006, the Static-99 instrument and the original risk estimates for each score represented the most current research in sex offender risk assessment. However, since 2006 developers of the Static-99 have conducted further research and have published newer versions of the Static-99 instrument and risk estimates. Progress included updates to the risk estimates for the original Static-99 in October 2008 and the re-issuing of the instrument as the Static-99R after modifications in November 2009. (See Chapter 3, Appendix D, and Appendix E for further information about the Static-99 and Static-99R.)

Despite evolution of the Static-99 instrument and risk estimates, Virginia continues to use the original Static-99 instrument and the score of “5”, influenced by the original risk estimates, as a threshold in the risk assessment process. State agencies cite limited validation and peer review studies and the specific mention of the Static-99 and score of “5” in *Code* for the lack of a transition to a new instrument and/or score.

Research Since 2006 Suggests Offenders Meeting Virginia's Threshold Score of "5" May Present a Lower Risk Than Originally Believed

In 2006, the most recent research for the Static-99 indicated that the threshold score of "5" was associated with a 32 percent absolute risk estimate and had a relative risk ratio of 3.67 (see Appendix E for an explanation of absolute and relative risk estimates). In other words, an offender scoring a "5" had a 32 percent chance of recidivism in the next five years and this individual was 3.67 times more likely to reoffend than the typical sex offender (a typical sex offender is one scoring a "2"). Table F-1 shows a comparison of the absolute and relative risk estimates associated with scores for the original Static-99, the updated Static-99, and the Static-99R. Newer versions of the instrument show that a score of "5" is associated with a lower absolute and relative risk. Consequently, to achieve a similar risk level to the score of "5" on the original Static-99, offenders would have to score approximately a "7" or "8" on the Static-99 using updated risk estimates; and approximately a "7", "8", or "9" using the Static-99R. These scores of "7", "8", and "9" are met by far fewer offenders than the current threshold score of "5".

Table F-1: Risk Estimates for Newer Versions of the Static-99 Differ From Those Available at the Time that the Current Instrument and Threshold Were Placed in Code

Score	Original Static-99 Risk Estimates (2006)		Updated Static-99 Risk Estimates (October, 2008)		Static-99R Risk Estimates (November, 2009)	
	Absolute	Relative	Absolute	Relative	Absolute	Relative
0	5%	.56	4%	0.44	3	0.59
1	6	.67	5	0.68	4	0.77
2	9	1.00	7	1.00	5	1.00
3	12	1.33	10	1.41	7	1.31
4	26	2.89	13	1.89	9	1.71
5	<u>32</u>	<u>3.67</u>	17	2.42	11	2.23
6	39	4.33	22	2.96	15	2.91
7			<u>28</u>	<u>3.44</u>	19	<u>3.80</u>
8			35	3.81	24	4.96
9			43	4.04	<u>30</u>	6.48
10			51			8.47

Note: The original Static-99 with old norms did not include relative risk ratios. These ratios were calculated by JLARC staff using absolute recidivism estimates and input from Dr. Karl Hanson. Risk estimates for the updated Static-99 are for the complete sample and risk estimates for the Static-99R are for the routine sample. All data in the table refers to five year risk estimates.

Source: Static-99 Coding Rules," "Static-99R Evaluators Workbook," and "Reporting Static-99 in Light of New Research on Recidivism Norms" by Hanson, Helmus, and Thornton.

Many Offenders Have Been Assessed With the Static-99 and the Threshold Score Influenced by Its Original Risk Estimates After Newer Versions of the Instrument Were Published

Nearly half of assessments with the Static-99 and threshold score of “5” were conducted when the original Static-99 instrument and risk estimates represented the most current research from the Static-99 developers. Table F-2 shows the distribution of Static-99 scores for the 310 offenders screened with the Static-99 between April 2006 and September 2008. The Static-99 and the original risk estimates were supported by the most current research during this time period.

