Patrick Henry Building • 1111 East Broad Street, Suite B036 • Richmond, Virginia 23219
804-225-4534 • Fax: 804-786-7872 • http://vscc.virginia.gov

June 26, 2013

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

Pursuant to the provisions of the Code of Virginia §§ 30-156 through 30-164 establishing the Virginia State Crime Commission and setting forth its purpose, please find attached herewith the Commission's 2012 Annual Report.

Very truly yours,

Robert B. Bell, Chair

2012 ANNUAL REPORT

VIRGINIA STATE CRIME COMMISSION

Table of Contents

Authority of the Crime Commission

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

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

Members of the Crime Commission

HOUSE OF DELEGATE APPOINTMENTS

The Honorable Robert B. Bell, Chair
The Honorable C. Todd Gilbert
The Honorable Charniele L. Herring
The Honorable G. M. (Manoli) Loupassi
The Honorable Beverly J. Sherwood
The Honorable Onzlee Ware

SENATE APPOINTMENTS

The Honorable Janet D. Howell, Vice-Chair
The Honorable Thomas K. Norment, Jr.

ATTORNEY GENERAL

The Honorable Kenneth T. Cuccinelli, II*

GOVERNOR'S APPOINTMENTS

Robyn Diehl McDougle, Ph.D.
The Honorable Nancy G. Parr
The Honorable Jim Plowman

Crime Commission Staff

Kristen J. Howard, Executive Director
G. Stewart Petoe, Director of Legal Affairs
Christina Barnes Arrington, Ph.D., Senior Methodologist
Holly B. Boyle, Policy Analyst
Thomas E. Cleator, Senior Staff Attorney

VIRGINIA STATE CRIME COMMISSION
Patrick Henry Building
1111 East Broad Street, Suite B036
Richmond, Virginia 23219

http://vscc.virginia.gov

*Designee, Patricia L. West

2012 Interim Executive Summary of Activities

Throughout 2012, the Commission held four Commission meetings: September 5, October 2, November 13, and December 5. During the 2012 General Assembly Session, a total of one mandated study and two bill referrals were sent to the Commission and approved for review. The Commission also reviewed several other issues. The Department of Criminal Justice Services requested the Commission to determine if the current regional training academy model used to train law enforcement officers is the best model for Virginia. As part of this study, the issue of law enforcement officer decertification was also reviewed. During the study year, the Commission also decided to review the issues of financial crimes against incapacitated adults and texting while driving. Additionally, the Commission requested a report from the Department of Forensic Science concerning the growing problems surrounding synthetic marijuana and research chemicals. The Commission continues to be involved in the Forensic Science Board's DNA Notification Project.

The Commission was mandated by Senate Joint Resolution 21 to study the issue of illegal cigarette trafficking, specifically: why illegal cigarette trafficking occurs; methods and strategies used by smugglers; financial impacts on state and local governments, manufacturers, wholesalers and retailers; prevalence, availability, and methods used to counterfeit cigarettes and cigarette tax stamps; beneficiaries of cigarette trafficking; statutory options; uses of technology to prevent and assess costs and benefits; policy and legislative recommendations; and public health implications of illegal non-regulated cigarettes.

Throughout the year, staff reviewed two study issues as a result of bills being referred to the Commission during the 2012 Session of the General Assembly: Senate Bill 205, which dealt with the collection of forensic evidence in cases of suspected sexual assault where the alleged victim cannot give consent and House Bill 923, which proposed a reorganization of the concealed weapons statute without any substantive changes. Detailed study presentations can be found on the Commission's website at: http://vscc.virginia.gov.

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

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

Consent for Forensic Sexual Assault Exams

Executive Summary

Senate Bill 205 was introduced by Senator George Barker during the 2012 Regular Session of the Virginia General Assembly. This bill sought to address situations in which victims of sexual assault are unable to provide consent for a sexual assault examination due to unconsciousness, mental incapacity or being under the age of 18. The bill passed the Senate, but was referred to the Crime Commission for study by letter from the House Courts of Justice Committee.

The issue of consent to a forensic sexual assault exam has not been widely discussed in legal or public policy academic literature. In normal circumstances, medical personnel must obtain informed consent from a patient before providing medical care. In emergency situations, when consent cannot be obtained from the patient, medical personnel can use "implied consent," but generally only for care to prevent serious harm or death. Forensic sexual assault exams are not considered medical care, but rather evidence collection, which is why practitioners have differing opinions as to whether current consent procedures are sufficient or more precise legislative approval for the exam is required.

The primary exam for a sexual assault is the Physical Evidence Recovery Kit (PERK). The PERK exam collects and preserves the physical manifestations of the sexual assault. Most forensic sexual assault exams are performed by a Forensic Nurse Examiner (FNE), who has specialized training in evidence collection from injuries. Often, these FNEs also have a Sexual Assault Nurse Examiner (SANE) certification, which focuses on the collection and preservation of evidence from a sexual assault. FNEs often work a regular nursing job, but may work as a FNE outside of their normal nursing duties, and frequently testify in court.

In Virginia, informed consent applies to medical care, as does implied consent. There is no specific provision that allows medical personnel to perform a forensic sexual assault exam on a person who cannot consent. There are, however, provisions in the Code of Virginia that allow judges to approve medical care for persons who are incapacitated; provide care for persons under the custody of community service boards; and, for juveniles to be taken under custody either under a removal order or an emergency removal. All of these provisions could theoretically be used to authorize a forensic sexual assault exam for a person unable to consent. Of the other 49 states, only 11 states have statutes that address the issue of consent to a forensic sexual assault exam: ten of these states mandate consent for the exam, and Maine allows exams to be performed on unconscious victims in "exigent" circumstances. Six of these states allow a minor to consent to an exam.

As a result of the study effort, the Crime Commission endorsed the following legislative recommendations at its December 5, 2012, meeting:

Recommendation 1: Create a new section in the Virginia Code that would allow a forensic exam to be conducted on a victim unable to consent, but only if the procedure is approved by a second, independent medical professional in a manner similar to that of Va. Code § 54.1-2983.2, which describes the procedure by which an independent physician can authorize medical procedures when a patient is unable to give consent.

Recommendation 2: Create a new section in the Virginia Code to allow for photographs and x-rays to be taken of adults suspected of being abused, similar to Va. Code § 63.2-1520, which applies to children.

Background

Senate Bill 205 (SB 205) was introduced by Senator George Barker during the 2012 Regular Session of the General Assembly.[1] This bill sought to address situations in which victims of sexual assault are unable to provide consent for a sexual assault examination due to unconsciousness, mental incapacity or being under the age of 18. The bill passed the Senate of Virginia, but was referred to the Crime Commission for study by letter from the Virginia House Courts of Justice Committee. Specifically, SB 205 proposed the following modifications to the Code of Virginia:

- Modify Va. Code § 37.2-1104 to allow a judge to approve the collection of forensic evidence, when a sexual assault is suspected, from an adult unable to make an informed decision;
- Modify Va. Code § 54.1-2969 to permit a minor, 14 years or older, to consent to a forensic evidence exam for suspected sexual assault; and,
- Modify Va. Code § 63.2-1520 to allow for the collection of forensic evidence from a minor child without the consent of a parent or guardian.

The issue of conducting a forensic sexual assault exam when the alleged victim cannot provide consent to the exam has not been written about extensively, and there are very few articles concerning the subject. One article clearly identifies the problem: forensic sexual assault exams fall into a grey area between providing care and collecting evidence.[2] Under normal circumstances, when a patient enters a hospital or seeks medical care, medical care personnel must obtain informed consent from the patient before providing treatment.[3] Basically, informed consent provides "the patient with enough information to ensure the patient's ability to choose the procedure based on knowledge of the necessity of the procedure, alternate treatment options, risks, and likelihood of success or failure."[4] If a patient comes into the hospital, unable to consent, then the doctrine of "implied consent" permits medical personnel to provide emergent medical care, but generally only to prevent serious harm or death.[5] A sexual assault exam, however, is not part of routine or emergent care; it is primarily a method for collecting evidence.[6] The concern, since a sexual assault examination involves touching the person, including taking vaginal or anal swabs, is that by doing the exam without

consent, medical personnel could be open to a civil lawsuit, or face criminal charges.[7] The U.S. Department of Justice's National Protocol for Sexual Assault Medical Forensic Examinations suggests that state laws should be followed regarding consent and access to the exam when medical personnel are presented with a situation involving vulnerable adult patients or minors who have been sexually abused.[8] While there may be a valid concern for not doing an exam, if an exam is not completed within 72 hours of an assault, much of the biological evidence could be degraded and of little use in any subsequent criminal prosecution.[9] Accordingly, there is a split in the field as to whether current implied consent laws are sufficient to proceed with a forensic sexual assault exam, or whether a legislative solution is required.[10]

While most emergency doctors or nurses can perform a forensic sexual assault exam, this examination is typically carried out by a FNE. A FNE is a registered nurse who has specialized forensic training in treating crime victims and collecting evidence of a crime, to include sexual assault.[11] They are trained in injury recognition and legal matters associated with evidence collection, and FNE nurses often testify in subsequent criminal cases.[12] These nurses often perform the FNE function in addition to their regular nursing job.[13] In Virginia, FNEs can either conduct exams for a hospital, at the request of law enforcement or a Commonwealth's Attorney, or as part of a Sexual Assault Response Team (SART).[14] According to the Virginia Chapter of the International Association of Forensic Nurses, there are approximately 100 FNEs in Virginia. A FNE may also obtain a SANE certification, which involves 40 hours of classroom study, and a practical, clinical component.[15] A SANE certification tests the nurse's proficiency in obtaining medical forensic history, a detailed physical and emotional assessment, written and photographic documentation of injuries, collection and management of forensic samples, and providing emotional and social support and resources.[16]

The typical or frequent examination used for victims of alleged sexual assault is the PERK examination.[17] The PERK examination kit in Virginia is issued by the Department of Forensic Science (DFS) to hospitals, and then returned to DFS for analysis.[18] This examination focuses on collecting a detailed medical history of the alleged victim, collecting and preserving the physical evidence of an assault, such as victim's clothing, blood, dried secretions, tissue, semen or other bodily fluids, fingernail scrapings, vaginal or penile swabs, hair samples, and anal or perianal swabs.[19] According to DFS, they received a total of 2,832 PERK kits for analysis over the past five fiscal years (Fiscal Years 2008-2012), for an average of 566 kits received each year.

Legal Analysis

Virginia, like every other state, requires medical care personnel to obtain informed consent from patients before providing treatment. Basically, the patient must be warned of the dangers or negative consequences, and alternatives to the treatment or procedure.[20] Likewise, implied consent is also permitted in Virginia for emergency situations where the patient is unable to provide consent.[21] Furthermore, there is also statutory authority for a physician to proceed with medical care without express consent from the patient if there is concurrence from an independent capacity reviewer, or if the patient is "unconscious or experiencing a profound impairment of consciousness due to trauma, stroke, or other acute physiological condition."[22] The

Virginia Code does not address what constitutes informed consent; however, there is a statutory definition of capacity for informed consent that is applicable to advanced medical directives:

> "Incapable of making an informed decision" means the inability of an adult patient, because of mental illness, intellectual disability, or any other mental or physical disorder that precludes communication or impairs judgment, to make an informed decision about providing, continuing, withholding or withdrawing a specific health care treatment or course of treatment because he is unable to understand the nature, extent or probable consequences of the proposed health care decision, or to make a rational evaluation of the risks and benefits of alternatives to that decision. For purposes of this article, persons who are deaf, dysphasic or have other communication disorders, who are otherwise mentally competent and able to communicate by means other than speech, shall not be considered incapable of making an informed decision.[23]

Under Virginia law, there is currently no specific authorization for a forensic sexual assault examination or PERK exam to be performed on an alleged victim without express consent.

While no specific authorization exists for situations where a victim of sexual assault cannot consent to an examination, there are some Code sections that theoretically could be used to authorize a sexual assault examination without express consent. A judge may order the temporary provision of care with a showing of probable cause that an adult is unable to consent to treatment for a mental or physical disorder.[24] Similarly, a magistrate may authorize emergency custody of a person incapable of making an informed decision as a "result of a physical injury or illness and that the medical standard of care indicates that testing, observation, and treatment are necessary to prevent imminent and irreversible harm."[25] Additionally, medical personnel may provide medical care to patients under the care of the Department of Behavioral Health and Developmental Services or a community services board when the delay may "adversely affect recovery."[26] It is also possible to obtain a search warrant to authorize a forensic sexual assault exam on a victim that cannot consent because the statutory language for search warrants is broad enough to allow a search of any "object, thing, or person, including without limitation, documents, books, papers, records or body fluids, constituting evidence of the commission of crime."[27]

With regard to juvenile victims, especially when there is concern that the parent or guardian may be responsible for sexually assaulting the minor, there are a few provisions under the Virginia Code that could allow for a sexual assault exam without the consent of the parent or guardian. An emergency removal order under Va. Code § 16.1-251 can be used to extricate a child from abusive conditions and place him in temporary custody. A child may also be taken into custody by physicians, child protective workers, or law enforcement, without the consent of parents or guardians, where there is suspected abuse and if the "evidence of abuse is perishable or subject to deterioration before a hearing can be held."[28] And finally, minors 14 years or older may

make health care decisions for themselves, although statutorily limited to medical decisions regarding the treatment of infectious or venereal diseases, birth control or family planning, outpatient care for substance abuse, and outpatient care related to the treatment of mental illness or emotional disturbance.[29] Depending on the circumstances, a forensic examination might fit into one of these categories.

An additional concern with forensic sexual assault exams is compliance with the federal Violence Against Women Act (VAWA).[30] Specifically, VAWA requires that states offer medical forensic sexual assault exams at no cost to the victims, but also that victims are not required to participate in the criminal justice system.[31] Virginia law complies with this requirement of VAWA, as Va. Code § 19.2-165.1 states "all medical fees expended in the gathering of evidence through physical evidence recovery kit examinations…shall be paid by the Commonwealth" and victims are not "required to participate in the criminal justice system or cooperate with law-enforcement authorities in order to be provided with such forensic medical exams."[32]

Crime Commission staff examined what the other 49 states do in regard to consent for a forensic sexual assault exam. There are only 10 states that statutorily require consent from the victim before the exam can be performed: California, Connecticut, Illinois, Indiana, Kansas, Kentucky, Missouri, Nebraska, Ohio, and Wyoming.[33] Only Maine allows for the performance of a sexual assault exam on a victim, without consent, although in a very limited set of circumstances:

> If an alleged victim of gross sexual assault is **unconscious** and a reasonable person would conclude that exigent circumstances justify conducting a forensic examination, a licensed hospital or licensed health care practitioner may perform an examination in accordance with the provisions of this section. A forensic examination kit completed in accordance with this subsection must be treated in accordance with Title 25, section 3821 and must preserve the alleged victim's anonymity. In addition, the law enforcement agency shall immediately report to the district attorney for the district in which the hospital or health care practitioner is located that such a forensic examination has been performed and a forensic examination kit has been completed under this subsection.[34]

The Maine statute only allows an examination without consent if the victim is unconscious, and does not address any other situations where a victim might be unable to consent. With regard to child victims, there are six states that permit a minor to consent to a sexual assault exam.[35] In Kansas, Kentucky, and Ohio, the consent to the examination is not subject to "disaffirmance" by a parent or guardian.[36] And in California, in cases of "known or suspected" child abuse, consent is not required from the parents or guardians.[37]

Additional Issue

In the course of the study, staff held informal interviews with FNEs across Virginia. During these discussions it was pointed out that under current law, FNE's are permitted to take photographs and x-rays of child victims of suspected abuse, without consent of the parents or guardian, during a medical examination.[38] Additionally, these photographs and x-rays may be used in subsequent legal proceedings.[39] As the FNEs explained, there is no authorization under the Code that allows photographs and x-rays to be taken of adult victims, without consent, of suspected abuse. Often, FNEs will examine adults who suffer from Alzheimer's, dementia, or some medical condition that precludes the adult from consenting to medical treatment. Many of the FNEs indicated that a similar provision in the Code for adults would be very helpful in parallel situations where abuse is suspected with adult patients.

Conclusion and Recommendations

While there has been little attention paid to the issue of forensic sexual assault exams for victims who cannot consent, it does present a distinct problem for medical personnel. Normal procedures for obtaining consent cannot be used, but medical personnel may instead rely on implied consent. The difficulty with using implied consent is that a forensic sexual assault exam is primarily an evidence collection procedure and not one designated to provide medical treatment. Therefore an exam performed without permission could possibly expose medical personnel to both criminal and civil liability. However, if exams are not performed on a victim within a relatively short time period, the evidence, because of degradation, may not be useful in a prosecution.

Virginia does not have a specific statutory authorization for medical personnel to perform a forensic sexual assault exam on a victim who cannot consent to the exam. There are, however, a few statutory provisions that, at least in theory, could provide the basis to proceed with a forensic sexual assault exam for both adults and minors when express consent cannot be obtained. There are 10 states that require express consent from a victim before a forensic sexual assault exam may be performed, and only one state, Maine, that allows an exam on a person who is unconscious. In interviews with FNEs, an additional issue was identified that would allow FNEs to take photographs and x-rays of incapacitated adults without permission, just as photographs and x-rays are allowed to be taken of children during examinations without permission of parents or guardians under Va. Code § 63.2-1520.

As a result of the study effort, the Crime Commission endorsed the following recommendations at its December 5, 2012, meeting:

Recommendation 1: Create a new section to the Virginia Code that would allow a forensic exam to be conducted on a victim unable to consent, but only if the procedure is approved by a second, independent medical professional in a manner similar to that of Va. Code § 54.1-2983.2, which describes the procedure by which an independent physician can authorize medical procedures when a patient is unable to give consent.

Senator George Barker introduced Senate Bill 1006 and Delegate Charniele Herring introduced House Bill 2120 during the 2013 General Session of the Virginia General Assembly, based on the Crime Commission recommendation. These bills were passed by both the Virginia Senate and Virginia House of Delegates as amended, and signed by the Governor.[40]

Recommendation 2: Create a new section to the Virginia Code to allow for photographs and x-rays to be taken of adults suspected of being abused, similar to Va. Code § 63.2-1520, which applies to children.

Senator George Barker introduced Senate Bill 997 and Delegate Charniele Herring introduced House Bill 2122 during the 2013 General Session of the Virginia General Assembly, based on the Crime Commission recommendation. These bills were passed by both the Virginia Senate and Virginia House of Delegates as amended, and signed by the Governor.[41]

Acknowledgements

The Virginia State Crime Commission extends its appreciation to the following agencies and organizations for their assistance and cooperation on this study:

INOVA Forensic Assessment and Consultation Teams Department

Virginia Chapter of the International Association of Forensic Nurses

Virginia Department of Forensic Science

[1] S.B. 205, 2012 Gen. Assem., Reg. Sess. (Va. 2012).
[2] Pierce-Weeks, Jennifer, & Campbell, Polly, THE CHALLENGES FORENSIC NURSES FACE WHEN THEIR PATIENT IS COMATOSE: ADDRESSING THE NEEDS OF OUR MOST VULNERABLE PATIENT POPULATION, Journal of Forensic Nursing, 104-10 (2008).
[3] Id. at 107.
[4] Id.
[5] Id.
[6] Id.
[7] Id.
[8] U.S. DOJ, A National Protocol for Sexual Assault Forensic Medical Examinations; Adults and Children (2004).
[9] Va. DCJS, "SEXUAL ASSAULT RESPONSE TEAMS (SART): A MODEL PROTOCOL FOR VIRGINIA, p. 35 (2011).
[10] Carr, Mary E., Moettus, Alda L., DEVELOPING A POLICY FOR SEXUAL ASSAULT EXAMINATIONS ON INCAPACITATED PATIENTS AND PATIENTS UNABLE TO CONSENT, 38 J.L. Med. & Ethics 647 (2010).

[11] International Association of Forensic Nurses, What is a Forensic Nurse, http://iafn.org/displaycommon.cfm?an=1&subarticlenbr=137.
[12] Id.
[13] Id.
[14] Va. DCJS, *supra* at note 9, p. 35.
[15] International Association of Forensic Nurses, Sexual Assault Nurse Examiners, http://iafn.org/displaycommon.cfm?an=1&subarticlenbr=546.
[16] Id.
[17] Pierce-Weeks, *supra* at note 2, p.106.
[18] Va. DCJS, *supra* at note 9, p. 35.
[19] U.S. DOJ, *supra* at note 8, p. 65.
[20] Tashman v. Gibbs, 263 Va. 65, 73 (2002).
[21] Washburn v. Klara, 263 Va. 586, 590 (2002).
[22] VA. CODE ANN. § 54.1-2983.2(B) (West 2012).
[23] VA. CODE ANN. § 54.1-2982 (West 2012).
[24] VA. CODE ANN. § 37.2-1104 (West 2012).
[25] VA. CODE ANN. § 37.2-1103 (West 2012).
[26] VA. CODE ANN. § 54.1-2970 (West 2012).
[27] VA. CODE ANN. § 19.2-53(4) (West 2012).
[28] VA. CODE ANN. § 63.2-1517 (West 2012). However, a hearing under Va. Code § 16.1-251 is required within 72 hours. Id. Decisions for medical care under § 63.2-1517 are permitted by Va. Code § 54.1-2969(A)(2)(ii).
[29] VA. CODE ANN. § 54.1-2969(E) (West 2012).
[30] Lonsway, Kimberly A. & Archambault, Joanne, REPLY TO ARTICLE "RECEIVING A FORENSIC MEDICAL EXAM WITHOUT PARTICIPATING IN THE CRIMINAL JUSTICE PROCESS: WHAT WILL IT MEAN?," Journal of Forensic Nursing, 78-88 (2010).
[31] 42 U.S.C.A § 3796gg-4(d) (West 2012).
[32] VA. CODE ANN. § 19.2-165.1(B) (West 2012).
[33] CAL. PENAL CODE § 13823.11 (West 2012); CONN. GEN. STAT. ANN. § 19a-112a (West 2012); 410 ILL. COMP. STAT. ANN. 70/5 (West 2012); IND. CODE ANN. § 16-21-8-3 (West 2012); KAN. STAT. ANN. § 65-448 (West 2012); KY. REV. STAT. ANN. § 216B.400 (West 2012); MO. ANN. STAT. § 595.220 (West 2012); OHIO REV. CODE ANN. § 2907.29 (West 2012); and WYO. STAT. ANN. § 6-2-309 (West 2012).
[34] ME. REV. STAT. tit. 24, § 2986 (West 2012).
[35] 410 ILL. COMP. STAT. ANN. 70/5 (West 2012); KAN. STAT. ANN. § 65-448 (West 2012); KY. REV. STAT. ANN. § 216B.400 (West 2012); MO. ANN. STAT. § 595.220 (West 2012); OHIO REV. CODE ANN. § 2907.29 (West 2012); and WYO. STAT. ANN. § 6-2-309 (West 2012).
[36] KAN. STAT. ANN. § 65-448 (West 2012); KY. REV. STAT. ANN. § 216B.400 (West 2012).
[37] CAL. PENAL CODE § 13823.11 (West 2012).
[38] VA. CODE ANN. § 63.2-1520 (West 2012).
[39] Id.
[40] 2013 Va. Acts. ch. 532, 441.
[41] 2013 Va. Acts. ch. 464, 442.

Financial Exploitation of Incapacitated Adults

Executive Summary

During 2012, Delegate Robert Bell requested the Crime Commission to review the topic of financial exploitation of incapacitated adults. The scope of the study was limited to a review of the recent bills that had been introduced during the 2012 Regular Session of the Virginia General Assembly, the current common law larceny crimes that exist in Virginia, and a brief overview of other state statutes that specifically criminalize financial crimes against the elderly or incapacitated adults. In addition, victims' rights advocates, law enforcement, prosecutors, and relevant stakeholder groups were contacted for information on the problems of financial exploitation in Virginia.

Currently, 33 other states have enacted some form of specific statute criminalizing the financial exploitation of an elderly or incapacitated person; an additional 5 states have not created a new criminal offense in this area, but statutorily provide for greater penalties if the victim of a larceny, embezzlement or fraud is elderly or incapacitated.

In Virginia, as nationally, financial crimes against the elderly appear to be on the rise. Anecdotal information gathered from Virginia indicates that in many cases, where there is clear evidence of financial exploitation or a fraud being committed upon a mentally incapacitated adult, the defendant can be successfully prosecuted. Virginia's use of common law principles in defining the crimes of larceny, embezzlement, and fraud, assists prosecutors in these cases; the broad elements in the common law crimes makes them applicable to a wide variety of situations where a victim, with limited understanding or mental capacities, has been financially exploited. Instances where a defendant misuses a legal power of attorney for personal gain are particularly apt to result in a successful prosecution.

However, in cases where the victim is not clearly mentally incompetent, and no outright fraud has occurred, prosecution is difficult in Virginia. Many of these cases involve friends or relatives of the victim, who convince the victim to provide them with gifts or money. These situations are the most difficult; it can be unclear if any criminal laws have been broken, and prosecutors struggle to determine if a criminal prosecution is warranted.

The Crime Commission voted to endorse legislation that would create a new, statutory crime in Virginia to address these instances of financial exploitation. The new crime would be applicable to everyone, not just those who have a fiduciary duty of care to the victim. It would make use of existing terms that are currently used in Virginia criminal law, and not attempt to create any new definitions or introduce new legal terms. The concept of "mental incapacity," for purposes of this new crime, would parallel the concept as it is defined in Va. Code § 18.2-67.10(3), which applies to sexual assaults.

The victim must have a condition, existing at the time of the offense, which prevents them from understanding the nature or consequences of the financial transaction which is the basis of the prosecution, and the accused must have known, or should have known, about the victim's condition. As a safeguard, the new statute would not apply to anyone who acted for the benefit of the mentally incapacitated adult.

The Crime Commission's recommended legislation was introduced by Delegate Robert Bell during the Regular Session of the 2013 General Assembly, as House Bill 1682. The bill was passed by both the House of Delegates and the Senate, and was signed into law by the Governor.

Background

Several recent news reports and studies have indicated that the rates of financial crimes against the elderly (typically defined as 65 years and older) have increased in the past few years.[1] Data collected by the Criminal Justice Research Center of the Virginia Department of Criminal Justice Services, using the Incident-Based Reporting System Data provided by the Virginia State Police, showed that between 2001 and 2007, overall state financial crimes increased at a rate of 8.6%; however, for victims aged 65 or older, the rate increased by 18%.[2] The losses suffered by elderly victims of financial exploitation can be devastatingly large; a 2010 study that consisted of interviews with 54 elder adults (average age of 76 years) and their case workers in Virginia, and an in-depth review and analysis of the crimes and abuse they suffered, revealed that the average dollar amount the victims lost was $87,967.[3]

FINANCIAL EXPLOITATION BILLS INTRODUCED IN 2012

Corresponding with the apparent increase in these types of crimes, recent Sessions of the Virginia General Assembly have seen a number of bills introduced to criminalize the financial exploitation of the elderly or the mentally incapacitated. During the 2012 Regular Session of the Virginia General Assembly, there were four Senate bills and seven House Bills introduced that dealt in some manner with this topic.[4] These bills took a number of different approaches. House Bill 125 (HB 125), introduced by Delegate Terry Kilgore, reaffirmed the existing law that if someone with a power of attorney violates his duties and converts funds belonging to the principal, he is guilty of embezzlement. House Bill 700 (HB 700), introduced by Delegate Eileen Filler-Corn, House Bill 982 (HB 982), introduced by Delegate James Scott, and Senate Bill 285 (SB 285), introduced by Senator Mark Herring, all took existing statutory crimes and created a new, additional offense if the victim of the existing crime was an incapacitated or elder adult. The other bills—Senate Bill 222 (SB 222), introduced by Senator Mark Herring, Senate Bill 431 (SB 431), introduced by Senator Richard Stuart, Senate Bill 443 (SB 443), introduced by Senator Jill Vogel, House Bill 409 (HB 409), introduced by Delegate Vivian Watts, House Bill 690 (HB 690), introduced by Delegate Kenneth Plum, House Bill 882 (HB 882), introduced by Delegate Mark Sickles, and House Bill 987 (HB 987), introduced by Delegate Manoli Loupassi—all created a proposed new statutory crime of "financial exploitation," one of the elements of which would be using "undue influence,"

"coercion," and "manipulation" or "harassment," to obtain property from someone who was elderly or mentally incapacitated.[5]

All of the Senate bills were rolled into SB 431, which was passed by the Senate, modified in the House Courts of Justice Committee, and then left in the House Appropriations Committee. House Bill 125 was passed by the House Courts of Justice Committee, and then left in the House Appropriations Committee. All of the other House bills were rolled into HB 987, which was modified in the House Courts Committee, and then left in the House Appropriations Committee. In sum, no bills dealing with the issue of financial exploitation were passed by the Virginia General Assembly in 2012.

CURRENT COMMON LAW LARCENY CRIMES IN VIRGINIA AND THE REQUIREMENT OF CONSENT

Virginia currently recognizes the four main types of "theft" or larceny crimes that developed under the common law: larceny, embezzlement, larceny by trick, and false pretenses. Larceny is the "wrongful or fraudulent taking of personal goods of some intrinsic value, belonging to another, without his assent, and with the intention to deprive the owner thereof permanently."[6] Embezzlement occurs when a person "wrongfully and fraudulently uses, disposes of, conceals or embezzles…personal property…which he shall have received for another or for his employer…or by virtue of his office, trust, or employment, or which shall have been entrusted or delivered to him by another."[7] Under the common law, it is not a defense to embezzlement that the defendant misappropriated the property for the benefit of a third party.[8] Larceny by trick occurs when a larceny is accomplished by tricking or fooling the victim into voluntarily turning over possession of an item.[9] False pretense, or fraud, is similar to larceny by trick, in that the victim is tricked or fooled into voluntarily giving the defendant personal property; the difference is that in false pretenses, the defendant obtains title to the item, as well as physical possession.[10]

For the crimes of larceny and embezzlement, the lack of consent of the victim is an element of the crime that must be proven. For the crimes of larceny by trick and false pretenses, consent is usually not an issue, because consent has been obtained, though illegally. The common law recognized, for all manners of larceny, that consent could only be valid if it was a voluntary or knowing consent. Consent could not be obtained by reason of infancy, insanity or intoxication; or if obtained by force or threatened force (which would be the crime of robbery), or fraud.[11]

While there are no cases in Virginia that deal specifically with the issue of consent in the context of either larceny or embezzlement, some appellate courts in other states have held that consent cannot be obtained from a person who is mentally incapacitated. For example, the Alabama Court of Criminal Appeals has held that if a defendant is aware that a victim is not mentally competent, and takes advantage of this fact in order to gain unauthorized control of the victim's funds, by "convincing" the victim to transfer large amounts of money into a joint bank account, a conviction for theft of property can be sustained.[12] Similarly, the Supreme Court of Connecticut has held that a defendant can be convicted of larceny if they rely upon the victim's mental incapacity in order to facilitate transfers of property; "The witnesses' testimony as to the victim's mental

incapacity, coupled with evidence that the defendant was siphoning the victim's accounts, supports the trial court's conclusions that: (1) the victim lacked the capacity to understand the transfers or consent to them; and (2) the defendant had been unduly influencing the victim in the transfer of her assets."[13] The New York Supreme Court, Appellate Division, in a memorandum opinion, issued a nearly identical holding; "In reviewing the evidence, we conclude that the People proved beyond a reasonable doubt that the victim was incapable of consenting to the defendant's actions and that the defendant was cognizant of her diminished mental capacity, yet continued to deplete her assets."[14] And, the Michigan Court of Appeals used similar legal reasoning in holding that a written agreement, signed by the victim, purporting to give consent for the defendant to use the victim's money for the defendant's own purposes, did not preclude a conviction for larceny.[15] The Michigan Court of Appeals noted that the mental status of the victim "is relevant to the underlying question whether [the victim] had the capacity to consent."[16]

At least two states have taken this concept of mental incapacity creating a bar to a claim that there was a valid consent given by the victim, and through statute made it applicable to larceny cases.[17] Title 18 of the Revised Statutes of Colorado states:

> Unless otherwise provided by this code or by the law defining the offense, assent does not constitute consent if…It is given by a person who, by reason of immaturity, mental disease or mental defect, or intoxication, is manifestly unable and is known or reasonably should be known by the defendant to be unable to make a reasonable judgment as to the nature or harmfulness of the conduct charged to constitute the offense.[18]

And, the Texas Penal Code states:

> "Effective consent" includes consent by a person legally authorized to act for the owner. Consent is not effective if: (A) induced by deception or coercion; (B) given by a person the actor knows is not legally authorized to act for the owner; (C) who by reason of youth, mental disease or defect, or intoxication is known by the actor to be unable to make reasonable property dispositions; (D) given solely to detect the commission of an offense; or (E) given by a person who by reason of advanced age is known by the actor to have a diminished capacity to make informed and rational decisions about the reasonable disposition of property.[19]

OTHER STATE STATUTES CRIMINALIZING FINANCIAL EXPLOITATION

Currently, 33 other states have enacted a specific statute that criminalizes the financial exploitation of an elderly or incapacitated person.[20] It should be noted, however, that in Oregon, South Dakota, and Tennessee, the statute only applies if the defendant has an affirmative legal duty to care for the victim, and then carries out the financial exploitation.[21] An additional five states do not create a specific crime of financial exploitation, but statutorily enhance the penalty for anyone who commits a regular act of larceny, embezzlement, or fraud against an elderly or "at risk" adult.[22] Eleven states, in addition to Virginia, have not enacted any statutes in this area.[23]

Of the 33 states that have a specific statute criminalizing financial exploitation, Utah's is the most comprehensive and strict. Anyone age 65 or older is defined as a "vulnerable adult"; it is not a defense to the crime of exploiting a vulnerable adult that the defendant was unaware of the age of the victim; it applies to anyone who has any kind of a business relationship with the victim; and a person is deemed to have violated the statute if he conceals the "preexisting condition of any property involved in a contract or agreement."[24] Another state with a fairly broad financial exploitation statute is Mississippi, which makes it unlawful to "exploit any vulnerable person."[25] The term "exploit" is defined as the "illegal or improper use of a vulnerable person or his resources…with or without the consent of the vulnerable adult," while a "vulnerable person" is defined as anyone "whose ability to perform the normal activities of daily living…is impaired due to a mental, emotional, physical or developmental disability or dysfunction, or brain damage or the infirmities of aging."[26]

By way of contrast, New Mexico's financial exploitation statute is very limited in whom it covers; it only applies to residents of a care facility, although an individuals' own home can be considered a care facility, if the person receives nursing care there.[27] The statute criminalizes "the act or process, performed intentionally, knowingly, or recklessly, of using a resident's property for another person's profit, advantage or benefit, without legal entitlement to do so."[28]

Alabama's financial exploitation statute provides a good example of the approach used by many states. A "protected person" includes any adult "that is mentally or physically incapable of adequately caring for himself or herself and his or her interests without serious consequences to himself or herself or others."[29] It is a crime to "exploit" any protected person, and the term is defined as the "expenditure, diminution, or use of the property, assets, or resources of a protected person without the express voluntary consent of that person or his or her legally authorized representative."[30]

Anecdotal Information about Financial Exploitation in Virginia

Crime Commission staff informally solicited requests for examples in Virginia where an elderly adult was the victim of financial exploitation. A number of stakeholders and interest groups were invited to meet with staff for a frank discussion of the problems of elder abuse and financial exploitation of the mentally incapacitated in Virginia: the

AARP Virginia, the Alzheimer's Association, the Virginia Network for Victims and Witnesses of Crimes, the Virginia Department of Social Services, the Virginia Poverty Law Center, the Virginia Association of Area Agencies on Aging, and the Office of the County Executive for Fairfax County. Commonwealth's Attorneys, law enforcement, and victims' rights advocates were also contacted for any information they could provide on specific cases, which would help to provide "real world" illustrations of the problem. It must be emphasized that this request was not a true survey, and cannot be considered anything more than a general gathering of selected anecdotal evidence.

In some of the reported cases, what initially appeared to be a case of financial exploitation eventually was discovered to be a situation where family relatives were upset on how the "victim" was spending his or her own money, and no exploitation had actually occurred. In a number of other cases, where there had clearly been some form of financial exploitation, criminal charges ultimately were filed against the perpetrator. In all reported cases where charges were filed, the defendant either pled guilty or was found guilty of embezzlement, fraud, or forging or uttering checks. It therefore appears that when there is incontrovertible proof that an elderly victim has been swindled, or has had money inappropriately taken from them, law enforcement and prosecutors are able to successfully prosecute defendants in Virginia.

From the reported cases, it also appears that when financial exploitation involves a power of attorney, it is much easier to prosecute the defendant than in instances where there is no fiduciary duty between the parties. This is to be expected, as a power of attorney creates an affirmative duty to not use this status for self-enrichment, and when it can be demonstrated that a person has misused their authority for financial gain, it becomes much easier to obtain a conviction. On the other hand, instances where the victim was not clearly mentally incompetent, and was convinced by a "friend" or relative to give gifts or money, are the most difficult, both in terms of determining whether any laws have been broken, and whether it is proper for a prosecution to proceed. A number of the reported cases involved fact patterns where some type of financial exploitation was alleged to have occurred, yet it was not clear if any criminal laws had actually been broken. Many of these indeterminate cases involved a victim who shortly thereafter was placed in the care of a conservator, or who probably would have met the standard for being placed in a conservatorship; i.e., was an incapacitated person, incapable of managing their financial affairs without assistance.[31]

Policy Considerations

Based upon the review of the current larceny offenses in Virginia, the overview of how other states have statutorily dealt with the problem of financial exploitation of the elderly and mentally incapacitated, and the anecdotal information provided to the Crime Commission about exploitation cases occurring in Virginia, four policy options were identified:

> **Option 1**: Keep Virginia's laws as they currently are, with no changes. It is already possible, in clear-cut cases of financial exploitation, to successfully prosecute the wrong-doers.

Option 2: Keep Virginia's criminal laws as they currently are, with no substantive changes, but statutorily define "consent," as was done in Texas and Colorado, to make clear that a person who is mentally incapacitated cannot give valid consent for the transfer of their property.

Option 3: Keep Virginia's existing larceny crimes as they currently are, but provide for a heightened penalty if the victim is mentally incapacitated. Under this option, there are a number of possibilities for how the term "mentally incapacitated" could be defined:

- The definition provided in the conservatorship Chapter of the Virginia Code:

  "Incapacitated person" means an adult who has been found by a court to be incapable of receiving and evaluating information effectively or responding to people, events, or environments to such an extent that the individual lacks the capacity to (i) meet the essential requirements for his health, care, safety, or therapeutic needs without the assistance or protection of a guardian or (ii) manage property or financial affairs or provide for his support or for the support of his legal dependents without the assistance or protection of a conservator. A finding that the individual displays poor judgment alone shall not be considered sufficient evidence that the individual is an incapacitated person within the meaning of this definition.[32]

- The definition provided in the Adult Services Chapter of the Virginia Code:

  "Incapacitated person" means any adult who is impaired by reason of mental illness, intellectual disability, physical illness or disability, advanced age or other causes to the extent that the adult lacks sufficient understanding or capacity to make, communicate or carry out responsible decisions concerning his or her well-being.[33]

- A more expansive definition, such as the one proposed in the final version of HB 987:

  "Mental or physical incapacity" means mental illness, intellectual disability, dementia, organic brain dysfunction, developmental disability, physical illness, injury, or disability that would impair the person's mental or physical ability to manage his money, assets, property, or financial resource;[34]

  or the definition proposed in HB 882, as introduced:

  "Vulnerable adult" means any person 18 years of age or older who suffers from a mental illness, mental retardation, dementia, organic brain dysfunction, developmental disability, physical

> *illness or disability, or other causes that would impair the person's mental or physical ability to manage his money, assets, property, or financial resources to the extent that the adult lacks sufficient understanding or capacity to make, communicate, or carry out reasonable decisions regarding his money, assets, property, or financial resources.*[35]

Option 4: Create a new statutory crime that is more expansive than the current crimes of larceny, embezzlement, and false pretenses. Under this option, there are two possibilities:

- The new crime could employ only those terms that are currently or regularly used in the criminal law of Virginia as in the final version of House Bill 987; e.g., "*obtain, with the intent to defraud."*[36]

- The new crime could employ novel terms or definitions that are broader in scope than those currently used in the criminal law of Virginia; e.g., *undue influence, coercion, harassment, manipulation.*[37]

Also, under Option 4, there are three possibilities as to whom the new statute would apply:

- Only to those who have a fiduciary duty to the victim;

- Only to those who have a fiduciary duty, or a legal duty to provide care to the victim; or

- A general applicability to everyone; any person who violated the statute, and financially exploited a mentally incapacitated person, would be guilty.

Conclusion

The Crime Commission reviewed the information on financial exploitation, and recognized its seriousness as a growing area of crime, both nationwide and in Virginia. The members voted to endorse legislation to create a new statutory crime that would penalize financial exploitation, yet would make use of existing terms that are currently used in Title 18.2 of the Code of Virginia. The new crime would be applicable to everyone, not just those who have a fiduciary or legal duty to the mentally incapacitated adult. The term "mentally incapacitated" would be defined in a manner parallel to the definition provided in Va. Code § 18.2-67.10(3), which applies to sexual assaults:

> *"Mental incapacity" means that condition of the complaining witness existing at the time of an offense under this article which prevents the complaining witness from understanding the nature or consequences of the sexual act involved in such offense and about which the accused knew or should have known.*

As a safeguard, the new statue specifically would not apply to anyone who acted for the benefit of a mentally incapacitated adult.

Delegate Robert Bell introduced House Bill 1682 during the 2013 General Session of the Virginia General Assembly, based on the Crime Commission recommendation. This bill was passed by both the Virginia Senate and the Virginia House of Delegates and was signed by the Governor.[38]

---

[1] *See, e.g.*, Philip Moeller, *Protecting Elders From Financial Abuse*, U.S. NEWS & WORLD REPORT (Nov. 20, 2012), http://money.usnews.com/money/blogs/the-best-life/2012/11/20/protecting-elders-from-financial-abuse; Jennifer Sergent, *Trusting the Wrong People: Current Virginia laws are murky on financial exploitation*, AARP BULLETIN (Nov. 1, 2012), www.aarp.org/money/scams-fraud/info-11-2-12/trusting-the-wrong-people-va.print.html; Michelle Singletary, *How to help fight fraud against the elderly*, WASH. POST (Nov. 8, 2011), http://articles.washingtonpost.com/2011-11-08/business/35284677_1_investor-protection-institute-senior-citizens-financial-exploitation; *Financial Exploitation of the Elderly*, U.S. DEPT. OF JUSTICE, NAT. INST. OF JUSTICE (Jan. 5, 2011), http://www.nij.gov/topics/crime/elder-abuse/financial-exploitation.htm.

[2] Information provided by e-mail from the Va. Dept. Criminal Justice Services, Criminal Justice Research Center.

[3] SHELLY JACKSON & THOMAS L. HAFEMESITER, FINANCIAL ABUSE OF ELDERLY PEOPLE VS. OTHER FORMS OF ELDER ABUSE: ASSESSING THEIR DYNAMICS, RISK FACTORS, AND SOCIETY'S RESPONSE, Final Report to the U.S. Dept. of Justice, National Institute of Justice, grant number 2006-WG-BX=0010, February 2011, https://www.ncjrs.gov/pdffiles1/nij/grants/233613.pdf.

[4] S.B. 222, 2012 Gen. Assemb., Reg. Sess. (Va. 2012); S.B. 285, 2012 Gen. Assemb., Reg. Sess. (Va. 2012); S.B. 431, 2012 Gen. Assemb., Reg. Sess. (Va. 2012); S.B. 443, 2012 Gen. Assemb., Reg. Sess. (Va. 2012); H.B. 125, 2012 Gen. Assemb., Reg. Sess. (Va. 2012); H.B. 409, 2012 Gen. Assemb., Reg. Sess. (Va. 2012); H.B. 690, 2012 Gen. Assemb., Reg. Sess. (Va. 2012); H.B. 700, 2012 Gen. Assemb., Reg. Sess. (Va. 2012); H.B. 882, 2012 Gen. Assemb., Reg. Sess. (Va. 2012); H.B. 982, 2012 Gen. Assemb., Reg. Sess. (Va. 2012); H.B. 987, 2012 Gen. Assemb., Reg. Sess. (Va. 2012).

[5] There were slight differences between each of these bills.

[6] Dunlavey v. Commonwealth, 184 Va. 521, 524 (1945).

[7] VA. CODE ANN. § 18.2-111 (2012). "A person entrusted with possession of another's personality who converts such property to his own use or benefit is guilty of the statutory offense of embezzlement." C.D. Smith v. Commonwealth, 222 Va. 646, 649 (1981).

[8] "[I]t is not necessary to show that the defendant misappropriated the property for his own personal use and benefit; it is sufficient to show that the defendant took the property to benefit another." Wells v. Commonwealth, 60 Va. App. 111, 118-119 (2012).

[9] Larceny by trick is "when one obtains the property of another by making a false representation of a past event or an existing fact with the intent to defraud the owner of the property by causing the owner of the property to part with the property. Owolabi v. Commonwealth, 16 Va. App. 78, 79 (1993).

[10] False pretenses involves "(1) an intent to defraud; (2) an actual fraud; (3) use of false pretenses for the purpose of perpetrating the fraud; and (4) accomplishment of the fraud by means of the false pretenses…that is, the false pretenses to some degree must have induced the owner to part with his property." Riegert v. Commonwealth, 218 Va. 511, 518 (1977).

[11] 1 CHARLES E. TORCIA, WHARTON'S CRIMINAL LAW, § 46, p. 304 (14th ed. 1978).

[12] Gainer v. State, 553 S.2d 673 (Ala. Crim. App. 1989).