Table F-2: Offenders Screened With the Original Static-99 Before Risk Estimates Associated With Each Score Were Updated

Time Period	Static-99 Score						Total
	4	5	6	7	8	9	
April 2006-September 2008	38	117	82	51	17	5	310

Note: Monthly grouping of offenders is based on the date that SOSA assessed that offender. The time period begins in April 2006 because SOSA began assessing offenders being released after July 1, 2006, at this time.

Source: JLARC staff analysis of SVP Tracker and SOSA Database.

Developers of the Static-99 released updated risk estimates for the scores on the original Static-99 in October, 2008. The updated risk estimates indicated that offenders scoring a “7” on the Static-99 present approximately the same absolute and relative risk as a score of “5” was believed to present in 2006 (Table F-1). Had Virginia’s threshold score been changed to “7” to reflect the updated risk estimates, offenders that scored a “4”, “5”, or “6” would not have received further review for civil commitment.

Table F-3 shows the distribution of Static-99 scores for offenders that were assessed with the Static-99 and the threshold score based on original risk estimates *after* updated risk estimates had been released in October, 2008. While it is not be realistic to expect a change to a new threshold score immediately once updates were published, Virginia continues to use the Static-99 and the threshold score based on original risk estimates three years after these updates. Since no adjustment has been made to Virginia’s threshold score, all offenders included in Table F-3 were forwarded for further review based on the threshold score of “5”. Offenders scoring a “4”, “5”, or “6” (the total of those left of the dashed line in Table F-3) would not have been forwarded for further review had Virginia adopted a threshold score of “7.”

Table F-4 shows the outcomes at each stage in the commitment review process for the offenders scoring above and below the hypothetical threshold score of “7” on the Static-99.

Table F-3: Approximately Three-Quarters of Offenders Meeting the Static-99 Threshold Score Would Not Have Received Further Review Had Virginia Updated the Threshold Score to Reflect Updated Static-99 Risk Estimates

Month	Static-99 Score						Total
	4	5	6	7	8	9	
October 2008	1	10		4			15
November 2008	1	3	5	1	2		12
December 2008	2	3	4	3	1		13
January 2009	2	3	3	2		1	11
February 2009			3	2			5
March 2009	3	6	1	5	1		16
April 2009	1	1	5		1		8
May 2009	1	9	5	3	1		19
June 2009	1	5	3	3			12
July 2009		7	6	3			16
August 2009	1	6	5		1		13
September 2009		6	3	2			11
October 2009	1	8	5	4			18
Total	14	67	48	32	7	1	169

Note: Monthly grouping of offenders is based on the date that SOSA assessed that offender. It may not be realistic to expect immediate changes to assessment practices after new research is published. The scoring distribution for each month is provided to show how the number of offenders meeting the screening threshold would have changed depending on when changes to the threshold score may have been made.

Source: JLARC staff analysis of SVPTTracker and SOSA database.

Table F-4: Process Outcomes for Offenders That Would Not Have Met an Updated Static-99 Threshold Score of “7”

Process Step	Offenders Scoring Below “7” on the Static-99 (129)	Offenders Scoring “7” or Higher on the Static-99 (40)
SVP Evaluator Finding		
Yes SVP	77 (60%)	28 (70%)
No SVP	52 (40%)	12 (30%)
CRC Finding		
Civil Commitment	67 (52%)	26 (65%)
Conditional Release	6 (5%)	0 (0%)
Full Release	56 (43%)	14 (35%)
OAG Petition Decision		
Yes Petition	66 (54%)	26 (65%)
No Petition	57 (36%)	14 (35%)
Decision Not Yet Made	6	0
Final Trial Disposition		
Civil Commitment	43 (74%)	19 (86%)
Conditional Release	9 (16%)	3 (14%)
Full Release	6 (10%)	0 (0%)
OAG Did Not Petition	57	14
Awaiting Trial Disposition	8	4
Awaiting OAG Petition Decision	6	0

Note: Percentages are calculated from cases where the outcome of that process step is known. The table summarizes the offenders assessed from October 2008 to October 2009 as detailed in Table F-3.