[13] State v. Calonico, 770 A.2d 454, 469 (Conn. 2001).

[14] People v. Camiola, 225 A.D.2d 380, 381 (N.Y.App.Div. 1st Dep. 1996).

[15] People v. Cain, 605 N.W.2d 28, 44 (Mich. App. 1999).

[16] Id.

[17] By way of contrast, Virginia statutorily makes lack of mental capacity a bar to a valid consent by the victim only for sex crimes. VA. CODE ANN. § 18.2-67.10 (3) (2012).

[18] COLO. REV. STAT. ANN. § 18-1-505 (West 2012). This statute is applicable to other crimes, as well as larceny.
[19] TEX. PENAL CODE ANN. § 31.03(3) (West 2012).
[20] ALA. CODE § 38-9-7 (West 2012); ARK. CODE ANN. § 5-28-103 (West 2012); DEL. CODE ANN. tit. 31, § 3913 (West 2012); FLA. STAT. ANN. § 825.103 (West 2012); GA. CODE ANN. § 30-5-8 (West 2012); IDAHO CODE ANN. § 18-1505 (West 2012); 720 IL COMP STAT. ANN. § 5/17-56 (West 2012); IND. CODE ANN. § 35-46-1-12 (West 2012); KAN. CRIM. CODE. ANN. § 21-5417 (West 2012); KY. REV. STAT. ANN. § 209.990 (West 2012); LA. REV. STAT. ANN. § 14:93.4 (West 2012) & LA. REV. STAT. ANN. § 14:67.21 (West 2012); MD. CODE ANN., CRIM. LAW § 8-801 (West 2012); MICH. COMP. LAWS ANN. § 750.174a (West 2012); MINN. STAT. ANN. § 609.2335 (West 2012); MISS. CODE. ANN. § 43-47-19 (West 2012); MO. ANN. STAT. § 570.145 (West 2012); MONT. CODE ANN. § 52-3-803 (2012); NEB. REV. STAT. § 28-358 (Michie 2012); NEV. REV. STAT. ANN. § 200.5092 (West 2012); N.M. STAT. ANN. § 30-47-6 (West 2012); N.C. GEN. STAT. ANN. § 14-112.2 (West 2012); N.D. CENT. CODE ANN. § 12.1-31-07.1 (West 2012); OKLA. STAT. ANN. tit. 21, § 843.4 (West 2012); OR. REV. STAT. ANN. § 163.205 (West 2012) & OR. REV. STAT. ANN. § 443.881 (West 2012); R.I. GEN. LAWS ANN. § 11-68-2 (West 2012) and R.I. GEN. LAWS ANN. § 11-41-5 (West 2012); S.C. CODE ANN. § 43-35-10 (Law Co-op 2012); S.D. CODIFIED LAWS § 22-46-3 (Michie 2012); TENN. CODE ANN. § 71-6-102 (West 2012); TEX. PENAL CODE ANN. § 32.53 (West 2012); UTAH CODE ANN. § 76-5-111 (West 2012); VT. STAT. ANN. tit. 13, § 1380 (West 2012); W. VA. CODE ANN. § 61-2-29b (West 2012); WYO. STAT. ANN. § 6-2-507 (West 2012).
[21] OR. REV. STAT. ANN. § 163.205 (West 2012) & OR. REV. STAT. ANN. § 443.881 (West 2012); S.D. CODIFIED LAWS § 22-46-3 (Michie 2012); TENN. CODE ANN. § 71-6-102 (West 2012).
[22] CAL. PENAL CODE § 368(a), (d), (e) (West 2012); COLO. REV. STAT. ANN. § 18-6.5-103(5) (West 2012); OHIO REV. CODE ANN. § 2913.02(B)(3) (West 2012); 18 PA. CONS. STAT. ANN. § 4107(a.1)(3) (West 2012); WIS. STAT. ANN. § 943.20(3)(6) (West 2012). In these states, the statutory provision providing for the heightened penalty if the victim is an elderly or incapacitated adult references a separate statutory crime of theft or larceny that is applicable to everyone.
[23] Alaska, Arizona, Connecticut, Hawaii, Iowa, Maine, Massachusetts, New Jersey, New Hampshire, New York, and Washington.
[24] UTAH CODE ANN. § 76-5-111 (West 2012).
[25] MISS. CODE. ANN. § 43-47-19 (West 2012).
[26] Id. The Mississippi Supreme Court has found the expansive wording and potential application of this statute troubling, noting in dicta, "We are troubled by the statute's broad reach." Decker v. State, 66 So.3d 754, 658 (2011).
[27] N.M. STAT. ANN. § 30-47-6 (West 2012).
[28] Id.
[29] ALA. CODE § 38-9-7 (West 2012).
[30] Id.
[31] VA. CODE ANN. § 64.2-2000 (2012).
[32] Id.
[33] VA. CODE ANN. § 63.2-1603 (2012).
[34] H.B. 987, 2012 Gen. Assemb., Reg. Sess. (as reported by Va. H. Cts. of Justice Comm., Feb. 3, 2012).
[35] H.B. 882, 2012 Gen. Assemb., Reg. Sess. (as introduced) (Va. 2012).
[36] H.B. 987, 2012 Gen. Assemb., Reg. Sess. (as reported by H. Cts. of Justice Comm., Feb. 3, 2012).
[37] *See,* S.B. 431, 2012 Gen. Assemb., Reg. Sess. (as introduced) (Va. 2012).
[38] 2013 Va. Acts ch. 419.

Illegal Cigarette Trafficking

Executive Summary

During the 2012 Regular Session of the Virginia General Assembly, Senate Joint Resolution 21 was enacted, which directed the Crime Commission to study and report on a number of topics involving the subject of illegal cigarette trafficking. The Commission was mandated to determine: why illegal cigarette trafficking occurs, the methods and strategies used by traffickers, the beneficiaries of trafficking, the health implications of non-regulated cigarettes, methods used to counterfeit cigarettes and tax stamps, potential uses of information technology to prevent cigarette trafficking, and statutory options that Virginia could adopt to combat the problem.

All cigarette trafficking schemes, regardless of the scope of the operation or the methods employed, depend upon tax avoidance to generate illegal profits. Traffickers exploit differences in tax rates between different jurisdictions or geographic locations, purchasing cigarettes in one area and then illegally transporting them to another area where the tax rates are higher. The difference in the tax rates creates the profit for the trafficker, who is also able to sell his cigarettes at lower than market prices. The lower prices, in turn, provide an incentive for retailers and consumers to purchase these black market cigarettes. Retail merchants who purchase trafficked cigarettes gain an unfair economic advantage over their competitors, due to the lower prices they can offer customers. The customers, in turn, may be unaware that these low-cost cigarettes are black market items, and may simply think they have found a great bargain.

Cigarette trafficking can occur at all points along the normal production and distribution channels, with cigarettes being diverted outside normal commercial streams and into the black market. Manufacturers can produce "off the book" cigarettes, failing to pay the taxes on them. Wholesalers can similarly falsify records, under-reporting the quantities of cigarettes purchased and then re-sold. Retailers can sell some or all of their cigarettes "off the books," thereby avoiding the payment of sales tax. And, individuals can purchase large quantities of cigarettes in one area, at the retail or wholesale level, and then transport them to another area or state, a process sometimes referred to as "smurfing." When individuals purchase their cigarettes at the wholesale level, sometimes creating fictional retail businesses to do so, they deprive the state of tax revenue. When this occurs, not one, but two states are made the victims of tax evasion—the state where the cigarettes were purchased, and the state where the cigarettes were transported.

To achieve lower costs, traffickers can arrange for their cigarettes to be manufactured overseas. Frequently, these cigarettes are counterfeits. The packaging used in popular brands of cigarettes is duplicated; however, the cigarettes inside will differ substantially from the genuine articles. A number of recent studies have reported that the manufacturing facilities used in the production of counterfeit cigarettes have little or no quality control; the counterfeit cigarettes, in turn, have alarmingly high levels of

contaminants, including dangerous levels of toxic metals. In short, counterfeit cigarettes present a serious public health risk.

The recent increases in state cigarette excise taxes in the north-eastern states have created a situation where Virginia has become a primary source of cigarettes for traffickers in the United States. Virginia currently has the second lowest state tax rate on cigarettes in the country, after Missouri. Meanwhile, New York, Rhode Island, and New Jersey have some of the highest cigarette tax rates in the country. In the past two years, a number of studies, some academically published in peer-reviewed journals, have determined that Virginia is currently the largest single source of out-of-state, black market cigarettes in New York City. By some estimates, up to 30% of all cigarettes purchased in New York City are black market; of those, over half may be trafficked from Virginia.

The profits that can be generated by exploiting the differences in tax rates between Virginia and the states north of the Commonwealth are staggering. The state excise tax rate for a carton of cigarettes (10 packs) is $3.00 in Virginia; in New Jersey, it is $27.00; in Rhode Island, it is $34.60; and in New York, it is $43.50, while in New York City, it is $58.50. Traffickers can therefore realize a profit of around $100,000 for a smuggling run from Virginia to New York City, transporting in a car or van just 1,500 cartons of cigarettes. In turn, a tractor-trailer filled with cartons of cigarettes represents a potential profit of a few million dollars.

These large amounts of money have proven irresistible to organized crime. Law enforcement intelligence reports have indicated that gangs and other organized crime rings have increasingly begun to focus their efforts on cigarette trafficking as a source of revenue. The profit margins on black market cigarettes are now greater than for cocaine, heroin, or illegal firearms. If organized crime continues to view Virginia as an ideal location to obtain cigarettes, their habitual presence may lead, in turn, to increases in attendant crimes—robberies, burglaries, credit card fraud, and money laundering.

The tax stamp that Virginia currently uses on cigarette packs has a number of security features, which can assist law enforcement in determining if a particular stamp is genuine or counterfeit. Tax stamps with higher security features, and with digital encoding capabilities, exist. However, there are associated costs with the use of high-tech tax stamps, and most of the information which a digital stamp could provide can currently be obtained with Virginia's existing stamps, albeit with more effort, such as tracing the serial number on a stamp back to the wholesaler. As almost all data and law enforcement intelligence indicates that Virginia is a source state for trafficked cigarettes, and not a destination state, switching to a digital tax stamp would probably not have a significant impact on Virginia's tax revenues.

However, technology could be used to assist manufacturers, wholesalers, and the Virginia Department of Taxation in expediting the filing of mandatory reports, and in facilitating the payments made by wholesalers for the tax stamps which they affix to packs of cigarettes. Currently, the mandatory reports made by manufacturers and wholesalers to the Virginia Department of Taxation and the Office of the Attorney General of Virginia are generated in paper format, and sent by mail. In a similar manner,

the payments made for tax stamps by wholesalers could be submitted to the Virginia Department of Taxation electronically.

The Crime Commission reviewed study findings at its September 5, 2012, and November 13, 2012, meetings and directed staff to draft legislation for several key issues. As a result of the study effort, the Crime Commission endorsed the following legislative recommendations at its December 5, 2012, meeting:

Recommendation 1: Amend Va. Code § 58.1-1017.1 for the possession of stamped cigarettes with the intent to distribute by raising the current penalty from a Class 2 misdemeanor to a Class 1 misdemeanor, and making the Class 1 misdemeanor for a second or subsequent offense a Class 6 felony.

Recommendation 2: Amend Va. Code § 58.1-1017.1 for the possession of stamped cigarettes with the intent to distribute by making a first offense that involves more than 500 cartons of cigarettes a Class 6 felony, and making the Class 6 felony for a second or subsequent offense a Class 5 felony.

Recommendation 3: Amend Va. Code § 58.1-1017 for the possession of unstamped cigarettes with the intent to evade taxes by making the existing Class 2 misdemeanor a Class 1 misdemeanor, and making a second or subsequent offense a Class 6 felony; and by making a second or subsequent offense of the existing Class 6 felony a Class 5 felony.

Recommendation 4: Amend Va. Code § 58.1-1017 for the possession of unstamped cigarettes to evade taxes by lowering the current felony threshold amount from 3,000 packs (300 cartons of cigarettes) to 500 packs (50 cartons).

Recommendation 5: Amend Va. Code § 18.2-513 by including Va. Code § 58.1-1017.1 in Virginia's RICO statute.

Recommendation 6: Amend Va. Code § 19.2-386.21 by allowing for the forfeiture of property used in connection with cigarette trafficking.

Recommendation 7: Amend Va. Code § 18.2-246.14 by making the distribution, or possession with the intent to distribute, counterfeit cigarettes a Class 1 misdemeanor, for quantities of less than 10 packs. Quantities of 10 packs or more would be a Class 6 felony, and a second or subsequent violation of the statute, after a previous conviction, would also be Class 6 felony, regardless of the number of counterfeit packs involved.

Recommendation 8: Wholesalers and manufacturers should be permitted, but not required, to file their mandatory reports electronically, provided the receiving agency chooses to allow this as an option. Cigarette wholesalers who are stamping agents should be permitted, but not required, to submit their payments electronically, provided the Virginia Department of Taxation chooses to allow this as an option.

In regards to policy recommendations, the Crime Commission endorsed the following:

Policy Recommendation 1: Increase efforts to combat cigarette trafficking in the Commonwealth, including through allocation of additional resources to agencies that are responsible for investigating this area of crime.

Policy Recommendation 2: Ensure that law enforcement receives adequate training on the subject of cigarette trafficking. A formal letter was sent to DCJS, recommending that they help to coordinate this training.

Policy Recommendation 3: Encourage the Virginia State Police to consider developing an information sharing system, accessible only to law enforcement that would allow for the collection of raw data and criminal intelligence on cigarette trafficking. A formal letter was sent to the Virginia State Police, inquiring if the general proposal to develop a law enforcement information sharing system focused on cigarette trafficking is feasible.

Background

During the 2012 Regular Session of the Virginia General Assembly, Senator Janet Howell introduced Senate Joint Resolution 21 (SJR 21), which directed the Crime Commission to study and report on the practice of illegal cigarette trafficking.[1] The resolution specifically directed the Crime Commission to review:

> (i) determine why illegal cigarette trafficking occurs; (ii) identify the methods of illegal cigarette trafficking and the strategies used by smugglers; (iii) document the effects and financial impact of illegal cigarette trafficking on State and local governments, and cigarette manufacturers, wholesalers, and retailers; (iv) identify the methods used to counterfeit cigarettes and cigarette tax stamps and the prevalence of these methods in the Commonwealth on the availability of counterfeit cigarettes and cigarette tax stamps; (v) determine the beneficiaries of illegal cigarette trafficking; (vi) review statutory options to combat illegal cigarette trafficking; (vii) identify potential uses of information technology to prevent illegal cigarette trafficking and assess the costs and benefits of using such technology; (viii) develop a set of policy and legislative recommendations to enhance the Commonwealth's efforts to combat the practice of illegal cigarette trafficking; (ix) identify the unique and challenging public health implications of illegal non-regulated cigarettes; and (x) consider such other related issues as the Virginia State Crime Commission deems appropriate.[2]

To comply with this study mandate, a literature review was conducted, examining the topic of cigarette trafficking, the frequency with which it occurs, and the health implications posed by counterfeit cigarettes. Numerous meetings and interviews were

held with representatives from cigarette manufacturers, cigarette wholesalers and retailers, as well as local and state law enforcement, the Northern Virginia Cigarette Tax Board (NVCTB), the Tobacco Enforcement Unit of the Office of the Attorney General of Virginia, the Virginia Department of Taxation, and the Federal Bureau of Alcohol, Tobacco, Firearms and Explosives (ATF). Data requests were also made to the Virginia Criminal Sentencing Commission (VCSC) on the number of convictions for offenses involving cigarette trafficking, or failure to properly pay cigarette excise taxes. In addition, information was gathered on the technical aspects of the cigarette industry, cigarette tax stamps, and the technologies that are available for states to implement.

Cigarette Trafficking

All cigarette trafficking schemes, no matter the methods employed, depend upon tax avoidance; it is the failure to pay some or all of legally required taxes that generates the profit for the criminal trafficker.[3] While cigarette trafficking has existed for decades, the recent increases in state taxes in certain states has greatly increased the potential profits that can be made by illegally transporting cigarettes from a low tax state to a high tax state. For example, the differential between tax rates between Virginia and New York City "provides an incentive to purchase cigarettes in Richmond, Virginia, for illegal resale in New York City, with a potential illicit profit of up to $3,330 per case."[4]

Virginia currently has the second lowest state excise tax rate of .30 cents per pack for cigarettes in the country, while the mid-Atlantic and New England states directly north of Virginia have some of the highest tax rates in the country.

Figure 1: Enacted Cigarette Excise Tax Rates per 20 Pack (in $) by State or Territory

Alabama	0.425	Montana	1.70
Alaska	2.00	Nebraska	0.64
Arizona	2.00	Nevada	0.80
Arkansas	1.15	New Hampshire	1.68
California	0.87	New Jersey	2.70
Colorado	0.84	New Mexico	1.66
Connecticut	**3.40**	**New York**	**4.35**
Delaware	1.60	North Carolina	0.45
District of Columbia	2.50	North Dakota	0.44
Florida	1.339	N. Marianas Islands	1.75
Georgia	0.37	Ohio	1.25
Guam	3.00	Oklahoma	1.03
Hawaii	3.20	Oregon	1.18
Idaho	0.57	Pennsylvania	1.60
Illinois	0.98	Puerto Rico	2.23
Indiana	0.995	**Rhode Island**	**3.46**

Iowa	1.36	South Carolina	0.57
Kansas	0.79	South Dakota	1.53
Kentucky	0.60	Tennessee	0.62
Louisiana	0.36	Texas	1.41
Maine	2.00	Utah	1.70
Maryland	2.00	Vermont	2.62
Massachusetts	2.51	**Virginia**	**0.30**
Michigan	2.00	Washington	3.025
Minnesota	1.58	West Virginia	0.55
Mississippi	0.68	Wisconsin	2.52
Missouri	**0.17**	Wyoming	0.60

Source: National Conference of State Legislatures, updated and rates current as of June 1, 2012, http://www.ncsl.org/issues-research/health/2011-state-cigarette-excise-taxes.aspx (last visited December 14, 2012). In addition, it should be noted that New York City has an additional tax of $1.50 per pack.

While the differences between Virginia and the other states in terms of tax rates may not seem particularly large at a per pack level, they quickly equate to large quantities of money when the actual tax costs of either cartons (ten packs of cigarettes) or cases (sixty cartons) are compared.[5]

- The state excise tax rate for a carton of cigarettes (10 packs):
  - **Virginia: $3.00**
  - Pennsylvania: $16.00
  - New Jersey: $27.00
  - Rhode Island: $34.60
  - New York: $43.50
  - **New York City: $58.50**

- The state excise tax rate for a case of cigarettes (60 cartons):
  - **Virginia: $180.00**
  - Pennsylvania: $960.00
  - New Jersey: $1,620.00
  - Rhode Island: $2,076.00
  - New York: $2,610.00
  - **New York City: $3,510.00**

These differences, in turn, translate into sizeable differences in the retail price which consumers pay for cigarettes in different states:[6]

- Representative prices for a premium brand pack of cigarettes in:
  - **Virginia: $5.55**
  - Pennsylvania: $6.93
  - New Jersey: $8.00
  - Rhode Island: $8.16
  - New York: $12.50
  - **New York City: $14.00**

If a retail merchant in a high tax state has access to illegally trafficked cigarettes, he can offer them for sale to the general public at a substantially lower price than the going rate in his neighborhood, and make a larger profit per pack than he otherwise would. The victims, in this case, are the local and/or state governments, which have lost their tax revenue, and legitimate retailers, who have difficulty competing with such a large undercutting in price. Meanwhile, the traffickers who illegally supply black market cigarettes to the retailers are also able to realize incredibly large profits:

> For example, purchasing legally taxed [cigarettes] in Virginia (a low excise tax state) for approximately $4.50 a pack and driving them to New York City (a high excise tax state/city combined), which sells for approximately $13.00 for resale, creates an estimated $8.50 per pack profit margin. In this example, a single carton (10 packs) yields $85.00 in profits; a single case (60 cartons) yields $5,100 in profits and a single truckload (typically 800 cases) yields $4,080,000.[7]

Similar schemes can be carried out within the state of Virginia as well. While the amounts of profit are smaller, traffickers can exploit the differences that exist between varying local tax rates, as illustrated in Figure 2 below. Law enforcement in various locales confirmed that they have encountered regional cigarette trafficking in the Commonwealth.

Figure 2: Local Tax Rates for Select Virginia Localities

Locality	State Tax	City Tax	Total Tax Per Pack	Tax Per Carton (x 10)
Alexandria	0.30	0.80	1.10	11.00
Chesapeake	0.30	0.50	0.80	8.00
Fairfax City	0.30	**0.85**	1.15	11.50
Fairfax County	0.30	0.30	0.60	6.00
Hampton	0.30	0.65	0.95	9.50
Newport News	0.30	0.65	0.95	9.50
Norfolk	0.30	0.75	1.05	10.50
Portsmouth	0.30	0.60	0.90	9.00
Suffolk	0.30	0.50	0.80	8.00
Tazewell	0.30	**0.05**	0.35	3.50
Va. Beach	0.30	0.65	0.95	9.50

Source: Data provided by Virginia Wholesalers and Distributors Association.

Methods of Cigarette Trafficking

"[T]here are multiple opportunities to divert tobacco products from the supply chain in the legal market into the black market before all the appropriate excise taxes and fees are collected….Illicit trade schemes can originate at each point in the tobacco supply chain."[8] The categories of cigarette trafficking can be broadly divided into the following types of crime, beginning at the retail level, and moving up the "distribution chain" to the manufacturing level:

- Smurfing;
- Fraudulent retail operations for purchasing in bulk;
- Retailers selling cigarettes "off the books;"
- Tax avoidance by wholesalers;
- Tax avoidance by manufacturers;
- International smuggling;
- Importing counterfeit cigarettes; and, as a collateral crime,
- Forged tax stamps.

SMURFING AND FRAUDULENT RETAIL OPERATIONS

"Smurfing" is street slang for the organized criminal activity of having a number of individuals "legally" purchase cartons of cigarettes from retail outlets; once a sufficiently large quantity of cigarettes have been assembled, the leader of the smurfing operation arranges for the cartons to be transported illegally to a high tax state.[9] Many retail stores have contractual limits with the major tobacco manufacturers on the number of cartons they are permitted to sell to any one individual; typically, the number is five cartons per day. These limits are what has created the phenomenon of smurfing in low tax states, like Virginia, and also what has led to the trafficking behavior of creating fraudulent retail operations.

Moving up one level of the distribution chain, from individual purchasers to retail operations, a number of traffickers have been observed by law enforcement in Virginia to create a retail business, primarily for the purpose of being able to purchase large quantities of cigarettes at a discount from wholesalers. In this manner, the traffickers are able to avoid the five cartons per day limits, and purchase their product at a cheaper price. These cartons of cigarettes are not destined for sale in Virginia, but are intended by the trafficker to be illegally shipped to a high tax state. When traffickers engage in this activity, Virginia is deprived of the sales tax that it should have earned if the cigarettes were sold lawfully within the state.[10] Some of these illegal retail operations will run a convenience store as a cover for their true purpose. In other instances, however, Virginia law enforcement has checked the listed business address given by a suspected cigarette trafficker, only to discover that the actual location is an empty store-front.

The criminal diversion of trafficked cigarettes from Virginia to high tax states in the north, particularly New York, Rhode Island, and New Jersey, appears to be a growing problem. Local law enforcement in a number of jurisdictions have reported that such illicit operations are occurring in their areas.[11] In addition, a number of law enforcement and academic studies, examining the phenomenon of black market cigarettes, have concluded that large numbers of cigarettes from Virginia are ending up in New York. A 2012 study that examined the extent of cigarette tax avoidance in the South Bronx found that 9.1% of all cigarettes there originated from Virginia.[12] Another study published this year found that 30.1% of all cigarettes in New York City came from out-of-state; of those, 71.4% came from Virginia.[13] An earlier unpublished study, from 2010, that examined the percentage of out-of-state cigarettes in New York City, both before and then after a tax increase, found that after the tax increase, 14% to 17% of

cigarettes originated from outside New York; of those, over 40% came from Virginia.[14] And, from August 1, 2011 to August 2, 2012, the Tobacco Task Force of the New York City Sheriff's Office compiled data on all contraband cigarettes seized, a total of just over 4,982 cartons. They found that Virginia was the largest source of contraband cigarettes, with 2,053 cartons. By contrast, the number of cartons of unknown origin, but carrying forged tax stamps, was 1,785, and the number from the next highest state identified, Georgia, was 111 cartons.[15]

RETAILERS SELLING CIGARETTES ILLEGALLY TO THE GENERAL PUBLIC

At this same level of the distribution chain, of course, it is possible for a retailer to engage in "off the books" sales to customers in Virginia. Law enforcement have also observed retailers selling packs of cigarettes that do not carry a proper state and/or local tax stamp.[16] A variation of this crime is to sell cigarette packs that do not have the local tax stamp completely fixed, such that the stamp is torn, or is only a partial stamp. In this way, a retailer is able to sell two packs, and only pay for one local tax stamp.

TAX AVOIDANCE BY WHOLESALERS AND MANUFACTURERS

Cigarette trafficking can also be carried out at the highest levels of the distribution chain. Some wholesalers have been found to have distributed cigarettes "off the books," falsely reporting their sales numbers to the state and federal government. For example, in 2010, Charles H. Wells, a Kentucky wholesaler, pled guilty to tax evasion.[17] Between October 2007 and July of 2008, he stole more than seven million dollars by failing to pay taxes and fees on cigarettes he sold to retailers. The scheme involved falsely claiming the cigarettes were sold to a Mississippi company, where state taxes are lower, when instead they were actually kept and sold in Kentucky. By not paying required taxes and fees, Wells was able to sell his cigarettes more cheaply, increasing his sales volume and hurting his competitors through his unfair pricing advantage.[18] Similarly, in 2012, tobacco wholesaler Isidro "Tony" Tavarez pled guilty to tax evasion in New York.[19] Between December 2005 and December 2007, he failed to pay more than $700,000 in taxes for cigarettes he sold; to carry out this theft, not only did he submit fraudulent forms to the New York State Department of Taxation and Finance, but he also forged purchase invoices from tobacco manufacturers to hide his purchases.[20]

Tobacco manufacturers have also been found guilty of similar schemes to evade taxes, through filing false documents and under-reporting their sales. In October 2012, Roberto Ribeiro, the president of Belcorp of America, Inc., was sentenced to 60 months incarceration and three years of supervised release, and ordered to pay $9.4 million in restitution and forfeit $19.6 million.[21] Ribeiro generated millions of dollars in illegal profits by under-reporting the quantities of cigarettes his company was manufacturing, and also under-reporting the amounts sold in several states, with the goal of avoiding payment of state and federal taxes and fees.[22]

INTERNATIONAL SMUGGLING AND COUNTERFEIT CIGARETTES

Cigarette trafficking can also occur across national borders. One method is when genuine cigarettes, lawfully manufactured abroad, are illegally imported into the United States, without being declared and with no excise or customs taxes paid, and are then distributed into black market channels.[23] Various studies have estimated that world-wide, billions of cigarettes end up smuggled into their final market; while the numbers have decreased from the mid-90's, the United States Department of Agriculture found that globally, at the beginning of the last decade, 150 billion fewer cigarettes were officially recorded as imported as were recorded as having been exported.[24] The most likely explanation for all of these missing cigarettes is that they were smuggled into countries other than the ones that were listed on their "official" export documents.

Even more troubling is when counterfeit cigarettes are produced abroad, and are then smuggled into the United States. Counterfeit cigarettes are like other "knock off" goods; they are fabricated to resemble an established brand, with nearly identical packaging. However, as they are counterfeit, they are produced in illegal "factories," under less than sanitary conditions:

> In China, counterfeit cigarettes can be produced from tobacco of various levels of quality, second-hand tobacco or even waste. Some of the chemicals that are used to process the low-quality tobacco, such as sulphur and carbamide, are poisonous and may cause health problems to cigarette consumers.[25]

A number of studies have been done examining the contaminants that are frequently found in counterfeit cigarettes. It has been generally reported that "counterfeit" cigarettes have been found to contain higher levels of tar, nicotine and carbon monoxide than genuine cigarettes. Furthermore, many are even contaminated with sand and other packaging materials such as bits of plastic."[26] Worse, counterfeit cigarettes have been found to contain far higher levels of heavy metals: cadmium levels that were 2.0 to 6.5 times higher than authentic brands; thallium levels that were 1.4 to 4.9 times higher; and lead levels that were 3.0 to 13.8 times higher.[27] A similar study found that arsenic, molybdenum (another heavy metal), and antimony concentrations were two to three times higher in counterfeit cigarettes than in genuine cigarettes; mercury concentrations were also higher, and the amount of lead was nearly ten times as high in the counterfeit cigarettes.[28]

A study conducted in Australia, which relied upon telephone interviews, found that smokers of illicit tobacco—illegally manufactured, though not necessarily counterfeit—reported worse physical and mental health than those who smoked legal tobacco products, evidence that the dangerous impurities found in illegal and counterfeit cigarettes can have a significant, dangerous impact on consumers, beyond the expected health consequences associated with smoking.[29]

FORGED TAX STAMPS

Forged cigarette tax stamps are a collateral crime of cigarette trafficking. In an effort to disguise the fact that excise taxes have not been properly paid on packs of cigarettes, and to hide the geographic source from where they came, counterfeit stamps are used as a tool by traffickers to deceive both law enforcement and consumers. This tactic apparently is more prevalent with imported counterfeit cigarettes. With traffickers concerned about hiding the fact that the cigarettes are counterfeit, the presence of a state tax stamp helps add to the "legitimate" appearance of a pack. Conversations with law enforcement indicate that counterfeit Virginia tax stamps are usually not found within the Commonwealth. Rather, they are found in other states, in connection with cigarettes that are often illegal imports; the forged Virginia tax stamps are used to bolster the deception that the packs are not counterfeit, but have come from another state, thus explaining their lower price to prospective consumers.[30]

Impact of Cigarette Trafficking

Nationally, it has been estimated that the total cost of cigarette trafficking, in terms of lost tax revenues, both state and federal, is in the billions of dollars, annually. It must be noted that all black markets are, by their very nature, opaque, and any figures must be considered, at best, as estimates, derived from imprecise data. Nevertheless, in 2002, the Internal Revenue Service determined that state tax losses from cigarette trafficking were approximately $1.1 billion annually.[31] The ATF has estimated that the loss to states is even higher, at around $5 billion annually.[32]

No studies have specifically concentrated on the quantity of cigarettes that are being trafficked out of Virginia. Informal conversations with law enforcement have indicated that the amount is in the tens of millions of dollars, and may well be close to $100 million dollars annually, at least for the past few years. It should be stressed, though, that these observations are based on estimates derived from localized observations in specific jurisdictions, and are not validated, empirical calculations.

Even more intangible, though, is the damage that cigarette trafficking does to legitimate suppliers of cigarettes, whether at the manufacturing, wholesale, or retail level. The unfair competition that trafficking creates, in terms of the lower prices offered by competitors who sell trafficked cigarettes, is extremely difficult for a legitimate merchant to combat, and can result, at the retail level at least, in bankruptcy. Counterfeit cigarettes are even more damaging, economically, to manufacturers, whose reputation is greatly impacted when their brands become associated with inconsistent, inferior products.

CONVICTION AND ENFORCEMENT DATA

Data was requested form the VCSC on the number of charges and convictions in Virginia courts over the past several fiscal years for various cigarettes offenses related to tax

avoidance, improper record keeping, and possession of counterfeit or illegal cigarettes. The numbers indicate that very few charges are filed, and even fewer convictions are obtained, under any of Virginia's relevant criminal statutes in general district courts.
In FY08, there were 11 misdemeanor charges related to cigarette tax violations filed in general district courts in Virginia, and 7 convictions. No felony charges were filed in general district courts in that year. In FY09, there were 157 misdemeanor charges and 4 felony charges filed, and 34 misdemeanor convictions. In FY10, there were 179 misdemeanor charges and 2 felony charges filed, and 43 misdemeanor convictions. And, in the most recently available figures for FY11, there were 117 misdemeanor charges and 13 felony charges filed, and 46 misdemeanor convictions. It should be noted that the vast majority of these cigarette misdemeanor charges were for violations of local ordinances related to local cigarette taxes. The most common state cigarette misdemeanor charged was Va. Code § 58.1-1017(B), which is the Class 2 misdemeanor for possession of less than 3,000 packs of unstamped cigarettes for the purpose of evading the payment of taxes; there were 67 charges in the four fiscal years. This was also the most common state cigarette misdemeanor conviction, with 26 convictions.
According to available general district court data, no charges have been filed for the following statutes since FY2008:

- § 3.2-4209.1- False information on any return by Tobacco manuf/importer.
- § 3.2-4219- False statement in record required by TSA.
- § 4.1-103.01(C)- Divulge information provided by tax commissioner.
- § 18.2-246.13 (E, F, G, H)- Fail to register before delivery of cigarettes; False statement filed, required before delivery of cigarettes; Fail to report cigarette delivery; False statement on report required after delivery of cigarettes.
- § 58.1-1006- Interfering with enforcement of cigarette excise tax.
- § 58.1-1008.1- Manufacturer fails or refuses to file report with Tax Dept.; Manufacturer refuses audit or inspection of records by Tax Dept.
- § 58.1-1008.2- False statement in record required for cigarette tax.
- § 58.1-1009- Cigarettes, unlawful sale of revenue stamps.
- § 58.1-1010- Illegal sale of unstamped cigarettes by wholesale dealers.
- § 58.1-1011- False/fraudulent statement in application for stamping permit.
- § 58.1-1021- Fail to keep records on purchase, sale of cigarettes (Use Tax).
- § 58.1-1021.04:1- False/fraudulent statement in application for distributor's license.
- § 58.1-1034- Violation of reporting requirements.

The data provided by the VCSC similarly indicates that very few charges are filed and very few convictions are obtained for these types of cigarette offenses in circuit courts. In FY08, there were four misdemeanor charges filed, 0 felony charges filed, and 3 misdemeanor convictions. All of these misdemeanor charges and convictions were due to appeals from earlier convictions in a district court, and not original charges filed for the first time in a circuit court. In FY09, there were no charges or convictions of any sort related to cigarette tax violations. In FY10, there were 8 misdemeanor charges, 0 felony charges, and 7 misdemeanor convictions. Again, all of the misdemeanor charges and convictions were due to appeals from earlier convictions in a district court. In FY11, there were 11 misdemeanor charges, 42 felony charges, 6 misdemeanor convictions, and 13 felony convictions. And, in the most recently available figures for

FY12, there were 0 misdemeanor charges, 12 felony charges, 4 misdemeanor convictions, and 1 felony conviction. As in the general district courts, the most common statute charged, for both misdemeanors and felonies, was Va. Code § 58.1-1017—an offense that involves less than 3,000 packs of unstamped cigarettes is a violation of subsection B, which is a Class 2 misdemeanor; an offense that involves 3,000 packs of cigarettes or more is a violation of subsection C, which is a Class 6 felony.
Available circuit court data indicate that no charges have been filed for the following statutes since FY2008:

- § 3.2-4212(D,i)/ § 3.1-336.10(D,i)- Sell or distribute cigarettes not in directory, <3,000 and < 3,000 pkgs.
- § 3.2-4212(D,ii)/ § 3.1-336.10(D,ii)- Possess, import, etc., cigarettes not in directory, <3,000 and < 3,000 pkgs.
- § 3.2-4209.1- False information on any return by Tobacco manuf/importer.
- § 3.2-4219- False statement in record required by TSA.
- § 4.1-103.01(B)- Dealers fail to allow inspection of records.
- § 4.1-103.01(C)- Divulge information provided by tax commissioner.
- § 18.2-246.13 (E, F, G, H)- Fail to register before delivery of cigarettes; False statement filed, required before delivery of cigarettes; Fail to report cigarette delivery; False statement on report required after delivery of cigarettes.
- § 58.1-1006- Interfering with enforcement of cigarette excise tax.
- § 58.1-1007- Fail to keep records on purchase, sale of cigarettes (Excise Tax).
- § 58.1-1008.1- Manufacturer fails or refuses to file report with Tax Dept.; Manufacturer refuses audit or inspection of records by Tax Dept.
- § 58.1-1008.2- False statement in record required for cigarette tax.
- § 58.1-1010- Illegal sale of unstamped cigarettes by wholesale dealers.
- § 58.1-1011- False/fraudulent statement in application for stamping permit.
- § 58.1-1021- Fail to keep records on purchase, sale of cigarettes (Use Tax).
- § 58.1-1021.04:1- False/fraudulent statement in application for distributor's license.
- § 58.1-1034- Violation of reporting requirements.

Special note should be given to Va. Code § 58.1-1017.1, which went into effect on July 1, 2012. This statute, passed during the 2011 Regular Session of the Virginia General Assembly, was the first criminal statute passed by any state to specifically deal with inter-state trafficking.[33] Under the terms of the statute, it is a Class 2 misdemeanor for any person who is not an authorized holder to possess more than 5,000 tax stamped cigarettes (25 cartons) with the intent to distribute them.[34] A second or subsequent offense is a Class 1 misdemeanor. Because this new criminal offense has been in effect for less than six months, the VCSC did not have any meaningful data on its use by law enforcement or prosecutors. Newspaper accounts have indicated that the statute has led to some arrests, however.[35]

The Virginia Department of Taxation audits cigarette wholesalers to ensure all required forms have been accurately completed and all required invoices are kept as required by law,[36] and also conducts site inspections at retailers who are known to sell cigarettes.[37] They reported that no wholesaler licenses have been revoked in the past two years. They have conducted over 1,400 retail site inspections since 2010. In the past three

years, approximately 100 warning letters were issued to retailers, notifying them that irregularities, illegal cigarettes, or un-taxed cigarettes were found on their business premises. In the past two years, the Department has issued 201 assessments for cigarette related violations, and collected $112,500 in penalties as a result.

The Northern Virginia Cigarette Tax Board, which is responsible for ensuring the payment of cigarette excise taxes in 17 jurisdictions in northern Virginia which have local taxes in addition to the state excise tax, conducts inspections of retail establishments as part of its enforcement duties.[38] They reported that they perform approximately 3,000 inspections each year. Figure 3 below provides the number of cigarette packs seized during inspections for failing to have the proper tax stamps or other violations of the law.

Figure 3: Number of Cigarette Packs Seized by Northern Virginia Cigarette Tax Board, CY07-CY12

Calendar Year	Total Packs Seized*
2007	9,320
2008	7,936
2009	18,159
2010	25,568
2011	22,777
2012	12,989

Source: Northern Virginia Cigarette Tax Board.
**Numbers are approximate.*

Law enforcement in Maryland routinely attempts to identify and stop suspected cigarette traffickers as they travel northwards on Interstate 95, leaving Virginia. The Comptroller of Maryland Field Enforcement Division was contacted for data on the quantity of cigarettes, originating in Virginia, that had been seized during the past five fiscal years, as well as the number of individuals who had been convicted, in Maryland, of felonious transportation of contraband cigarettes, as illustrated in Figure 4 below. These figures give additional evidence of the increasing volume of cigarettes that come from Virginia and are destined for illegal sales up north.

Figure 4: Data for Possession & Transportation of Va. Stamped Cigarettes into Maryland

Fiscal Year	Arrests	Packs	Value	Tax Loss	Convicted	Not Convicted
2008	13	43,612	$ 214,722.24	$ 83,014.00	6	7
2009	39	161,420	$ 821,442.57	$317,319.00	22	15
2010	23	64,605	$ 485,995.95	$ 145,680.97	9	11
2011	47	177,332	$ 1,028,097.76	$ 354,845.82	32	15

2012	109	315,936	$ 1,899,541.64	$631,832.00	53	56
Totals	**231**	**762,905**	**$4,449,800.16**	**$ 1,532,691.79**	**122***	**104***

*Source: Comptroller of Maryland- Field Enforcement Division. * The figures only identify individuals charged with the felony charge of "transporting contraband cigarettes in the State of Maryland," and not those charged with misdemeanor possession.*

Beneficiaries of Cigarette Trafficking

While anyone who engages in cigarette trafficking is, by definition, a criminal, the recent trends in this area of crime are troubling. Reports by law enforcement, at the local, state, and federal levels, have indicated that organized crime is moving into this field, seeing it as an excellent way to both generate profits and re-invest money they have made in other illegal ventures. An agent with the Virginia State Police reported that illegally trafficked cigarettes now have a higher profit margin than cocaine, heroin, marijuana, or guns, making them an irresistible lure for organized gangs. This general observation about the "street value" of black market cigarettes has also been noted by federal law enforcement in interviews.[39] In a number of instances, criminals have been willing to exchange drugs for cartons of cigarettes.[40]

Further demonstrating the nexus that has started to arise between cigarette trafficking and other criminal conspiracies, the Virginia State Police's Criminal Interdiction and Counter-terrorism Unit reported that from January to October of 2012, approximately 1,941 cartons of cigarettes were seized, along with $226,360 in cash, during the course of normal drug interdiction efforts.

The most worrisome possibility, however, is that an international terrorist group will use cigarette trafficking in the United States as a source of revenue, or in a worst-case scenario, as a means to fund a future attack. The attraction of cigarette trafficking to terrorist organizations has already been documented in a number of publicized cases.[41] The most notorious was the Hezbollah cell that was uncovered in the middle of the 1990's in Operation Smokescreen, a large, inter-agency state and federal investigative operation. The cell was able to generate over eight million dollars in five years' time through cigarette trafficking, purchasing cigarettes in North Carolina and then transporting them for sale in Michigan; almost a quarter of that amount was pure profit, and over $100,000 is believed to have been funneled to Hezbollah overseas.[42] Another Hezbollah-linked ring in Dearborn, Michigan was discovered to be involved with cigarette trafficking in 2003, this time relying upon cigarettes purchased from the Seneca Nation of Indians' Cattaraugus reservation in up-state New York.[43] And, the "Lackawanna Seven" allegedly received funding in early 2001 from an individual named Aref Ahmed, so they could travel from Buffalo, New York, to Afghanistan, in order to attend an al Qaeda training camp. Ahmed had received some of those funds through cigarette trafficking.[44]

While the involvement of terrorist groups with cigarette trafficking should not be over-stated,[45] the serious dangers posed by these groups to the United States must be taken into consideration when assessing how grave a problem this area of crime can create.

Tax Stamp and Information Technology

The tax stamp that Virginia requires to be placed on all packs of cigarettes sold in the Commonwealth has a number of security features; counterfeit stamps can be detected in a number of ways, such as through visual inspection, tracing the serial number on the stamp back to the wholesaler to determine if it is plausible an individual pack ended up where it has been located; use of an ultraviolet light indicator; and other means.[46] Tax stamps with higher security features, and digital encoding, exist, and could possibly be provided by several well-recognized national vendors, such as Authentix or SICPA.

Digital stamps, in particular, have the ability to provide detailed tracking data for each pack of cigarettes. However, there is a cost to the use of high-tech tax stamps, and most of the information which digital stamps could provide can currently be obtained through other means, albeit with more effort on the part of investigators or law enforcement. Also, while the more advanced tax stamps are purportedly more difficult to counterfeit, they can still be copied by expert forgers.[47]

As all available data suggests that Virginia is a source state for trafficked cigarettes, and not a destination state, the switch to a more high-tech or digital tax stamp would probably not have a significant impact on Virginia's revenues. Additionally, the benefits of a better, but more expensive technology, in combatting cigarette trafficking would not be realized, if law enforcement efforts were not simultaneously increased in investigating these criminal operations.

In 2011, the Virginia Tax Commissioner convened a working group, consisting of representatives from the Virginia Wholesalers and Distributors Association, the Virginia Retail Merchants Association, the Retail Alliance, the Virginia Petroleum, Convenience and Grocery Association, the Northern Virginia Cigarette Tax Board, and others.[48] Among the topics considered by the working group was the feasibility and desirability of changing Virginia's current cigarette tax stamps by upgrading to a more "modern" stamp. No consensus was reached on this issue.[49]

While no unanimous opinion exists for the policy decision of whether or not Virginia should switch to a digital cigarette tax stamp, there is a general consensus that Virginia's current reporting requirements for manufacturers and wholesalers could be improved through technology. Cigarette manufacturers and wholesalers are mandated to file periodic reports with the Virginia Department of Taxation, and in the case of wholesalers who are stamping agents, with the Office of the Attorney General of Virginia.[50] These reports are generated in paper format, and are sent via the mail. It has been suggested that allowing manufacturers and wholesalers to complete and transmit these reports electronically would save both private entities and the Commonwealth time and effort, and could lead to more information being collected, more efficiently, in the future.

Although Virginia does not presently have the capability to receive these reports electronically, suitable computer programs could be implemented in the near future. Similarly, the payments sent by wholesaler stamping agents for their cigarette tax

stamps could one day be handled electronically, which would expedite the receipt of revenues for the Commonwealth.

Statutory Options

All local and state law enforcement personnel involved with investigating cigarette trafficking who were contacted during this study reported that they were satisfied with Virginia's criminal statutes dealing with this area of crime, with two exceptions. There was wide-spread agreement that the current penalties under the cigarette "smurfing" statute, Va. Code § 58.1-1017.1, are too low to provide any real deterrent to cigarette trafficking in Virginia.[51] It was also suggested that Virginia's penalties for possession of unstamped cigarettes, in violation of Va. Code § 58.1-1017, could be increased, and the threshold amounts needed to make a violation of the statute a felony could be lowered.[52]

Based upon information gathered from individuals contacted during the course of the study, and a review of the relevant portions of the Code of Virginia, the following statutory options were identified as means by which cigarette trafficking could be more effectively combated in the Commonwealth.