Source: JLARC staff analysis of SVPTTracker and SOSA database.

Developers of the Static-99 re-issued the instrument as the Static-99R with new risk estimates for each score in November 2009. The Static-99R indicates that offenders scoring a “7”, “8”, or “9” present approximately the same absolute and relative risk as a score of “5” was believed to present in 2006 (Table F-1). Had Virginia begun using the Static-99R and a threshold score of “7” to reflect further research, all offenders that scored below a “7” on the Static-99R would not have received further review for civil commitment.

Table F-5 shows the distribution of Static-99 scores for offenders that were assessed with the Static-99 and the threshold score based on original risk estimates *after* the Static-99R had been released in November 2009. The table also shows adjusted Static-99R score for these offenders. While it is not be realistic to expect a change to the new instrument and threshold score immediately once updates were published, Virginia continues to use the Static-99 and the threshold score based on original risk estimates two years later after these updates. Since no changes have been made to the risk assessment instrument or threshold score used in Virginia, all offenders included in Table F-3 were advanced based on the threshold score of “5”. Offenders scoring below a “7” on the Static-99R (the total of those left of the dashed line in Table F-5) would not have been forwarded for further review had Virginia began using the Static-99R with a threshold score of “7.”

Table F-6 shows the outcomes at each stage in the commitment review process for the offenders scoring above and below the hypothetical threshold score of “7” on the Static-99R.

Table F-5: Over 80 Percent of Offenders Meeting the Static-99 Threshold Score Would Not Have Received Further Review Had Virginia Begun Using the Static-99R and a New Threshold Score

Month/Year	Instrument	Static-99 / Static-99R Score										Total
		1	2	3	4	5	6	7	8	9	10	
November 2009	Static-99					3	6	3		1		13
	Static-99R				3	5	3	2				13
December 2009	Static-99				2	4	2			1		9
	Static-99R				2	3	2	1				8
January 2010	Static-99					1	3	1				5
	Static-99R				1	3	1					5
February 2010	Static-99				1	8	3	2	1			15
	Static-99R	1	1		4	3	4	2				15
March 2010	Static-99					5	3		1			9
	Static-99R	1			3	4		1				9
April 2010	Static-99					3	1	3				7
	Static-99R				3		2	2				7
May 2010	Static-99				1	7	5	2	3	1		19
	Static-99R			3	6	3	1	2	2	1		18
June 2010	Static-99				1	4	4					9
	Static-99R				4	3	1	1				9
July 2010	Static-99				1	7	3					11
	Static-99R				3	6	1	1				11
August 2010	Static-99				3	3		2		1		9
	Static-99R	1		1	3	1	2			1		9
September 2010	Static-99				4	2	1	1			1	9
	Static-99R			1	3	1	2	1	1			9
October 2010	Static-99				3	7	5	4		1		20
	Static-99R				6	6	4	1	2			19
November 2010	Static-99				1	8	5	4				18
	Static-99R	1	2	1	4	6	3	1				18
December 2010	Static-99					4	3	4				11
	Static-99R				2	1	6		1			10
January 2011	Static-99				3	5	5	2	2	1		18
	Static-99R	1		1	2	6	3	4		1		18
February 2011	Static-99				2	2	5		2			11
	Static-99R				2	4	2	1	1			10
March 2011	Static-99				2	2	3		1	2		10
	Static-99R			1	1	1	3	2	2			10
April 2011	Static-99				1	4	3	2				10
	Static-99R				2	3	3	2				10
May 2011	Static-99					4	3					7
	Static-99R				3	1	3					7
Total	Static-99				25	83	63	30	10	8	1	220
	Static-99R	3	4	9	57	60	46	24	9	3		215

Note: Monthly grouping of offenders is based on the date that SOSA assessed that offender. It may not be realistic to expect immediate changes to assessment practices after new research is published. The scoring distribution for each month is meant to show how the number of offenders meeting the screening threshold would have changed depending on when changes to the threshold score may have been made. Static-99R scores were found using the age of each offender on the date of their release from prison to adjust the scoring of the age "item" from the Static-99 to the Static-99R. The total number of Static-99 scores does not match the total of Static-99R scores because the birthdate of some offenders was unknown, thus making a score adjustment based on age at release impossible.