The penalties for possession of stamped cigarettes with the intent to unlawfully distribute them, in violation of Va. Code § 58.1-1017.1, could be increased, as noted above. The current penalty of a Class 2 misdemeanor could be increased to a Class 1 misdemeanor, and the penalty for a second or subsequent offense could be increased from a Class 1 misdemeanor to a Class 6 felony. In addition, when very large quantities of cigarettes are involved, a first offense could be made a felony, automatically. An extra benefit for law enforcement if a felony offense is created under Va. Code § 58.1-1017.1 is that conspiracies to traffic stamped cigarettes could be charged and prosecuted. At the current time, there is no ability to prosecute cigarette traffickers for conspiring to violate Va. Code § 58.1-1017.1, at least for a first offense, as there is no general crime of conspiracy for misdemeanor offenses in Virginia.[53]

Similarly, the penalties for possession of unstamped cigarettes with the intent to evade taxes, in violation of Va. Code § 58.1-1017, could be increased. The current penalty of a Class 2 misdemeanor could be increased to a Class 1 misdemeanor, and heightened penalties could be created for second or subsequent offenses. The existing felony threshold level in Va. Code § 58.1-1017 of 3,000 packs of cigarettes could be lowered, making it easier to obtain a felony charge under the statute.

The possession of unstamped cigarettes in violation of Va. Code § 58.1-1017 is currently a qualifying offense under Virginia's RICO statute.[54] When the new crime of possession of stamped cigarettes with the intent to distribute them was created under Va. Code § 58.1-1017.1, it was not included in the RICO statute. This oversight could be remedied, and the trafficking of stamped cigarettes could also be made a RICO offense.

Under existing law, all "fixtures, equipment, materials and personal property" used in substantial connection with the sale or possession of counterfeit cigarettes, which includes cigarettes that bear a counterfeit tax stamp, is subject to forfeiture.[55] Allowing

for the forfeiture of property that is used in substantial connection with cigarette tax evasion, as well as with counterfeit cigarettes, could provide an additional tool by which law enforcement could go after the profits and property of cigarette traffickers.

Localities currently have the authority, given to them by the Virginia legislature, to create misdemeanor ordinances for the purpose of enforcing the collection of local cigarette excise taxes.[56] Allowing localities to create misdemeanor ordinances against cigarette traffickers in general might provide an incentive for local police to vigilantly patrol for cigarette smurfing in local jurisdictions.

Virginia has a specific statute targeting the possession or sale of counterfeit cigarettes, but the penalties are entirely civil, i.e., it is not a criminal statute.[57] A criminal penalty could be added for people who knowingly possess or sell counterfeit cigarettes.[58] This could be seen as especially appropriate, considering the grave health implications that are presented by counterfeit cigarettes, due to their frequently dangerous levels of contaminants.

As previously noted, tobacco manufacturers and wholesalers are required to file periodic reports with the Office of the Attorney General of Virginia and the Virginia Department of Taxation.[59] Currently, these reports are generated in paper format, and in some cases, are even filled out by hand. They are then sent by regular mail to the requisite agency. While the relevant statutes are silent as to how the forms are to be submitted, and therefore there is nothing statutorily that would prohibit these forms being sent electronically, the Virginia legislature could specifically authorize the electronic filing of these reports, if both the agency and the manufacturer or wholesaler wished to avail themselves of such an option. Similarly, the Virginia legislature could authorize electronic payments for cigarette tax stamps, provided both the Virginia Department of Taxation and the individual wholesaler were in agreement.

Additional Policy Options

In addition to the possible statutory options detailed above, there are a number of general policy options that Virginia could implement that would assist in deterring cigarette trafficking in the state. As a general matter, Virginia law enforcement should be encouraged to increase its efforts in enforcing Virginia's law pertaining to cigarettes, and vigilantly seek to detect, deter and arrest cigarette traffickers, at all levels of distribution. To assist this effort, additional resources could be provided to law enforcement to allow them greater ability to focus specifically on this area of crime.

Training should be provided to law enforcement, both to educate on the seriousness of what might mistakenly be thought of as a "victimless" crime, and to help individual officers recognize the signs of trafficking and the specific methods used. The Virginia Department of Criminal Justice Services (DCJS) could help coordinate training for both new and veteran law enforcement officers. As an additional training measure, a specialized conference could be organized in Virginia, with local, state and federal law enforcement participating. Other key stakeholders interested in combatting cigarette

trafficking could be invited, including representatives from the wholesalers, retail merchants, manufacturers, the Virginia Department of Taxation, the Northern Virginia Cigarette Tax Board, Commonwealth's Attorneys, and the Office of the Attorney General of Virginia.

To assist in the gathering of data, which is a crucial part of conducting law enforcement investigations, the Virginia State Police should consider developing an information sharing system, accessible only to law enforcement, that would help various state, local, and perhaps federal law enforcement agencies collate and review criminal intelligence information about cigarette trafficking gangs. Such a system could also help ensure that one law enforcement agency did not accidentally interfere with another agency's ongoing investigation. And, to provide information on which retail businesses in Virginia actually sell tobacco products, the Virginia Department of Taxation could consider establishing a process whereby this information is collected, perhaps as a self-reporting requirement for all sales tax accounts. Knowing which retailers are in the business of selling tobacco products would greatly assist the Department of Taxation, and law enforcement, in conducting retail store site inspections for signs of tax evasion or cigarette trafficking.

Conclusion

The Crime Commission reviewed the information on cigarette trafficking in Virginia, and recognized its seriousness as a growing area of crime. As a result of the study effort, the Crime Commission endorsed the following legislative recommendations at its December 5, 2012, meeting:

Recommendation 1: Amend Va. Code § 58.1-1017.1 for the possession of stamped cigarettes with the intent to distribute by raising the current penalty from a Class 2 misdemeanor to a Class 1 misdemeanor, and making the Class 1 misdemeanor for a second or subsequent offense a Class 6 felony.

Recommendation 2: Amend Va. Code § 58.1-1017.1 for the possession of stamped cigarettes with the intent to distribute by making a first offense that involves more than 500 cartons of cigarettes a Class 6 felony, and making the Class 6 felony for a second or subsequent offense a Class 5 felony.

Senator Janet Howell introduced Senate Bill 1017 and Delegate Todd Gilbert introduced House Bill 1783 during the Regular Session of the 2013 Virginia General Assembly, based on these two Crime Commission recommendations. Both of these identical bills were passed by the Virginia Senate and the Virginia House of Delegates as introduced, and signed by the Governor.[60]

Recommendation 3: Amend Va. Code § 58.1-1017 for the possession of unstamped cigarettes with the intent to evade taxes by making the existing Class 2 misdemeanor a Class 1 misdemeanor, and making a second or subsequent offense a Class 6 felony; and by making a second or subsequent offense of the existing Class 6 felony a Class 5 felony.

Recommendation 4: Amend Va. Code § 58.1-1017 for the possession of unstamped cigarettes to evade taxes by lowering the current felony threshold amount from 3,000 packs (300 cartons of cigarettes) to 500 packs (50 cartons).

Senator Janet Howell introduced Senate Bill 1018 during the Regular Session of the 2013 Virginia General Assembly, based on these two Crime Commission recommendations. The bill was amended in the House Appropriations Committee to only include Recommendation 4—lowering the felony threshold amount for Va. Code § 58.1-1017. This amended bill was passed by the Virginia Senate and the Virginia House of Delegates, and signed by the Governor.[61]

Delegate Onzlee Ware introduced House Bill 1820, based on Recommendation 4, and House Bill 1822, based on Recommendation 3, during the Regular Session of the 2013 Virginia General Assembly. House Bill 1820 was amended in the Senate Courts of Justice Committee to also include Recommendation 3—increasing the existing penalties for Va. Code § 58.1-1017. This amended bill was passed by the Virginia Senate and the Virginia House of Delegates, and signed by the Governor.[62] House Bill 1822 was left in the House Courts of Justice Committee.

Recommendation 5: Amend Va. Code § 18.2-513 by including Va. Code§ 58.1-1017.1 in Virginia's RICO statute.

Senator Janet Howell introduced Senate Bill 1020 and Delegate Todd Gilbert introduced House Bill 1780 during the Regular Session of the 2013 Virginia General Assembly, based on this Crime Commission recommendation. Senate Bill 1020 was passed by the Virginia Senate and the Virginia House of Delegates as introduced, and signed by the Governor.[63] House Bill 1780 was left in the House Courts of Justice Committee.

Recommendation 6: Amend Va. Code § 19.2-386.21 by allowing for the forfeiture of property used in connection with cigarette trafficking.

Senator Janet Howell introduced Senate Bill 1022 during the Regular Session of the 2013 Virginia General Assembly, based on this Crime Commission recommendation. Senate Bill 1022 was passed by the Virginia Senate and the Virginia House of Delegates as introduced, and signed by the Governor.[64]

Recommendation 7: Amend Va. Code § 18.2-246.14 by making the distribution, or possession with the intent to distribute, counterfeit cigarettes a Class 1 misdemeanor, for quantities of less than 10 packs. Quantities of 10 packs or more would be a Class 6 felony, and a second or subsequent violation of the statute, after a previous conviction, would also be Class 6 felony, regardless of the number of counterfeit packs involved.

Senator Janet Howell introduced Senate Bill 1019 and Delegate Charniele Herring introduced House Bill 2056 during the Regular Session of the 2013 Virginia General Assembly, based on this Crime Commission recommendation. Senate Bill 1019 was passed by the Virginia Senate and the Virginia House of Delegates as introduced, and signed by the Governor.[65] House Bill 2056 was left in the House Courts of Justice Committee.

Recommendation 8: Wholesalers and manufacturers should be permitted, but not required, to file their mandatory reports electronically, provided the receiving agency chooses to allow this as an option. Cigarette wholesalers who are stamping agents should be permitted, but not required, to submit their payments electronically, provided the Virginia Department of Taxation chooses to allow this as an option.

Policy Recommendation 1: Increase efforts to combat cigarette trafficking in the Commonwealth, including through allocation of additional resources to agencies that are responsible for investigating this area of crime.

Policy Recommendation 2: Ensure that law enforcement receives adequate training on the subject of cigarette trafficking. A formal letter was sent to DCJS, recommending that they help to coordinate this training.

Policy Recommendation 3: Encourage the Virginia State Police to consider developing an information sharing system, accessible only to law enforcement that would allow for the collection of raw data and criminal intelligence on cigarette trafficking. A formal letter was sent to the Virginia State Police, inquiring if the general proposal to develop a law enforcement information sharing system focused on cigarette trafficking is feasible.

Acknowledgements

The Virginia State Crime Commission extends its appreciation to the following agencies and organizations for their assistance and cooperation on this study:

Altria/ Philip Morris USA

Bureau of Alcohol, Tobacco, Firearms and Explosives (ATF)

Lorillard

Maryland Comptroller's Office

McLane

Northern Virginia Cigarette Tax Board

Office of the Attorney General of Virginia- Tobacco Enforcement Unit

S&M Brands

SICPA

The Smith Group

Virginia Criminal Sentencing Commission

Virginia Department of Taxation

Virginia Retail Merchants Associations

Virginia State Police

Virginia Wholesalers and Distributors Association

---

[1] S.J.R. 21, 2012 Gen. Assemb., Reg. Sess. (Va. 2012).
[2] Id.
[3] U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-11-313, ILLICIT TOBACCO: VARIOUS SCHEMES ARE USED TO EVADE TAXES AND FEES (2011).
[4] Id. at p. 14.
[5] Figures below are derived by simple multiplication: 10 times the state excise tax rate for a carton of cigarettes, and 600 times (10 times 60) the state excise rate for a case of cigarettes.
[6] *See generally* Nic Turiciano, *What Does a Pack of Cigarettes Cost in Each State Now?* THE AWL (June 26, 2012), http://www.theawl.com/2012/06/pack-of-cigarettes-cost; Amber Sutherland, Kevin Fasick & Jennifer Fermino, *Smokers huff & puff over new cigarette tax*, NEW YORK POST (July 3, 2010, 6:37 AM), http://www.nypost.com/p/news/local/these_packs_cost_LGzOpJq8Ght1i9Q2yAZBXM (indicating that in New York City, premium packs can now cost $14.50 or more in some stores).
[7] Press release, ATF Fact Sheet, *ATF Tobacco Diversion* (March 2011), http://www.atf.gov/publications/factsheets/factsheet-tobacco-diversion.html.
[8] GAO-11-313, *supra* at note 3, p.15.
[9] The individual purchasers are referred to as smurfs; this terminology is also used in methamphetamine manufacturing operations, where the head of an operation pays underlings to travel from pharmacy to pharmacy throughout the day, buying packages of pseudoephedrine or other pre-cursor chemicals.
[10] For example, in one law enforcement investigation, it was revealed that a fraudulent retail operation had purchased $290,000 dollars' worth of cigarettes from a wholesaler in Virginia. The Virginia Department of Taxation received no sales tax for any of these cigarettes, which were illegally shipped to Rhode Island. The estimated loss in tax revenue to Virginia was $14,500. In a currently on-going investigation, it is estimated that a separate fraudulent retail operation has purchased over three million dollars' worth of cigarettes, without reporting any sales to the Virginia Department of Taxation.
[11] Due to the sensitivity of on-going investigations, specific locales are not mentioned in this report.
[12] Kurti, M.K., von Lampe, K., & Thompkins, C.E., The illegal cigarette market in a socioeconomically deprived inner-city area: The case of the South Bronx. *Tobacco Control*, (2012), published online in advance of print journal, DOI: 10.1136/tobaccocontrol-2011-050412.
[13] Davis, K.C., Farrelly, M.C., & Campbell, K., *Cigarette tax avoidance in five northeastern U.S. metropolitan areas, Final report*, prepared for Micaela Coady, Bureau of Tobacco Control, New York City Dept. of Health and Mental Hygiene (2012).
[14] Chernick, H., & Merriman, D., Using littered pack data to estimate cigarette tax avoidance in NYC. Unpublished manuscript (2011).

[15] Information presented by the Tobacco Task Force of the New York City Sheriff's Office, Effectively Combating I-95 Cigarette Trafficking Conference, August 16, 2012.
[16] State law requires that all cigarettes sold must carry a tax stamp on the package. VA. CODE ANN. § 58.1-1003 (2012). In addition, some localities also impose a local tax on cigarettes, and require cigarette packs to carry a local tax stamp. VA. CODE ANN. § 58.1-3832 (2012).
[17] Bill Estep, *Wholesaler pleads guilty in huge cigarette contraband case*, LEXINGTON HERALD-LEADER, May 15, 2010, http://www.kentucky.com/2010/05/15/1265441/wholesaler-pleads-guilty-in-huge.html (last visited Dec. 19, 2012).
[18] Id. Wells' criminal scheme in this instance provides a perfect illustration of how cigarette trafficking operations are carried out by wholesalers. Among the fees Wells failed to pay were the required escrow payments that tobacco manufacturers are required to make if they have not joined the Master Settlement Agreement, negotiated between the major tobacco manufacturers and 46 states, including New York and Virginia, in 1998. It should be noted that MSA payments made by the participating tobacco manufacturers represent a significant source of revenue for states; Virginia annually receives around $115 million per year.
[19] Press Release, Attorney General of New York Eric T. Schneiderman, *A. G. Scheiderman Secures Jail Time for Tobacco Wholesaler Who Evaded Over $700,000 in Taxes* (April 12, 2012), http://www.noodls.com/viewNoodl/13917626/new-york-state-office-of-the-attorney-general/ag-schneiderman-secures-jail-time-for-tobacco-wholesaler-w (last visited on Dec. 19, 2012).
[20] Id.
[21] Press Release, Timothy J. Heaphy, United States Attorney Western District of Virginia, *Three Sentenced on Cigarette Trafficking Charges* (October 18, 2012), http://www.atf.gov/press/releases/2012/10/101812-wash-three-sentenced-on-cigarette-trafficking-charges.html.
[22] Id.
[23] GAO-11-313, *supra* at note 3, p.17.
[24] Joossens, L., & Raw, M., From cigarette smuggling to illicit tobacco trade. *Tobacco Control*, 21(2), 230-234 (2012), doi:10.1136/tobacconcontrol-2011-050205.
[25] Shen, A., Antonopoulos, G. A., & Von Lampe, K., 'The dragon breathes smoke': Cigarette counterfeiting in the People's Republic of China. *British Journal of Criminology,* 50(2), 239-258 (2010), p. 245.
[26] Press release, ATF Fact Sheet, *ATF Tobacco Diversion* (March 2011), p. 2-3, http://www.atf.gov/publications/factsheets/factsheet-tobacco-diversion.html.
[27] Pappas, R.S. et al., Cadmium, lead, and thallium in smoke particulate from counterfeit cigarettes compared to authentic US brands, *Food and Chemical Toxicology*, 45, 202-209 (2007), http://www.thecre.com/ccsf/?p=81. A similar study that examined counterfeit cigarettes found in the United Kingdom also found elevated levels of heavy metals compared to the amounts found in genuine cigarettes. Stephens, W. E., Calder, A., & Newton, J., Source and health implications of high toxic metal concentrations in illicit tobacco products, *Environmental Science & Technology,* 39(2), 479-488 (2005), http://www.thecre.com/ccsf/?p=78.
[28] Swamia, K., Judda, C.D., & Orsinia, J., Trace metals analysis of legal and counterfeit tobacco samples using inductively coupled plasma mass spectrometry and cold vapor atomic absorption spectrometry, *Spectroscopy Letters*, 42, 479-490 (2009), http://www.thecre.com/ccsf/?p=85.
[29] Aitken, C. K., Smokers of illicit tobacco report significantly worse health than other smokers, *Nicotine & Tobacco Research*, 11(8), 996-1001 (2009), http://www.thecre.com/ccsf/?p=7.
[30] For example, in February of 2012, a number of arrests were made in Brooklyn, New York, stemming from a criminal operation that involved the attempted purchase of untaxed cigarettes from Virginia, along with 10,800 counterfeit Virginia tax stamps that were to be affixed to those cigarette packs. The cigarettes and the counterfeit stamps were all intended for the New York market. Press Release, Charles J. Hynes, District Attorney for Kings County, New York, *Kings County District Attorney Charles J. Hynes Announces 23 Arrests for Distributing 550 Cases of Untaxed Cigarettes, Evading over $2 Million in City and State Taxes* (February 29, 2012), http://www.brooklynda.org/press_releases/2012/Press%20Releases%2002-12.htm.

[31] U. S. Dept. of the Treasury, Report to Congress on Federal Tobacco Receipts Lost Due to Illicit Trade and Recommendations for Increased Enforcement, February 4, 2010, p. 4, n. 1, citing IRS, State and Local Revenue Impacts from Untaxed Sales, June 25, 2002, http://www.ttb.gov/pdf/tobacco-receipts.pdf.

[32] Gary Fields, *States Go to War on Cigarette Smuggling*, WALL STREET JOURNAL, July 20, 2009, http://online.wsj.com/article/SB124804682785163691.html.

[33] While all states have statutes making it a crime for a person to import cigarettes for re-sale that do not bear a tax stamp, or have not had the cigarette excise tax paid on them, Virginia is the only state that has a statute that applies to cigarettes that have a correct tax stamp. The focus of Virginia's statute is not the loss of tax revenue to the state; it is an attempt to stop people who purchase large quantities of cigarettes for what would likely be trafficking purposes. The crime is committed, not when the trafficker crosses one of Virginia's borders into another state, but immediately upon his possession of more than 25 cartons, provided he also has the requisite intent to later distribute those cartons, and not retain them for personal consumption.

[34] An authorized holder is someone who is lawfully in the commercial business of either manufacturing or selling cigarettes, whether at the wholesale or retail level. VA. CODE ANN. § 58.1-1017.1 (2012). The statute, in other words, only applies to private individuals who possess large quantities of cigarettes and have the intent to distribute them.

[35] *See, e.g.,* Sarah Bloom, *4 arrested for cigarette trafficking in Chesterfield*, WWBT NBC12, Nov. 23, 2012, http://www.nbc12.com/story/20089956/cigarette-trafficking-bust-in-chesterfield-county.

[36] Wholesalers must make and retain true duplicate invoices which show the full and complete details of all of their sales and deliveries of cigarettes. VA. CODE ANN. § 58.1-1003(B) (2012). Wholesalers that have tax stamping authority must file a monthly report with the Virginia Department of Taxation that lists all brands of cigarettes, and the quantities, which have been affixed with a Virginia cigarette tax stamp. VA. CODE ANN. § 58.1-1003(C) (2012).

[37] Virginia does not require a special retail license for cigarettes; any merchant with a valid business license may sell cigarettes, which explains why cigarettes are sometimes seen for sale in unexpected retail establishments, such as dry cleaners, pet stores, etc. Also, Virginia does not have any official lists or records of retailers who sell cigarettes. Thus, the Virginia Department of Taxation is only able to audit those locations where it is known that cigarettes are sold.

[38] The Northern Virginia Cigarette Tax Board operates in Fairfax County, the cities of Alexandria, Fairfax, Falls Church, and Manassas, and the towns of Clifton, Dumfries, Haymarket, Hillsboro, Herndon, Leesburg, Lovettsville, Middleburg, Purcellville, Round Hill, Vienna, and Warrenton.

[39] "Cigarette smuggling is as lucrative or more lucrative that smuggling drugs or smuggling guns,' ATF agent Ashan Benedict, who has handled several smuggling cases in the area, says." Kris Van Cleave, *Only on 7: Undercover Maryland investigators close in on a suspected smuggler,* WJLA.COM, Nov. 9, 2012, http://www.wjla.com/articles/2012/11/only-on-7-undercover-maryland-investigators-close-in-on-a-suspected-smuggler--81899.html.

[40] "In Fairfax County, Va.,…suspects exchanged one kilogram of cocaine…in exchange for 3,000 cartons of cigarettes. 'They were willing to trade cocaine for cigarettes. That tells you about the profit margin they saw on the cigarettes,' said Edgar Domenech, who heads the ATF's Washington, D.C. field division." Fields, *supra* note 32.

[41] *See, e.g.*, REPUB. STAFF OF H. COMM. ON HOMELAND SECURITY, 110TH CONG., TOBACCO AND TERROR: HOW CIGARETTE SMUGGLING IS FUNDING OUR ENEMIES ABROAD, p. 6 (Comm. Print 2008).

[42] David E. Kaplan, *Homegrown terrorists: How a Hezbollah cell made millions in Sleepy Charlotte, N.C.,* U.S. NEWS AND WORLD REPORT, March 2, 2003, http://www.usnews.com/usnews/news/articles/030310/10hez.htm.

[43] REPUB. STAFF OF H. COMM. ON HOMELAND SECURITY, 110TH CONG., *supra* note 41.

[44] Id. at p. 6; *Final 'Buffalo Six' Member Pleads Guilty*, FOXNEWS.COM, May 19, 2003, http://www.foxnews.com/story/0,2933,87264,00.html.

[45] Klaus von Lampe, *The Illegal Cigarette Trade*, INTERNATIONAL CRIMINAL JUSTICE, p. 148, 150 (Mangai Natarajan ed., 2011).

[46] Only a cursory description of the security features of Virginia's cigarette tax stamps is provided in this report, in order to protect both proprietary features of the stamps, and to prevent the disclosure of techniques that law enforcement uses to determine if an individual stamp is counterfeit. It should be noted that the additional, local stamps required by certain localities within Virginia may be entirely different from the state stamp, and may or may not possess the same security features.
[47] According to ATF agents contacted during this study, within just a few months of California switching to a new, improved digital tax stamp in 2011, counterfeit versions of the stamp were discovered in the state. The same thing happened in California back in 2005, when a new, improved tax stamp was introduced. *See, e.g.*, Press Release, John Chiang, Chairman, California State Board of Equalization, *Five Arrested for Selling Counterfeit Cigarettes and Tax Stamps*, October 21, 2005, http://www.boe.ca.gov/news/pdf/71-C.pdf.
[48] 2011 Va. Acts chs. 293, 366.
[49] VA. DEPT. OF TAXATION, STUDY ON LOCAL CIGARETTE TAX ENFORCEMENT POLICIES, Section III (Appendix V) (Oct. 1, 2011).
[50] VA. CODE ANN. §§ 3.2-4209, 58.1-1003, 58.1-1008, 58.1-1008.1, 58.1-1021.02:1 (2012).
[51] The current penalties are a Class 2 misdemeanor for a first offense, and a Class 1 misdemeanor for a second or subsequent offense. VA. CODE ANN. § 58.1-1017.1 (2012).
[52] There is no felony violation unless 3,000 or more packages of cigarettes are sold, purchased, transported, received or possessed. VA. CODE ANN. § 58.1-1017(C) (2012).
[53] Wright v. Commonwealth, 224 Va. 502, 506 (1982). The legislature has created several misdemeanor conspiracy offenses for certain specific crimes, such as trespass, pursuant to Va. Code § 18.2-23. However, in the absence of a specific statute, it is not possible to be charged with conspiracy to commit a misdemeanor.
[54] VA. CODE ANN. § 18.2-513 (2012).
[55] VA. CODE ANN. § 19.2-386.21 (2012).
[56] VA. CODE ANN. § 58.1-3832 (2012).
[57] VA. CODE ANN. § 18.2-246.14 (2012).
[58] Arguably, in some circumstances, the possession of counterfeit cigarettes might already be a violation of Virginia law. VA. CODE ANN. § 59.1-92.13 (2012) (knowing violations of Virginia's trademark statue is a Class 1 misdemeanor; possession of 100 or more identical counterfeit registered marks is a Class 6 felony).
[59] *See* note 50, *supra.*
[60] 2013 Va. Acts chs. 623, 567.
[61] 2013 Va. Acts ch. 624.
[62] 2013 Va. Acts ch. 570.
[63] 2013 Va. Acts ch. 626.
[64] 2013 Va. Acts ch. 627.
[65] 2013 Va. Acts ch. 625.

Law Enforcement Training Academies

Executive Summary

In 2012, the Virginia Department of Criminal Justice Services (DCJS) requested the Crime Commission to conduct a study of the regional criminal justice academy concept, as well as other academy models, to help determine whether Virginia's current model is the best approach or if other models would provide a more effective and efficient training environment. Due to the large scope of training offered by criminal justice training academies, the current study focused solely on law enforcement officer training provided by regional criminal justice academies and independent training academies.

Crime Commission staff utilized several methodologies to assess the issue, including examining relevant literature, meeting with key stakeholders, and creating an informal work group. Staff also disseminated four distinct, comprehensive surveys to all regional and independent law enforcement training academy directors, regional criminal justice academy member agencies and the Peace Officer Standards and Training (P.O.S.T.) directors of other states.

There are two basic types of law enforcement academy models in Virginia: regional criminal justice academies and independent academies. There are potential advantages and disadvantages for both types of academies. A review of relevant literature and data revealed that the fiscal stability of regional criminal justice academies has been an ongoing concern. The two primary factors leading to such instability are changes in academy membership and the reduction in state funding via general funds.

An informal work group with various representatives was created to discuss the issue and to assist in developing a comprehensive survey for all law enforcement academy directors and regional academy member agencies. The academy director surveys focused on a number of key issues related to law enforcement training, including academy/agency background, academy instructors, and resource sharing, as well as basic, field, and in-service training for law enforcement officers. The survey also examined the total number of officers served, retention rates, record keeping concerns, liability involvement, and overall concerns related to the delivery of law enforcement training across the state. The survey for regional academy member agencies focused on agency background, membership fees, membership changes and overall satisfaction with their respective regional academy. Similar to the academy director surveys, member agencies were also asked about academy instructors and other in-kind contributions, field and in-service training, record keeping, liability involvement, and overall concerns related to the delivery of law enforcement training across the state.

The final survey was disseminated to the P.O.S.T. directors of the other 49 states, and focused on the total number of law enforcement officers served within each state,

compulsory minimum training standards required by statute for basic, field and in-service training, an overview of their academy model for delivering law enforcement training, and a description of their record management system for law enforcement training records. Findings indicate many different model options for delivering mandated criminal justice officer training across the United States.

The Crime Commission reviewed study findings at its October 2, 2012, and November 13, 2012, meetings and directed staff to draft legislation for several key issues. As a result of the study effort, the Crime Commission endorsed the following legislative recommendations at its December 5, 2012, meeting:

Recommendation 1: Amend Va. Code § 2.2-4002 by providing an exemption from the Administrative Process Act for DCJS when developing, issuing or revising any training standards established by the Criminal Justice Services Board (CJSB) under § 9.1-102.

Recommendation 2: Amend Va. Code § 2.2-2618 to require the Commonwealth's Attorneys' Services Council (CASC) to provide annual legal update materials to law enforcement agencies, training academies, and DCJS.

Recommendation 3: Amend Va. Code § 9.1-102 to require (i) each certified criminal justice training academy to submit an annual report evaluating how the academy is meeting its performance and training objectives and its current and projected operating budgets, with each report being provided to the Chairs of the Senate Finance and House Appropriations Committees, the Criminal Justice Services Board, and the Virginia State Crime Commission; and, (ii) DCJS to provide each academy with an annual evaluation based on the academy's own annual report, as well as internal audits, field visits and other relevant information.

Recommendation 4: Amend Va. Code § 9.1-102 to allow DCJS to provide direct assistance to any certified criminal justice training academy that is not meeting established minimum standards or performance objectives, including assisting with staffing needs and management of the daily operations of the academy.

Recommendation 5: Amend Va. Code § 15.2-1705 related to minimum qualifications of law enforcement officers and § 15.2-1707 to expand the grounds for decertification to now include law enforcement officers who have been convicted of or pled guilty or no contest to a Class 1 misdemeanor involving moral turpitude or any offense that would be a Class 1 misdemeanor involving moral turpitude if committed in Virginia, or who have been convicted of any sex offense or domestic assault under the laws of the Commonwealth, another state, or the United States.

Recommendation 6: Amend Va. Code § 15.2-1707 to require law enforcement agencies to notify DCJS when an officer meets the qualifications for decertification.

In regards to policy recommendations, the Crime Commission endorsed the following:

Policy Recommendation 1: Request the Joint Legislative Audit and Review Commission (JLARC) to conduct a detailed cost-benefit analysis of Virginia's criminal justice training academies. The study would also include examining the feasibility of expanding available training options in collaboration or conjunction with institutions of higher education. A letter was sent to JLARC requesting that this study be conducted, however, due to a lack of staff, the study would not be completed in a timely manner.

Policy Recommendation 2: Consider amending Va. Code §§ 16.1-69.48:1, 17.1-275.1-4 and 17.1-275.7-9 to increase the fixed fee for court costs apportioned to regional criminal justice training academies.

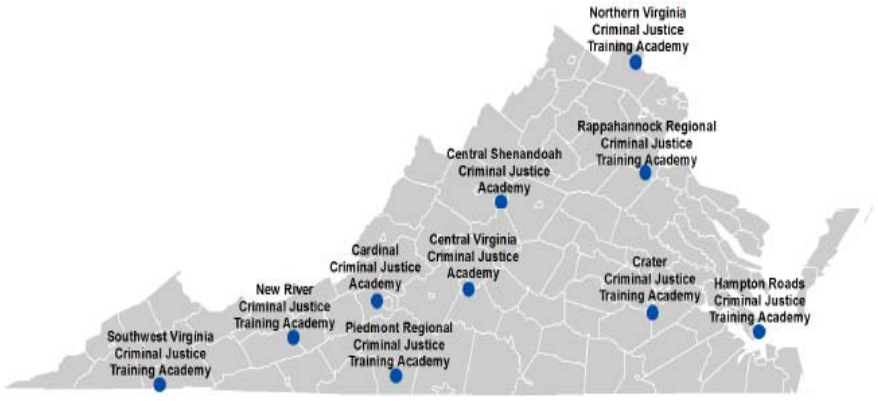
Background

Virginia has almost 20,000 certified law enforcement officers and 378 local, state, campus, and private law enforcement agencies. There are 38 certified criminal justice training academies in the state – 10 regional, 19 independent, and 9 other types of academies. [1] However, all Virginia law enforcement officers receive their training at either a regional criminal justice training academy ("regional academy") or an independent training academy.[2]

OVERVIEW OF REGIONAL ACADEMIES

Regional academies train recruits and officers for a specific geographic region of the state. Regional academies were established between 1965 and 1997 and serve anywhere from 12 to 65 member agencies. Currently, the regional system is divided into 10 distinct regions as illustrated in Figure 1 below. This was done in order to provide efficient delivery of mandated training to local criminal justice personnel.

Figure 1: Location of Regional Criminal Justice Training Academies



Source: Department of Criminal Justice Services, 2011.[3]

It should be noted that under 6VAC20-90-30, each regional academy must have a charter that creates an academy governing body, which specifies the composition, authority and functions of the academy governing body, selection criteria and duties of the regional academy director.

OVERVIEW OF INDEPENDENT ACADEMIES

Independent training academies include any "… state or local criminal justice agency which is not affiliated with a regional training academy and who serves as their own independent academy for training their own, and/or other authorized personnel…"[4] Independent academies were established as early as the 1950s to as recently as 2011. These academies are based at agencies that have anywhere from 39 to 2,000 officers. There are currently 19 independent criminal justice academies in Virginia that serve the following types of primary law enforcement agencies:

- 7 City Police Departments;
- 5 County Police Departments;
- 4 State Policing Agencies;
- 1 County Sheriff's Office;
- 1 Campus Police Department; and,
- Virginia State Police.

The geographic distribution of independent training academies serving primary law enforcement agencies includes nine in the Metro-Richmond area, five in the Hampton Roads area, two in northern Virginia, two in the Southwest region and one in the Eastern Shore. Specifically:

- Chesapeake Bay Bridge Tunnel Police Department
- Chesapeake Police Department
- Chesterfield County Police Department
- Division of Capitol Police
- Fairfax County Police Department
- Hampton Police Department
- Hanover County Sheriff's Office
- Henrico County Police Department
- Newport News Police Department
- Norfolk Police Department
- Prince William County Police Department
- Richmond Police Department
- Roanoke County Police Department
- Roanoke Police Department
- Virginia Department of Alcoholic Beverage Control
- Virginia Beach Police Department
- Virginia Commonwealth University Police Department
- Virginia Department of Game and Inland Fisheries
- Virginia State Police.[5]

ACADEMY MEMBERSHIP, CREATION, AND DECERTIFICATION

There are provisions in place that outline the process for changing academy membership, creating a new academy and for decertifying academies that do not meet certification standards established by the Virginia Code.

All local or political subdivisions may be permitted to (i) change to a different regional academy; (ii) change from an independent to a regional academy; or, (iii) change from a regional to an independent academy. Regional academies may also be permitted to merge with one another.

Provisions on the creation of new academies are provided in Virginia's Administrative Code, under 6VAC20-20-61. In order to create a certified academy, a state or local unit of government must demonstrate two components. First, they must show the inability to obtain adequate training from existing academies or show sufficient hardship rendering the use of other existing academies as impractical. Second, they must provide evidence for a sufficient number of officers to warrant the establishment of a full-time training function for a minimum of five years.

Finally, DCJS may suspend or revoke the certification of any training academy upon written notice pursuant to 6VAC20-20-61(G). Although no academies have been suspended or decertified in the past two years, there is some concern that any deficiencies need to be dealt with more efficiently.[6] As such, monthly audits by DCJS field representatives began almost two years ago. However, there arguably needs to be additional corrective measures available to DCJS that could be used prior to the suspension or decertification of an academy. Allowing DCJS to provide direct assistance to academies not meeting minimum training standards or performance objectives would help (i) avoid the possibility of academy decertification; (ii) ensure that officers are receiving the established minimum training; and, (iii) provide an efficient response to concerns in contrast to the current protocol, which can take months to bring an academy back into compliance. Related are concerns about successful academy recertification, which takes place every three years. Comprehensive annual self-assessments by academies are needed to readily identify and address any issues in order to ensure that each academy is on track for recertification. Likewise, annual evaluations by DCJS would provide early detection of any issues or deficiencies that can be addressed in order to ensure that each academy is on track for recertification. Recommendations related to DCJS assistance, annual academy self-assessments and annual evaluations were endorsed by the Crime Commission.

DCJS' 2011 FISCAL REVIEW OF REGIONAL ACADEMIES

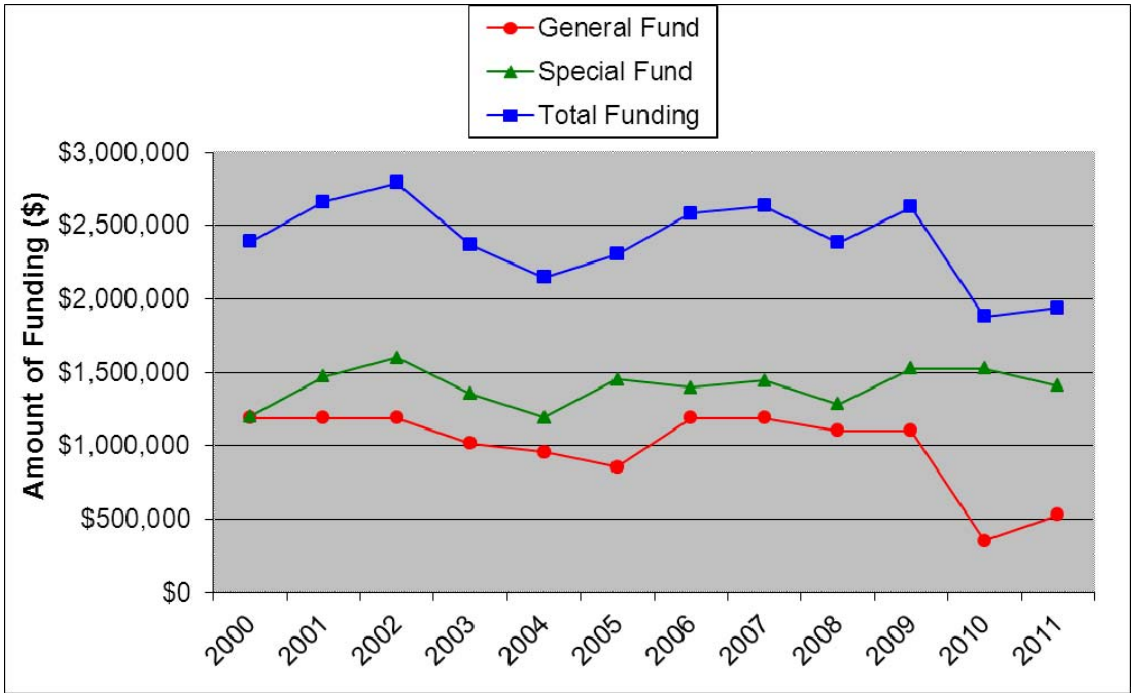
The Criminal Justice Services Board (CJSB) is the supervisory board of DCJS and is the approval body for policies related to criminal justice standards and training. The DCJS establishes policy, as well as compulsory minimum entry-level, in-service and advanced training standards for criminal justice officers, including law enforcement officers, correctional officers, jailors, court security/civil process officers, and dispatchers. Pursuant to the 2011 Appropriations Act, DCJS was asked to prepare a fiscal review of regional criminal justice training academies.[7]

Their 2011 report listed a number of pertinent findings.[8] First, the fiscal review revealed that regional academies are funded through various sources. The academies are funded primarily through fees paid for criminal justice officer training by the member criminal justice agencies. The secondary source is state funding and the balance of funding stems from other sources, such as grants, tuition and fees for special programs, pre-employment recruits, interest on accounts, and in-kind contributions from member agencies. They found that each regional academy has a unique financial situation and composition.

Two main factors were found to be currently affecting regional academy funding and revenues. The first factor is the reduction of state funding. State funding for regional academies comes from two sources: general funds and special funds based on a fixed fee attached to convictions for misdemeanors, felonies and traffic cases in district and circuit courts across the state.[9] The fixed fee special funding has remained fairly consistent since 2000, whereas general funds have decreased significantly.

Specifically, total state funds for regional academies have experienced a significant drop over the past 12 years, from $2.38 million in Fiscal Year (FY) 2000 to $1.93 million in FY2011. Again, as shown in Figure 2 below, the significant drop in funding is reflected in the total general funds allocated; the special funding has remained fairly consistent.

Figure 2: State Funding for Regional Academies by Source, FY2000-FY2011



Source: Chart created by VSCC staff; Figures drawn from 2000-2011 Appropriations Acts.

The second factor impacting regional academy revenue is the loss of member agencies. Whenever a member agency withdraws, that regional academy loses financial and in-kind support. [10] This is especially problematic when larger member agencies depart to form their own independent academies, which has been the trend. In 2000, primarily due to concerns relating to large agencies withdrawing from the regional academy system to create their own independent academies, a moratorium on the establishment of new academies was created under the Appropriations Act, Item 465, B1.b. to: "…not approve or provide funding for the establishment of any new criminal justice academy…" This moratorium is effective through June 30, 2014. However, subsequent Appropriations Acts have been used to *allow* for the establishment of four new independent academies in 2007, 2009, 2010, and 2011.[11] The funding shortage and withdrawal of member agencies has led regional academies to negotiate withdrawal fees from agencies that leave the academy, increase member agency training fees, maximize in-kind contributions from member agencies, offer training to non-member agencies, or over-rely upon existing/limited reserves.[12]

It should be noted that concerns related to the funding and membership instability of regional academies have existed since the 1980s.[13] Such concerns continue to exist. While DCJS noted that most regional academies are currently meeting their training mission, they warned that if member agencies continue to leave regional academies, there may be too much additional pressure on the remaining agencies to provide the revenue to maintain the academy as a viable training entity, especially if state funds continue to diminish.

In March 2012, DCJS requested the Crime Commission conduct a study of the regional academy concept, as well as other academy models, to help determine whether Virginia's current model is the best approach or if other models would provide a more effective and efficient training environment. Due to the large scope of criminal justice officer training, the Crime Commission study focused solely on law enforcement academy training.

Study Findings

In order to examine this issue, staff completed a number of activities, including a review of relevant literature, meetings with key stakeholders and an informal work group, as well as comprehensive surveys to all law enforcement academy directors, regional academy member agencies and the P.O.S.T. directors of all other states.[14]

INFORMAL WORK GROUP

In order for Crime Commission staff to obtain a full understanding of the issues surrounding law enforcement academies and training, staff requested assistance from key stakeholders to discuss and assist in the development of comprehensive surveys for all academy directors and regional academy member agencies. Staff invited representatives from the following agencies and organizations to participate:

- Regional and independent academy directors;
- Chiefs of Police and Sheriffs that serve as primary law enforcement;
- Virginia Association of Chiefs of Police;
- Virginia Department of Criminal Justice Services; and,
- Virginia Sheriff's Association.

ACADEMY DIRECTOR SURVEYS

Staff disseminated surveys to all directors of regional and independent training academies.[15] All (10 of 10) regional academy directors and 95% (18 of 19) of independent academy directors responded to the survey, providing an extremely high response rate. The surveys addressed a number of key issues that will be discussed below.

Academy Accommodations and Accreditation Status

Academies can be commuter-based, residential, or both. Sixty percent (6 of 10) of regional academies are commuter-based, with the other 40% (4 of 10) being both commuter and residential or having dorms available if needed. Most of the independent academies, 83% (15 of 18) are commuter-based, with only 17% (3 of 18) being residential. The resources available to academies vary widely in regards to educational equipment (e.g., computer labs, laptops, classroom AV equipment), weapons training (e.g., outdoor/indoor firearms ranges, firearms training simulators), physical training (e.g., weight rooms, gymnasiums, obstacle courses, swimming pools), driving training (e.g., driving training facilities or tracks, driving simulators), as well as other resources including courtrooms, mock courtrooms or facilities for advanced tactical training.

Most academies have additional satellite locations for training. Seventy percent (7 of 10) of regional academies and 72% (13 of 18) of independent academies have additional satellite locations for training. The majority of training provided at satellite facilities is for in-service and advanced/specialized training.

Criminal justice training academies can be accredited by the Commission on Accreditation for Law Enforcement Agencies (CALEA). Accreditation can be beneficial in that it provides a uniform set of written directives based on national best practices. Accreditation can also limit an agency's liability and risk exposure. It should be noted that accreditation can be very costly, and even though many law enforcement academies, let alone *agencies*, are not accredited, many will base their policies on such accredited standards and best practices. As of October 2012, 10% (1 of 10) of regional academies and 39% (7 of 18) of responding independent academies were accredited by CALEA.

Academy Instructors

Academy instructors are a vital component of law enforcement training. Any mandated training must be carried out by a DCJS-certified instructor who is designated to instruct in at least one of several specific subject areas: general, firearms, defensive tactics,

driver, or speed measurement training. Compulsory minimum standards for instructors are set forth pursuant to 6VAC20-80-20.[16] For instance, instructors must meet minimum education and experience requirements. The DCJS requires that instructors have a high school diploma or GED and two years of experience; however, some agencies require an additional year of experience. Instructors must be recertified every three years pursuant to 6VAC20-80-30. Many officers will hold multiple instructor certifications. Across Virginia law enforcement agencies and academies, there were:

- 8,313 certified general instructors;
- 2,703 certified firearms instructors;
- 1,227 certified defensive tactics instructors;
- 804 certified driver training instructors; and,
- 431 certified speed measurement instructors.[17]

Regional academies rely on permanent academy staff, as well as instructors from member agencies. Survey findings indicate that 80% (8 of 10) of regional academies require member agencies to provide instructors or officers to assist with instructional activities. Independent academies rely primarily on officers within their agency who have other primary assignments. Both kinds of academies rely upon civilians and volunteers to assist with specialized instruction or instructional support. A number of academies cited some difficulties with assigning instructors to courses due to manpower shortages or scheduling conflicts; however, they said that most of these concerns were typically able to be managed. Other survey respondents expressed concern related to the consistency of training provided to recruits and officers with so many different instructors. To help address this issue, nearly all academies reported that they provide syllabi or lesson plans to instructors for *each* class or course.