Source: JLARC staff analysis of SVPTTracker and SOSA database. "Static-99 Coding Rules" and the "Static-99R Evaluators Workbook"

Table F-6: Process Outcomes for Offenders That Would Not Have Met a Static-99R Threshold Score of “7”

Process Step	Offenders Scoring Below “7” on the Static-99R (179)	Offenders Scoring “7” or Higher on the Static-99R (36)
SVP Evaluator Finding		
Yes SVP	83 (46%)	25 (69%)
No SVP	96 (54%)	11 (31%)
CRC Finding		
Civil Commitment	67 (38%)	21 (58%)
Conditional Release	3 (2%)	1 (3%)
Full Release	108 (61%)	14 (39%)
OAG Petition Decision		
Yes Petition	26 (25%)	6 (40%)
No Petition	79 (75%)	9 (60%)
Decision Not Yet Made	74	21
Final Trial Disposition		
Civil Commitment	20 (80%)	6 (100%)
Conditional Release	4 (16%)	0 (0%)
Full Release	1 (4%)	0 (0%)
OAG Did Not Petition	79	9
Awaiting Trial Disposition	1	0
Awaiting OAG Petition Decision	74	21

Note: Percentages are calculated from cases where the outcome of the process step is known. Percentages may not equal 100 due to rounding. One offender scoring below a 7 on the Static-99R has an unknown CRC finding. The table summarizes the offenders assessed from November 2009 to present as detailed in Table F-5.

Source: JLARC staff analysis of SVPTTracker and SOSA database.

G

Agency Responses

As part of an extensive validation process, State agencies and other entities involved in a JLARC assessment are given the opportunity to comment on an exposure draft of the report. JLARC staff provided an exposure draft of this report to the Secretary of Health and Human Resources, the Department of Behavioral Health and Developmental Services, the Department of Corrections, and the Office of the Attorney General. Appropriate technical corrections resulting from their comments have been made in this version of the report. This appendix includes their written response letters.



COMMONWEALTH of VIRGINIA

Office of the Governor

William A. Hazel, Jr., MD
Secretary of Health and Human Resources

November 8, 2011

Mr. Glen S. Tittermary, Director
Joint Legislative Audit and Review Commission
Suite 1100, General Assembly Building, Capitol Square
Richmond, Virginia 23219

Dear Mr. Tittermary:

Thank you for allowing me to review and provide follow-up to the Joint Legislative Audit and Review Commission's exposure draft report, *Review of the Civil Commitment of Sexually Violent Predators*. I, along with the Department of Behavioral Health and Developmental Services staff, have reviewed the draft document and provided comment as requested. We are grateful to you and your team for a thorough and very useful report.

As Secretary, I have spent time attempting to understand the roles of predicate crimes, assessment processes, treatment efficacy and program expenses. We have awaited the outcome of this report in order to identify how best to move forward in preparing to address the growing census at the Virginia Center for Behavioral Rehabilitation (VCBR). As we move forward, there are several points that require emphasis.

We believe that the array of qualifying predicate crimes contributes to the growing population of our VCBR census. Even though this is a relatively small group, this list should be reexamined to ensure that it is current and referrals to the VCBR are appropriate.

The assessment process must be thoroughly reevaluated. There should be enough flexibility in the code to ensure that the procedures and evaluation techniques can be updated consistent with best practices. It is appropriate to delete references to the STATIC 99 and specific scoring and permit assessors to utilize evidence based procedures and testing to determine appropriate referral to the VCBR. In addition, Virginia can benefit from the experiences in other states to identify programs that reduce the intra-observer variability amongst evaluators noted in your document. Such process improvement would require some additional resources.

The Commonwealth must consider that the current treatment process is not rehabilitative for those refusing treatment in the program. Our current structure yields a process that is not only expensive but is also disruptive to the individuals who are making the effort to benefit from the therapy.

*Glen S. Tittermary
November 8, 2011
Page 2*

Finally, we must take into consideration how our current facility design contributes to the cost of our program. Having visited another states facility, it was obvious to me that our higher staffing levels are in part a direct result of the current structure of the physical space at VCBR. As we compare costs with other facilities, this must be recognized. The SVP Program and the VCBR provide a unique set of challenges to the Commonwealth. The findings of this report will be helpful in adding value to our programs as we go forward.

Sincerely,

A handwritten signature in black ink, appearing to read "William A. Hazel Jr.", with a stylized flourish at the end.

William A. Hazel Jr., M.D.

WAH:es



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JAMES W. STEWART, III
COMMISSIONER

November 7, 2011

Mr. Glen S. Tittermary, Director
Joint Legislative Audit and Review Commission
Suite 1100, General Assembly Building, Capitol Square
Richmond, Virginia 23219

Dear Mr. Tittermary:

Thank you for the opportunity to review and provide input on JLARC's exposure draft report, *Review of the Civil Commitment of Sexually Violent Predators*. Your staff is to be commended for their attention to detail and professionalism. The department has reviewed the document, discussed it with your staff and provided formal comments in response.

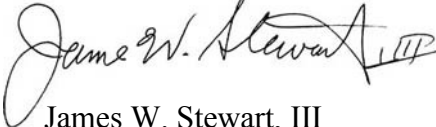
The review of the Virginia's Sexually Violent Predator (SVP) system is most timely. Eventually, in spite of current efforts to house more individuals at the Virginia Center for Behavioral Rehabilitation (VCBR), capacity will still be reached and at some point, additional facility capacity will be needed.

The department was pleased to see that overall, the SVP program compares favorably to other states with similar programs – in cost, staffing, census, day to day management, and program design. DBHDS also was pleased with the recommendation that the STATIC 99 not be the sole source for determining who should be referred to the program. A tool in and of itself cannot make a final determination of risk. It can be used as an initial guide, but it requires professional expertise with clinical judgment based on extensive professional training.

Clearly, it is a complex subject and this report will help inform the Governor and the legislature on planning for the future. Should you have questions in the interim regarding the progress of this project and/or the estimated timeline, please feel free to contact me at (804) 786-3921.

Again, thank you for the opportunity to review the report in advance.

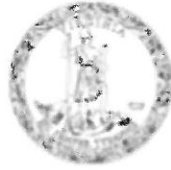
Sincerely,



James W. Stewart, III

Enclosure

C: The Honorable William A. Hazel Jr., MD
Olivia Garland, Ph.D.
Steven Wolf, Ph.D.



COMMONWEALTH of VIRGINIA

HAROLD W. CLARKE
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Department of Corrections

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November 4, 2011

Glen S. Tittermary
Director
Joint Legislative Audit and Review Commission
General Assembly Building, Suite 1100
Capitol Square
Richmond, Virginia 23219

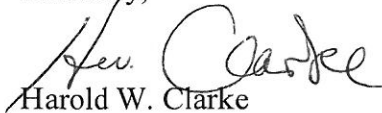
Re: Review of the Civil Commitment of Sexually Violent Predators

Dear Director Tittermary:

We have received and reviewed your exposure draft report titled *Review of the Civil Commitment of Sexually Violent Predators*. We appreciated the opportunity to provide feedback and meet with your staff on October 27, 2011. It is our understanding that the few concerns we addressed will be considered in revising the final edition of the report. We are pleased and in agreement with the main premise and recommendations provided in the report. We do appreciate the time and consideration you invested in this important project.

Your staff was a pleasure to work with on this review and we are enthusiastic about working with you during this session of the General Assembly. If we can provide additional assistance to you in regards to this review, please do not hesitate to contact us.