All academies evaluate the performance of instructors. There are several methods of evaluation, including student evaluations, supervisor evaluations, peer evaluations, academy director/staff evaluations, DCJS field representative evaluations, or classroom cameras. The DCJS has a mechanism for decertifying instructors who do not meet certain standards. This revocation process is separate and distinct from individual officer decertification. In other words, an instructor can be decertified but still remain a certified law enforcement officer. Instructor certification can be revoked if the instructor:

- Falsifies any report, form or roster;
- Demonstrates instructional incompetence; and/or;
- Misuses his authority.[18]

Over the past two years, four instructors' certifications have been revoked. Such individuals cannot reapply for instructor certification for a period of three years.

Resource Sharing

As far as resource sharing, many academies indicated that they do, or would permit recruits and officers from other agencies to attend their basic and in-service training under special circumstances. Specifically, for *basic training*, 100% (10 of 10) of regional

academies indicated that they do or would under special circumstances and 63% (10 of 16)[19] of independent academies indicated that they do or would under special circumstances. More academies permit officers from other agencies to attend their *in-service* training. For in-service training, 100% (10 of 10) of regional academies and 89% (16 of 18) of independent academies indicated that they do or would permit outside students under special circumstances.

Many academies, and some member agencies, are willing to share their instructors with other academies. For instance, 60% (6 of 10) of regional academies will send their instructors to other academies or would under special circumstances; 78% (14 of 18) of independent academies will send their instructors to other independent or regional academies.

Pre- Employment and Academic Credit Programs

There are a couple of specific training options that should be mentioned. The first option is known as a pre-employment program. Pre-employment programs allow a recruit to independently complete basic law enforcement training at a regional academy and then be hired by a law enforcement agency at a later date.[20] Most, 70% (7 of 10), of regional academies offer such a program. These programs were established in the mid-1990s, and as recently as 2010. Survey findings indicate that at least 52 member agencies and four independent academy agencies have hired graduates from such programs.

The pre-employment model is often viewed as a "win-win" approach for many of the key stakeholders, as it is seen as a source of revenue for the regional academies and shifts the burden of training costs from member agencies to individual recruits. Veterans may also qualify to be reimbursed for the cost of such training under the Post-9/11 GI Bill.[21]

An additional option for basic law enforcement academies is to forge an agreement with a college or university that permits recruits to receive academic credit for completing their basic training program. This allows qualified recruits to complete credit towards an undergraduate degree simultaneously with earning law enforcement certification. Specifically, 70% (7 of 10) of regional academies and 56% (10 of 18) of independent academies have such agreements. These agreements are with all types of higher education institutions (both in- and out-of-state), including two year community colleges, four year colleges and universities, as well as private, for profit institutions.

It must be stressed that, in the Virginia model, no law enforcement training is provided by colleges or universities; whereas, in many other states, academies are actually *operated* by colleges and universities. Specifically, a study by the Bureau of Justice Statistics found that almost half of the academies across the nation are operated by academia.[22] This has been recognized as an option for Virginia to consider. For instance, a 2004 study by DCJS examined alternative training delivery methods for criminal justice officers, with specific attention placed upon utilizing the Virginia Community College System, to possibly reduce the cost of training.[23] They recommended that JLARC conduct an in-depth study to ascertain if this was a viable option. The Crime

Commission similarly endorsed this concept. This method of partial outsourcing could assist academies with instructor shortages and limited course offerings. This would also provide another way for recruits and officers to gain academic credit.

Virginia Law Enforcement Training

The CJSB is the approval authority for the training categories and hours of compulsory minimum training standards, whereas the Committee on Training (COT) of the CJSB is the approval authority for the performance outcomes, training objectives, criteria, and lesson plan guides that support performance outcomes.[24]

The compulsory minimum training standards for law enforcement officers in Virginia include:

- 480 hours of basic training hours;
- 100 hours of field training;
- 40 hours of in-service training every two years; and,
- Annual firearms qualifications.

The following subsections highlight some of the information captured for these law enforcement training components.

Basic Law Enforcement Training

As seen in Figure 3 below, all academies significantly exceed the 480 hour compulsory minimum training standard required for basic training. Independent academies have slightly higher training hours/length, which is to be expected, due to their providing additional agency-specific training within their basic training.

Figure 3: Comparison of Basic Academy Training Between Regional and Independent Academies

Basic Training Overview	Regional Academies (n=10)	Independent Academies (n=16)
Range of Basic Training Hours	680 – 949	624 - 1,690
Average Basic Training Hours	776	1,016
Median Basic Training Hours	760	960
Range of Basic Academy Length	4.5 - 6 months	5 - 8.5 months
Average Length of Basic Academy	4.5 months	6 months

Source: Virginia State Crime Commission, Regional and Independent Academy Directors Survey.

Per DCJS standards, there are nine performance outcomes for law enforcement officers, including professionalism, legal issues, communications, investigations, patrol, defensive tactics/use of force, weapons use, driver training, and the optional category of physical issues. As seen in Figure 4, in general, regional and independent academies reported having similar median hours per category, with the exception of investigations, weapons use and "other," which again makes sense due to independent academies presenting agency-specific curriculum.

Figure 4: Regional and Independent Academies – Median Hours per Performance Outcome Category

Category	Regional Academies-Median Hours	Independent Academies-Median Hours
Professionalism	11	12
Legal Issues	109	82
Communication	28	30
Patrol	199	200
Investigations	40	80
Defensive Tactics/Use of Force	95	80
Weapons Use	53	95
Driver Training	48	52
Physical Training	60.5	71
Other	48	108

Source: Virginia State Crime Commission, Regional and Independent Academy Directors Survey. n= 10 regional academies and 16 independent academies.

Retention Rates

Retention rates across basic law enforcement academy classes vary widely for both regional and independent academies. There are many different reasons why recruits do not complete a basic training academy class, such as voluntarily withdrawing, accepting an offer from another agency, the inability to pass minimum qualifications, termination for conduct/behavior, and, of course, injury or illness. Figure 5 illustrates that the retention rate is significantly lower at independent academies. Unfortunately, however, the data does not reliably indicate *why* the retention rate is significantly lower.

Figure 5: Regional and Independent Academies-Retention Rate for the Past 5 Academy Classes

Retention Rate for Past 5 Academy Classes	Regional Academies (n=10)	Independent Academies (n=16)
Range of Recruits per Academy Class	8 to 86 recruits	6 to 101 recruits
Range of Retention Rates	67%-100%	33%-100%
Average Retention Rate	91%	79%
Median Retention Rate	93%	80%

Source: Virginia State Crime Commission, Regional and Independent Academy Directors Survey.

State Certification Exam

Since 2003, all law enforcement officers completing basic training are also required to successfully complete a statewide certification exam, which is developed and administered by DCJS pursuant to Va. Code § 15.2-1706. This comprehensive exam provides testing on all eight required categories of performance outcomes.

The certification exam should be modified accordingly whenever training standards change. However, concern was voiced by stakeholders that the exam has not been revised for some time, and some of the questions are not up-to-date.

Field Training

Field training typically occurs after a recruit has completed the basic academy class; however, it should be noted that some of the independent academies will conduct field training during the basic academy class and will place recruits with a field training officer in order to expose the recruit to calls for service and how such calls may be handled. Every recruit is required to complete a minimum of 100 hours of field training. Field training certifies that an officer has demonstrated competency in all performance objectives pursuant to Va. Code § 9.1-102 and 6VAC20-20-40. Currently, there are nearly 100 performance objectives.

Regional academies do not provide any field training; rather, it is provided by the hiring agency. All independent training academy agencies and regional academy member agencies require field training for law enforcement officers. Most agencies significantly exceed the 100 hour compulsory minimum training standard required.

In-Service Training

Once certified, every law enforcement officer must complete in-service training provided by a certified training academy. Specifically, each officer must complete a

minimum of 40 hours every two years, as well as annual firearms training. All regional and independent training academies provide in-service training for law enforcement officers.

The required 40 hours of in-service training every two years is broken into the following categories:

- 34 hours of career development training;
- 4 hours of legal training; and,
- 2 hours of cultural diversity training.

Additionally, every officer is required to meet annual firearms qualifications, which includes a policy review of weapons safety, nomenclature, maintenance and use of force.

In order to meet the 40 hour requirement, there are many different types of in-service and specialized courses offered at academies across Virginia, such as active shooter, advanced firearms, advanced narcotics, advanced investigations, bicycle patrol, building searches, crash reconstruction, crowd management, HAZMAT, hostage negotiation, K-9, leadership/command staff training, less-than-lethal weapons, mental health, motorcycle patrol, mounted patrol, RADAR/LIDAR, SWAT, and VCIN certification or recertification. Some of these courses are even offered on-line, with 90% (9 of 10) of regional academies and 61% (11 of 18) of independent academies offering various on-line courses.

Some academies and agencies indicated that they would like to see in-service requirements for defensive tactics and driver training.[25] Others mentioned exploring physical fitness standards and a cost-effective online in-service library. Finally, a number of respondents also expressed concern that the required cultural diversity training was either outdated, repetitive, or both.

In terms of legal training and updates, survey findings and discussions with key stakeholders indicated that non-attorneys often teach legal updates with materials that may not have come from an attorney. No single agency is entrusted with the responsibility of preparing such materials for law enforcement training. In order to ensure consistency in legal training to law enforcement officers across the state, Crime Commission staff recommended that the Commonwealth's Attorneys' Services Council be required to provide annual legal update materials that can be used by all law enforcement agencies, academies, and DCJS.

Liability Concerns

While it is highly improbable that a criminal justice training academy would be held liable under a § 1983 suit[26] for failure to train, staff still inquired as to whether any academies were involved in litigation related to training. Only a few academies reported that they had been asked to testify in the past five years on training an officer received from their academy. Specifically, 20% (2 of 10) of regional academies and 33% (6 of 18) of independent academies indicated that they had testified. Only two academies indicated that they were named as a defendant in a civil lawsuit resulting from an

alleged training inadequacy. Only one academy reported that they had lost or settled such litigation.

Record Keeping

Due to liability concerns, record keeping related to training that officers receive has been emphasized. The Library of Virginia has established a records retention and disposition schedule for criminal justice training academy records; specifically:

- Class records and student records must be retained for 50 years;
- Lesson plans must be retained for 25 years;
- Instructors' personnel records, testing and performance records, and training aids for courses must be retained for 5 years; and,
- Standard operating policies and procedures must be retained 3 years after the end of the last academy certification year.

Many agencies, since they are the ones responsible for keeping these records, indicated that they are having a difficult time maintaining and storing them.

The DCJS does utilize several electronic records systems, including the T-REX Online System (T-REX) and the ACE system. T-REX is an automated records system utilized by DCJS to track criminal justice employees in Virginia. The system tracks the hiring, training completion status, certifications, and other personnel information for each employee. Information from this system is used to determine 599 funding eligibilities of police departments by verifying training compliance of officers, as well as to track officer populations, which is essential in determining the Regional Criminal Justice Training Academy fund allocation. The ACE system can be used to integrate the completion of training hours into a state database and ACE-TRACK includes a test bank of questions and objectives for local use by academies.

Unfortunately, significant limitations are present in these records systems. For instance, the systems are antiquated and are not interactive. Further, there is no way to readily identify all of the specific courses each law enforcement officer attended for their 40 hours of in-service training. The vast majority of responding agencies expressed concern related to the current software and management of law enforcement training records. The DCJS is aware of these problems and is currently working on a new and improved data management system that will address many of the expressed concerns.

Decertification of Law Enforcement Officers

There are many reasons why a law enforcement officer can become separated from his agency, including transferring to a different law enforcement agency, being hired by a civilian employer, retirement, or termination. However, there are also provisions for decertifying law enforcement officers through the CJSB under Va. Code § 15.2-1707. Law enforcement certification is the process by which officers are licensed in the Commonwealth. Certification establishes that the officer has satisfied specified selection, training and in-service standards; decertification is the loss of such

certification. Decertified officers do not have the right to serve as a law enforcement officer within the Commonwealth until their certification has been reinstated by the CJSB. Currently, under Virginia law, a law enforcement officer can be decertified if he:

- Is convicted of or pled guilty or no contest to a felony or any offense that would be a felony if committed in Virginia;
- Fails to comply with or maintain compliance with mandated training requirements; or,
- Refuses to submit to a drug screening or has produced a positive result on a drug screening reported to the employing agency.

Currently, the statute does not specifically require Chiefs of Police or Sheriffs to report such officers to the CJSB. The statute does, however, require clerks of court who have knowledge of a felony conviction involving a law enforcement officer to report the conviction to his employing agency.[27] According to DCJS, over the past two years, only four law enforcement officers have been decertified in the Commonwealth. It appears that the CJSB is not being informed of all officers who should be decertified under current law. It was determined that officers in violation are often given the option to resign in lieu of termination. Some of these officers are subsequently hired by other law enforcement agencies because they are still certified and, thus, the hiring agency does not have to pay any training costs. It must be noted that this has been a long-standing concern in the Commonwealth and is not a new finding.[28]

Because the grounds for decertifying officers in Virginia are narrow and the CJSB is not being notified of all officers who should be decertified under current law, Crime Commission staff made the following recommendations for consideration:

- Consider expanding the criteria for decertification under Va. Code § 15.2-1707 to include Class 1 misdemeanors involving moral turpitude,[29] any sex offenses[30] and domestic violence.

- Require Sheriffs, Chiefs of Police or agency administrators to notify the CJSB in writing when any certified law enforcement officer or jail officer who is currently employed is convicted of or pleads guilty or no contest to certain crimes.

Concerns related to law enforcement officer decertification are not unique to Virginia. Numerous states have taken various approaches to address the issue. In 2009, the International Association of Directors of Law Enforcement (IADLEST) conducted a nationwide survey of P.O.S.T agencies regarding certification practices.[31] Most states reported having the authority to certify or license law enforcement officers. The study found that the most common basis for decertification was felony conviction and that 36 other states expand the grounds for decertification to certain misdemeanors.[32]

Advantages and Disadvantages of Virginia's Law Enforcement Academy Models

Based on formal and informal surveys, work groups, and discussion, staff found that there are a number of advantages and disadvantages to both the regional academy and

independent academy models. The regional academy model has a number of potential advantages, including shared cost to member agencies, the ability to pool resources, benefits to smaller agencies, cooperation, networking, partnerships and cross-training fostered between member agencies, less cost to an individual member agency's locality, and increased exposure to various ways of conducting police operations, training and management. Similarly, the regional academy model bears some potential disadvantages, including lack of specificity or customization in training, travel time concerns for member agencies, the risk of member agencies leaving, reduced financial support from the state, and a potentially higher level of political conflict due to disagreements among the numerous member agencies as to the management and operations of the academy.

Likewise, the independent academy model has its unique advantages, such as increased autonomy, specialized training tailored to the community being served, better control of the quality, type and scheduling of classes, having "one vision" or administration to answer to, and, potentially fewer political disagreements. Possible disadvantages include lack of exposure to other agencies' approaches to police operations, training and management, unintended isolation, less resource sharing availability, and, costs not being shared, but rather absorbed wholly by the agency or locality.

REGIONAL ACADEMY MEMBER AGENCY SURVEY

Crime Commission staff distributed surveys to all Virginia law enforcement agencies whose officers received training at regional academies. The surveys gathered information on agency demographics, any relevant academy membership changes, their overall satisfaction with their current regional academy, their instructor and "in-kind" contributions, their field training program and in-service training, recordkeeping and liability concerns, as well as any other issues related to the delivery of law enforcement training to officers.[33]

Historically, Crime Commission staff typically has surveyed only the Virginia State Police, Sheriff's Offices with primary law enforcement duties and City/County Police Departments. These agencies serve the vast majority of Virginia's population; approximately 90%. The response rate from those that are members of a regional academy was 57% (69 of 122 agencies).

Since other types of law enforcement agencies also belong to regional academies, staff additionally surveyed other agencies, such as town police departments, college/university police departments and other law enforcement agencies. Staff received an additional 68 surveys from such departments.[34] Therefore, there were a total of 137 agencies responding to the survey, which serves as the base response number.

Responding agencies indicated that they began attending their current regional academy anywhere from as early as 1965 to as recently as 2012. Nearly all responding agencies indicated that they were a member of their regional academy, as opposed to a non-member who would be on a per diem or tuition basis. The current membership fee per-officer varies widely across the 10 regional academies.

As discussed earlier, regional academy membership concerns have existed for quite some time. From survey responses and informal discussion with key stakeholders, it appears that when a member agency considers or decides to transfer to another regional academy or to develop their own independent academy, they will typically cite cost/expense or travel time/geographic concerns. Other concerns may also include academy leadership concerns, lack of input into academy operation and instruction, limited variety of courses offered per year, not enough classes or courses offered per year, and/or quality of training.

Level of Satisfaction

Member agencies were asked to indicate their level of satisfaction with their current, respective regional academy using the following scale.

1= completely dissatisfied	4= somewhat satisfied
2= mostly dissatisfied	5= mostly satisfied
3= somewhat dissatisfied	6= completely satisfied

In general, regional academy members indicated they were "mostly satisfied" with the vast majority of training provided by their respective regional academy. Specifically, Figure 6 below delineates the average score response for each element:

Figure 6: Regional Academy Members' Satisfaction Levels

Training Element	Average
Overall costs/expenses	5.44
Instructor competency	5.43
Number of basic training academy classes offered per year	5.33
Overall training facilities	5.30
Academy leadership	5.27
Firearms training	5.27
Defensive tactics training	5.25
Overall quality of training	5.23
Driver (EVOC) training	5.22
Equipment	5.22
Number of in-service courses offered per year	4.84
Variety of courses offered	4.67

Source: 2012 VSCC Regional Academy Member Survey.

Instructors and Other "In-Kind Contributions"

According to survey responses, member agencies individually employ anywhere from 0 to approximately 100 law enforcement officers who are currently certified to instruct. Most of the member agencies indicated that they send their certified instructors to regional and/or independent academies. Specifically:

- 59% (79 of 134) provide instructors to their regional academy only;
- 10% (13 of 134) provide instructors to their regional academy and other regional academies;
- 7% (9 of 134) provide instructors to both regional and independent academies; and,
- 25% (33 of 134) do not provide any instructors to any academies.

While 40% (4 of 10) of regional academies indicated that they require their member agencies to provide instructors, these academies recognize that some member agencies either do not have any certified instructors or are too small to reasonably provide instructor manpower at the academy. There are, however, other types of contributions that member agencies can provide to their regional academy, known as "in-kind" contributions. In addition to providing instructors, member agencies reported providing the following contributions over the past 12 months:

- 80% (107 of 134) instructional support;[35]
- 25% (34 of 134) facilities for classroom training, practical training or graduation ceremonies;
- 17% (23 of 134) firearms range;
- 12% (16 of 134) donations;[36] and,
- 2% (3 of 134) facility cleaning/grounds maintenance/landscaping

These types of "in-kind" contributions are being even more heavily relied upon by regional academies due to the reductions in state funding.

Liability Issues

The survey inquired as to whether any member agencies were involved in litigation related to training. Few regional academy member agencies reported that they had been asked to testify in the past five years on the training an officer received from their academy. Only 12% (16 of 135) of responding member agencies indicated that they had testified. Eleven member agencies indicated that they were named as a defendant in a civil lawsuit resulting from an alleged training inadequacy. Only four of these agencies reported that they had lost or settled such litigation.

49 STATE P.O.S.T. DIRECTOR SURVEY

As discussed earlier, there are advantages and disadvantages to Virginia's current law enforcement academy models. Numerous reports have discussed Virginia's model for law enforcement training and have noted possible alternatives to help improve the efficiency, cost-effectiveness and quality of training delivery.[37] Likewise, it may be beneficial to examine how other states are delivering law enforcement academy training for potential insight on various approaches. Staff disseminated surveys to all other states' P.O.S.T directors in order to capture a summary of their overall law enforcement academy training model. There was a 65% (32 of 49) response rate. The survey captured a number of items, including the total number of law enforcement officers served by the P.O.S.T within each state, any compulsory minimum training standards required by statute for basic, field and in-service training, an overview of their academy model for delivering law enforcement training, as well as a description of their record management system for law enforcement training records.

The responding states had anywhere from 1,300 to 166,000 law enforcement officers;[38] 45 to 2,406 law enforcement agencies;[39] and, 1 to 75 law enforcement academies.[40] Compulsory minimum training standards required by statute varies across states. The basic/entry-level training for the other states ranged from 400 to 818 hours, with an average of 605 hours. While Virginia's requirement is only 480 hours, as illustrated earlier in Figure 3, all academies far exceed this requirement, averaging closer to 600 hours. In regards to field training, 67% (21 of 32) of responding states did not have a statutory requirement. Responses indicated a range of 0 to 480 hours required for field training, with Virginia's requirement being 100 hours. Although many of the states do not have a statutory requirement, this does not preclude individual agencies from within the state from requiring such training by internal policy. In-service training requirements varied widely as well. Responding states indicated a range of 0 to 40 hours per year required by statute. As mentioned earlier, Virginia's requirement is 40 hours per 2 years for law enforcement officers.

Most of the responding states, 83% (25 of 30), indicated that they had a centralized electronic database for maintaining law enforcement training records. Of the states that have a centralized electronic database, 88% (22 of 25) provide an itemized list of some or all courses that individual officers complete. This is worth noting, as Virginia is not able to provide such itemized information with its current record management system. Further, 32% (8 of 25) of those with a centralized record management system afford officers the ability to have electronic access to view their personal training records. Again, this personal access is currently not available in Virginia.

Every state has its own unique "model" for delivering mandated law enforcement training. Based on responses, it appears that states can utilize one or more of the following models:

- Centralized academy model;
- Independent academy model;
- Regional academy model;
- Higher education/pre-employment models; and/or,

- Private model.

Under the centralized academy model, all or nearly all law enforcement officers will receive training at one centralized academy or a satellite location of that academy. Maine, Oregon, South Carolina, South Dakota, Vermont, and Wyoming appear to have one centralized academy where all law enforcement officers must go to complete training (residential). Washington and West Virginia have one centralized academy for law enforcement officers except for their State Troopers, who have their own independent academy. Connecticut, Iowa, and North Carolina have a centralized academy with additional satellite locations across the State. For example, North Carolina indicates that they have one state training academy; however, their curriculum is actually delivered at two state training academy campuses *and* 58 community colleges and 20 law enforcement agencies.

It does not appear that the independent academy model is the sole one used by any of the responding states. Similar to Virginia, the independent academy model is typically used in conjunction with other model types. Other states also employ a regional academy model similar to Virginia. For example, Arkansas relies solely on a regional academy model, while Arizona, Georgia, Indiana, Michigan, and Tennessee utilize the regional academy model in conjunction with other models.

Many of the responding states reported utilizing an academic/pre-employment model for law enforcement officer training. California, Florida, Georgia, Idaho, Missouri, New York, North Carolina, North Dakota, Ohio and Wisconsin employ this type of academy model with such training being carried out at all types of higher education institutions. Under this model, academies are actually *operated* by a college or university to allow individuals to complete law enforcement training, as well as receive academic credit. This is distinct from what is seen in Virginia, where officers can receive academic credit for merely attending a stand-alone independent or regional criminal justice academy (i.e., no formal training is actually provided by higher education institutions).