Sincerely,


Harold W. Clarke

Director
Virginia Department of Corrections



COMMONWEALTH of VIRGINIA

Office of the Attorney General

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November 7, 2011

Mr. Glen S. Tittermary
Director
Joint Legislative Audit and Review Commission
Suite 1100, Capitol Square
General Assembly Building
Richmond, Virginia 23219

RE: JLARC Review of the Civil Commitment of Sexually Violent Predators

Dear Mr. Tittermary:

On behalf of the Office of the Attorney General ("OAG"), thank you for taking the time to meet with OAG regarding our concerns with the exposure draft of the report submitted for our review on October 20, 2001. In addition, we appreciate the follow up electronic mail message from Division Chief Justin Brown, providing an outline of the key changes anticipated in the final report. This letter is written in light of the exposure draft and the conceptual changes outlined by Mr. Brown and covers only the main concerns discussed in the review process.

Regarding the screening process in the Sexually Violent Predators Civil Commitment Act, Virginia Code § 37.2-900 et seq. (the "SVP Act"), OAG agrees with the report's recommendations to amend the screening process to no longer rely solely on a threshold score on a particular actuarial risk assessment instrument in order for an offender to be referred to the Commitment Review Committee ("CRC") for a more extensive psychosexual evaluation. The OAG supports this recommendation because, as discussed, actuarial risk assessment measures are both under- and over-inclusive in identifying those with the requisite risk level to be considered a sexually violent predator. Furthermore, an actuarial risk assessment instrument is named in the SVP Act solely for the purposes of screening, is not codified as part of the definition of a sexually violent predator, and is but one area considered by mental health evaluators and courts in determining whether an offender meets the sexually violent predator criteria. However, the inclusion of a defined threshold score may lead to overemphasis of that actuarial instrument in litigation and imply that a threshold score is required to meet the statutory definition of sexually violent predator found in Virginia Code § 37.2-900.

Instead, OAG supports the report's recommendation to amend the screening processes currently found in Virginia Code §§ 37.2-903 and 37.2-904 and formulate a multidisciplinary team approach to reviewing the cases prior to deciding whether an offender should have the

Mr. Glen S. Tittermary

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November 7, 2011

more extensive psychosexual evaluation resulting in referral to the OAG. This in-depth review would ameliorate the under- and over-inclusive nature of adhering to a strict, numerical threshold on an actuarial risk assessment instrument. A multidisciplinary team approach would bring together professionals with different expertise for a more thorough screening of cases. The exact implementation of the process is beyond the scope of this response, although OAG has identified concerns with the revised process proposed in the exposure draft of the report.

Any revised process should include, consistent with the current state of forensic examination and psychological risk assessment, consideration of actuarial risk assessment. However, OAG notes that defining and identifying current, scientifically validated actuarial risk assessment instruments remains problematic due to lack of consensus in the psychological community and the length of time required for independent cross-validation of updated research. Also, while recidivism estimates have declined, the rationale for the reduction is unclear and it remains possible that the reduction is due to better detection, supervision and treatment methods as opposed to flawed research of older actuarial instruments or factors that are inherent to offenders themselves. Thus, generalizations about the state of actuarial research should be avoided.

Any revised process for referral of cases to OAG must also retain consideration of an evaluation by a mental health expert. Two of the three components of the statutory sexually violent predator definition center on an offender's diagnosis and level of risk, and thus are necessarily grounded in clinical observation and evaluation. The psychosexual evaluation of the offender provides the necessary information for a fully informed recommendation to OAG.

Finally, the OAG supports consolidating the annual reviews of civilly committed sexually violent predators in the Nottoway Circuit Court or at the Virginia Center for Behavioral Rehabilitation ("VCBR") with a designated judge or judges sitting there. Such a change would save the Commonwealth time, money and effort, while addressing some of the issues of the variability of results raised by the report.

Thank you for your attention to this matter and for the opportunity to contribute to this review process.

Sincerely,

A handwritten signature in black ink, appearing to read "Jill M. Ryan", with a long, sweeping horizontal line extending to the right.

Jill M. Ryan

Senior Assistant Attorney General and Chief

Sexually Violent Predators Civil Commitment Section

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