Finally, two responding states indicated having a private model option in addition to the other model options mentioned above. Missouri has two private academies governed by a board of law enforcement professionals and, Georgia has two academies that are run by law enforcement associations, with one of these academies providing in-service training only.

In summary, there are many different model options for delivering mandated criminal justice officer training across the United States. It is beneficial to understand how other states carry out such training. If Virginia considers changing its current system, other states' models should be further examined to see which approaches would complement Virginia's overall philosophy and approach to law enforcement training. Previous studies agree. For example, JLARC indicated that any change or alternative to the system should consider five criteria, including, "long term stability of membership, compact geographical arrangement of member agencies, more uniform distribution of officers served, minimal disruption of existing academy operations and ease of administration."[41] As such, Crime Commission staff cautioned that any significant changes to the current model of law enforcement training should consider the full array

of potential intended and unintended consequences, since the current system has been operating for over 40 years. Staff further recommended that if Virginia wants to change its current training system, a detailed cost-benefit analysis of its training academies should be conducted by JLARC, which could provide a useful view of the economics of Virginia's system at the statewide level. In addition, it was recommended by the Crime Commission that such a study should consider the feasibility of expanding available training options in collaboration or conjunction with institutions of higher education.

Summary and Conclusion

There are two basic types of law enforcement academy models in Virginia: regional academies and independent academies. There are advantages and disadvantages for both. Further, there are various types of law enforcement academy models seen across the United States. Each state is unique; however, Virginia does appear to have more independent academies than other states.

Regional academies are fiscally vulnerable. In particular, concerns continue to be raised about the financial instability of regional criminal justice academies due to decreased state funding, changes in membership, and creation of new independent academies. Despite a moratorium on the creation of new academies in 2000 (effective through June 30, 2014), independent academies continue to be established.

From survey responses, it was determined that retention rates across basic law enforcement academy classes vary widely for both regional and independent academies. In looking at both types of academies, it was found that all academies significantly exceed the 480 hour compulsory minimum training standard required for law enforcement basic training and that regional academy member agencies appear to be "mostly satisfied" with the law enforcement training provided by regional academies.

All academies evaluate the performance of instructors; however, there are still some concerns about the consistency in the delivery of law enforcement training. Despite the apparent liability involved in training law enforcement officers, very few academies and agencies have been involved in litigation resulting from alleged training inadequacies.

From surveys and meetings, staff found that one of the biggest concerns of stakeholders was the current record keeping system for law enforcement training records. They noted that the current system is cumbersome and antiquated. Also, from the records of decertification, which DCJS began keeping two years ago, it is apparent that not all law enforcement officers who meet the criteria for decertification are actually being reported to DCJS.

As a result of the study effort, the Crime Commission endorsed the following recommendations at its December 5, 2012, meeting:

Recommendation 1: Amend Va. Code § 2.2-4002 by providing an exemption from the Administrative Process Act for DCJS when developing, issuing or revising any training standards established by the Criminal Justice Services Board (CJSB) under § 9.1-102.

Senator Janet Howell introduced Senate Bill 1024 during the 2013 General Session of the Virginia General Assembly, based on the Crime Commission recommendation. Specifically, the bill amended Va. Code § 2.2-4002 by providing an exemption from the Administrative Process Act for DCJS when developing, issuing or revising any training standards established by the CJSB under § 9.1-102. The bill was passed by the Senate and the House of Delegates as introduced. The Governor returned the bill with an amendment, which was adopted by the Virginia Senate and the Virginia House of Delegates, and the bill became law.[42]

Recommendation 2: Amend Va. Code § 2.2-2618 to require the CASC to provide annual legal update materials to law enforcement agencies, training academies, and DCJS.

Delegate Onzlee Ware introduced House Bill 1818 during the 2013 General Session of the Virginia General Assembly, based on the Crime Commission recommendation. The bill was passed as introduced by the House of Delegates and the Senate, and signed by the Governor.[43]

Recommendation 3: Amend Va. Code § 9.1-102 to require (i) each certified criminal justice training academy to submit an annual report evaluating how the academy is meeting its performance and training objectives and its current and projected operating budgets, with each report being provided to the Chairs of the Senate Finance and House Appropriations Committees, the Criminal Justice Services Board, and the Virginia State Crime Commission; and, (ii) DCJS to provide each academy with an annual evaluation based on the academy's own annual report, as well as internal audits, field visits and other relevant information.

Recommendation 4: Amend Va. Code § 9.1-102 to allow DCJS to provide direct assistance to any certified criminal justice training academy that is not meeting established minimum standards or performance objectives, including assisting with staffing needs and management of the daily operations of the academy.

Recommendations 3 and 4 were combined into a single bill. Delegate Onzlee Ware introduced House Bill 1819 during the 2013 General Session of the Virginia General Assembly, based on the Crime Commission recommendation. The bill was left in House Appropriations.

Recommendation 5: Amend Va. Code § 15.2-1705 related to minimum qualifications of law enforcement officers and § 15.2-1707 to expand the grounds for decertification to include law enforcement officers who have been convicted of or pled guilty or no contest to a Class 1 misdemeanor involving moral turpitude or any offense that would be a Class 1 misdemeanor involving moral turpitude if committed in Virginia, or who have been convicted of any sex offense or domestic assault under the laws of the Commonwealth, another state, or the United States.

Recommendation 6: Amend Va. Code § 15.2-1707 to require law enforcement agencies to notify DCJS when an officer meets the qualifications for decertification.

Recommendations 5 and 6 were also combined into a single bill. Senator Janet Howell introduced Senate Bill 1026 and Delegate Charniele Herring introduced House Bill 2121 during the 2013 General Session of the Virginia General Assembly, based on the Crime Commission recommendation. Both bills were amended in the nature of a substitute in the House Militia and Police Committee, to remove the existing requirement in the Code of Virginia that circuit court clerks must notify the employing agency whenever they know of any law enforcement or jail officer who has been convicted of a felony. The substitute bills also permitted DCJS the ability to waive the requirements for decertification for good cause shown. Both bills were passed, in identical form, by the Senate and the House of Delegates and signed by the Governor.

In regards to policy recommendations, the Crime Commission endorsed the following:

Policy Recommendation 1: Request the Joint Legislative Audit and Review Commission (JLARC) to conduct a detailed cost-benefit analysis of Virginia's criminal justice training academies. The study would also include examining the feasibility of expanding available training options in collaboration or conjunction with institutions of higher education.

Policy Recommendation 2: Consider amending Va. Code §§ 16.1-69.48:1, 17.1-275.1-4 and 17.1-275.7-9 to increase the fixed fee for court costs apportioned to regional criminal justice training academies.

Acknowledgements

The Virginia State Crime Commission extends its appreciation to the following agencies for their assistance and cooperation on this study:

Independent and Regional Criminal Justice Academy Directors

Informal Work Group Members

International Association of Directors of Law Enforcement (IADLEST) and participating P.O.S.T. Directors

Virginia Association of Chiefs of Police

Virginia Criminal Sentencing Commission

Virginia Department of Criminal Justice Services

Virginia Law Enforcement Agencies

Virginia Sheriffs' Association

Virginia State Police

[1] The other nine criminal justice training academies include seven Sheriff's Office training academies (not primary law enforcement), the Department of Corrections' academy, and DCJS.
[2] According to DCJS policy, all local political subdivisions whose personnel are subject to this mandated training must be assigned to a designated regional training academy or be served by an independent training academy.
[3] DCJS, *Analysis of the Current and Projected Financial Operations and the Financial Outlook for the Regional Law Enforcement Training Academies*, (Sept. 2011), at p.6.
[4] DCJS, *Virginia Criminal Justice Training Reference Manual,* Retrieved September 2012.
[5] It should be noted that the Chesapeake Bay Bridge Tunnel Police Department and the Division of Capitol Police provide in-service training only; their recruits complete basic training at a regional criminal justice training academy.
[6] Currently, if an academy is found in noncompliance with one or more requirements, they will be given a reasonable time to correct the situation, not to exceed 60 days. If still not compliant upon reassessment, the academy has a maximum of an additional 30 days to correct the problem(s). If not in compliance at the second reassessment, academy certification will be suspended or revoked.
[7] 2011 Va. Acts Ch. 890, Item 384, B1.f.
[8] DCJS, *supra* note 3.
[9] The Regional Criminal Justice Academy Training Fund is set forth under Va. Code § 9.1-106.
[10] State funding to regional academies is based on the relative percentage of officers served by the academy. Therefore, any changes in regional academy membership affect regional academy budgets.
[11] These academies were supported with local funds per the agreements signed between the former regional academy and locality stakeholders.
[12] DCJS, *supra* note 3.
[13] See, for example, Virginia State Crime Commission (VSCC), *Report of Law Enforcement Training,* Senate Document No. 7 (1980); VSCC, *Funding of Regional Criminal Justice Training Academies,* House Document No. 63 (1997); JLARC, *Review of Regional Criminal Justice Training Academies,* House Document No. 28 (January 1999); JLARC, *Alternatives to Stabilize Regional Criminal Justice Training Academy Membership,* Senate Document No. 7 (November 1999).
[14] P.O.S.T. agencies are responsible for assuring that officers meet minimum standards of competency and ethical behavior. This terminology is the most common in other states, though they can be referred to by other titles.
[15] Copies of the VSCC Regional and Independent Academy Director surveys are available upon request.
[16] There are exemptions made to these certification requirements under tit. 6 Va. Admin. Code § 20-80-50 (2012). Individuals assigned to instruct in emergency situations; individuals with professional/proficiency skills related to a specific subject and with documentation; lawyers, medical professionals, public administrators, teachers, social services, etc., with final DCJS approval; subject matter experts with documentation; certified emergency care and first aid instructors; and, field training officers.
[17] As of August 30, 2012.
[18] tit. 6 Va. Admin. Code § 20-80-80 (2012).
[19] The base denominator is not 18 here because two of the independent academies only provide in-service training and no basic training.
[20] For additional information on pre-employment program requirements, refer to DCJS' *Virginia Criminal Justice Training Reference Manual,* at p. 83.
[21] 38 U.S.C.A. §§ 3301-3325 (West 2013).
[22] *See, e.g.*, Bureau of Justice Statistics, *State and Local Law Enforcement Training Academies, 2006.* Revised 4/14/09.
[23] DCJS, *Study on Alternative Training Delivery Methods for Criminal Justice Officers,* House Document No. 58 (2004).
[24] tit. 6 Va. Admin. Code § 20-20-25 (2012).

[25] This is consistent with concerns voiced in the Crime Commission's 2010 *Law Enforcement Emergency Response* study.
[26] The common name given to civil rights lawsuits filed under 42 USC §1983.
[27] VA CODE ANN. § 15.2-1707 (2012).
[28] *See, e.g.*, VSCC, *Law Enforcement Training and Officer Decertification,* Senate Document No. 35 (1994), at p. 10.
[29] Moral turpitude is lying, cheating, or stealing. Such a misdemeanor would include petty larceny.
[30] Such sex offenses would include sexual battery or engaging in consensual sex with a 15 year old.
[31] See, Franklin, R.A., Hickman, M., & Hiller, M., *2009 Survey of POST Agencies Regarding Certification Practices,* Sykesville, MD: International Association of Directors of Law Enforcement, Funded by Bureau of Justice Assistance, Grant No. 2005-DD-BX-1119, (2009).
[32] Id. at p. 6. Note: Figures current as of the time of this publication in 2009.
[33] A copy of the VSCC Regional Academy Member survey is available upon request.
[34]Additional surveys were received from 35 town police departments; 24 college/university police departments; and 9 state and private agencies.
[35] Instructional support can include providing role players, evaluators, or instructional materials.
[36] Donations included equipment, technology, vehicles, furniture, and other training equipment.
[37] *See*, *e.g.*, VSCC (1980), *supra* note 13; JLARC (November 1999), *supra* note 13; DCJS, *supra* note 23.
[38] Virginia had 19,753 officers, as of August 30, 2012.
[39] Virginia had 378 agencies, as of August 30, 2012.
[40] Virginia currently has 38 academies.
[41] JLARC (November 1999), *supra* note 13, p. 13-14.
[42] 2013 Va. Acts ch. 780.
[43] 2013 Va. Acts ch. 79.

Reorganization of the Concealed Weapons Statute

Executive Summary

During the 2012 Regular Session of the Virginia General Assembly, House Bill 923 (HB 923) was introduced by Delegate Scott Lingamfelter. The purpose of the bill was to reorganize the concealed weapons statute, Va. Code § 18.2-308, by separating it into 17 distinct code sections. A preamble in the bill specifically stated that "nothing in this reorganization is intended to change the substantive law related to carrying concealed weapons or obtaining a concealed handgun permit."

House Bill 923 was referred to the House Courts of Justice Committee, and after consideration, was continued to 2013. A letter was sent to the Crime Commission, asking for the language of the bill to be examined, to ensure that no substantive changes were made to Virginia law.

After a review of the bill, the Crime Commission verified that no substantive changes to Virginia's laws dealing with concealed weapons would occur if the bill were to be enacted. However, other changes were made to Va. Code § 18.2-308 during the 2012 Regular Session; these would need to be incorporated into HB 923, or a new bill introduced in 2013, to ensure that the reorganization bill did not affect any of the recently passed modifications to Virginia's concealed weapons laws.

The Crime Commission voted to endorse the concept of reorganizing Va. Code § 18.2-308 into smaller, distinct sections, in the manner of HB 923, provided that no substantive changes would be made. Delegate Scott Lingamfelter introduced the Crime Commission's recommended legislation during the 2013 Regular Session of the Virginia General Assembly, as House Bill 1833. The bill was passed by both the House of Delegates and the Senate, and was signed into law by the Governor.

Background

Virginia Code § 18.2-308 contains Virginia's statutory provisions related to concealed weapons. At the time of Virginia's recodification of Title 18.1 into Title 18.2 in 1975, Va. Code § 18.2-308 consisted of three short paragraphs.[1] The statute was not divided into subsections, as it currently is. Each paragraph dealt with a distinct topic: the first paragraph prohibited the carrying of concealed weapons, in language similar to the existing subsection A of the statute; the second paragraph exempted law enforcement and any person in his own place of abode from the statute; and the third paragraph allowed a circuit court to grant an applicant permission to carry concealed weapons for a period of one year. This third paragraph was the forerunner of the current concealed handgun permit process in Virginia.

Since 1975, Va. Code § 18.2-308 has been modified practically every year by the General Assembly. In the 37 years between 1975 and 2012, the concealed weapons statute has been modified in 34 separate Regular Sessions, sometimes with multiple changes occurring during the same Session. The statute now contains over 50 paragraphs, is divided into 27 distinct subsections, and is 11 pages long in the Michie's edition of the Code of Virginia.[2]

The statute now addresses multiple topics that are related to concealed weapons and concealed handgun permits:

- Criminalizes the carrying of concealed weapons;
- General exemptions from this prohibition;
- Exemptions for law enforcement;
- Exemptions for retired law enforcement;
- Process for applying for a concealed handgun permit;
- Persons ineligible from obtaining a permit;
- Criminalizes making a false statement on a permit application;
- Acceptable methods for an applicant to demonstrate to the circuit court that he has demonstrated competence with a handgun;
- What information a concealed weapons permit shall contain;
- The civil penalty if an individual fails to display his permit upon demand by law enforcement;
- Applications for new permits upon expiration of an existing permit;
- The forfeit of a permit after conviction for a disqualifying criminal offense;
- Criminalizing the carrying of a concealed handgun while under the influence of alcohol or illegal drugs;
- Permits a court to suspend the permit of a person who is charged with a felony;
- Criminalizes the carrying of a concealed handgun while consuming alcohol in a restaurant or club;
- The revocation of a permit if the holder is adjudicated legally incompetent or mentally incapacitated, or is civilly committed or ordered to outpatient treatment;
- The fees paid by an application for a permit;
- Replacement of permits;
- Petition for review to the Va. Ct. of Appeals if an application for a permit is denied;
- Validity of other states' permits in Virginia; and,
- Application for permits by non-residents.

House Bill 923 logically breaks Va. Code § 18.2-308 into 17 smaller statutes. Each statute deals with a distinct topic; no substantive changes are present in the bill. All cross-references to Va. Code § 18.2-308 throughout the Code of Virginia have been appropriately modified to reflect the new section number. All of the other amendments to Va. Code § 18.2-308 that were made during the 2012 Regular Session by other bills would not interfere with the basic reorganizational scheme proposed by HB 923.[3]

Conclusion

The Crime Commission voted to endorse the basic reorganization scheme proposed by HB 923, with the condition that any such reorganization not contain any substantive changes to Virginia's concealed weapons laws. Delegate Scott Lingamfelter introduced the Crime Commission's recommended legislation during the 2013 Regular Session of the Virginia General Assembly, as House Bill 1833. This bill incorporated the changes that had been made to Va. Code § 18.2-308 during the 2012 Regular Session of the General Assembly. House Bill 1833 was passed by both the House of Delegates and the Senate, and was signed into law by the Governor.

---

[1] 1975 Va. Acts chs. 14, 15.
[2] VA. CODE ANN § 18.2-308 (2012).
[3] 2012 Va. Acts chs. 132, 175, 291, 557, 776.

Texting While Driving

Executive Summary

During the course of the study year, the Crime Commission decided to review the issue of texting while driving due to a fatal accident that occurred in Virginia. There is significant national concern with texting while driving, as it is believed to be the cause of many accidents and fatalities. Several studies have shown that performing an additional cognitive task while driving seriously degrades a driver's ability to operate their motor vehicle. There are several studies that show talking on a cellular phone while driving interferes with a person's ability to drive, even suggesting that cell phone use while driving is just as or more dangerous than drinking and driving. The recent studies on texting while driving demonstrate that drivers are at a greater risk for an accident and divert their eyes from the road for significant amounts of time while texting. National statistics for accidents indicate that distracted driving is a factor in up to 16% of all fatalities. Precise numbers of accidents and fatalities specifically caused by texting and driving are not yet available at a national level, but Virginia began collecting accident information involving texting in 2012. In 2009, the Virginia General Assembly passed a statute that punished texting while driving as a traffic infraction. While the statute is still new, there has been a continuous increase in charges and convictions each year since its passage.

In Virginia, reckless driving is considered a criminal violation, as opposed to a traffic infraction. There are two "general" reckless driving statutes that punish driving done in a reckless manner or without consideration of "life, limb, and property." There are also 13 *per se*, or strict, reckless driving offenses in Virginia.

The states surrounding Virginia, namely Kentucky, Maryland, North Carolina, Tennessee, and West Virginia, punish texting while driving as fines, similar to Virginia. Only one state in the country, Utah, statutorily punishes texting with more than a simple fine: either by including it as a factor in negligent homicide or as "careless driving," punishable by up to three months in jail.

As a result of the study effort, the Crime Commission endorsed the following recommendation at its December 5, 2012, meeting:

> **Recommendation 1:** Amend Va. Code § 46.2-853 (Driving a vehicle that is not under control) by adding the following language; *"Driving a motor vehicle that is not under proper control" includes driving a motor vehicle on any highway in the Commonwealth while simultaneously using a handheld personal communications device for any purpose other than verbal communication.*" The existing penalty for Va. Code § 46.2-853 would make texting while driving a reckless driving offense, punishable as a Class 1 misdemeanor.

Background

The Crime Commission decided to study the issue of texting and driving, due to a 2012 fatal accident that occurred in Fairfax County, Virginia. In the accident, a driver struck and killed another person, who was parked on the side of the road, with evidence suggesting that the driver was texting right before and after the accident.[1] The driver was charged with reckless driving, but the judge dismissed the charge, saying that since the Virginia General Assembly had made texting while driving a fined offense, he could not find the driver guilty of reckless driving.[2]

There has been growing concern in recent years with the potential danger from texting while driving and it has been allegedly linked to numerous highway fatalities.[3] The National Highway Transportation Safety Administration (NHTSA) has made a major effort to curtail "distracted driving," which includes texting while driving, with public service announcements and information.[4] According to NHTSA, there are three types of driving distractions: manual -- taking your hands off the steering wheel; visual -- taking your eyes off the road; and cognitive -- taking your mind off driving.[5] Furthermore, NHTSA states that because text messaging requires visual, manual, and cognitive attention from the driver, it is by far the most alarming distraction.[6] There has been a very sharp increase in the use of texting over the past few years, with an estimated 2.72 trillion text messages sent or received in 2012, up from 240.8 billion in 2007.[7] A recent study from the Pew Center reported that up to 26% of respondents indicated engaging in texting while driving, and 48% reported being in a car where the driver texted.[8] One organization has even estimated that up to 28% of all traffic accidents involved the use of "cell phones and texting."[9]

There are several behavioral studies which suggest that drivers who engage in an additional cognitive task seriously reduce their driving ability.[10] Additionally, there are many studies that focus on cell phone use while driving, which come to the same conclusion that the additional task of cell phone use interferes with driving.[11] A recent study from Carnegie Mellon used MRI imaging to examine individuals engaged in simulated driving while having cell phone conversations.[12] This study showed that listening to a conversation on a cell phone while driving reduces brain activity associated with driving by 37%.[13] One researcher has even concluded that driving while talking on a cell phone is as dangerous as driving while intoxicated, because, according to the simulation study, drivers using cell phones had slower braking reactions.[14]

Texting while driving is thought to be more dangerous than talking on a cell phone and driving, because texting "utilizes cognitive functioning while also requiring the driver to remove her eyes from the road to see the phone."[15] Another study concluded that drivers who are texting look away from the road up to 14 times in a 30 second time period.[16] Another finding from this same study noted that drivers inadvertently leave their lanes 10% more often when texting.[17] A recent study by the Virginia Tech Transportation Institute (VTTI) studied video of truck drivers over several million miles.[18] The VTTI study concluded that texting while driving increased the risk of accident 23.2 times over non-distracted driving, with drivers taking their eyes off the road every 4.6 out of 6 seconds.[19]

While there are many academic studies that point to the danger of texting and driving, official accident and highway deaths do not provide an accurate picture of deaths directly related to texting. In fact, NHTSA has stated that estimating the role of distraction in accidents "is difficult because the police-reported distraction and inattention data appear to have a wide degree of reporting and collection variability."[20] At least as early as 2006, NHTSA has been recording "distracted affected" accidents. This category includes texting, but also several other distractions, including: using a cell phone or smartphone, eating and drinking, talking to passengers, grooming, reading (including maps), using a navigation system, watching a video, and adjusting a radio, CD player, or MP3 player. According to NHTSA, nearly 10% - 16% of fatalities have been labeled "distracted affected" from 2006-2010.[21]

Figure 1: Total Number of Highway and "Distracted Affected" Highway Fatalities, CY2006-2010

Calendar Year	Total Highway Fatalities	Total "Distraction Affected" Highway Fatalities
2006	42,708	5,836
2007	41,259	5,917
2008	37,423	5,838
2009	33,883	5,474
2010	32,885	3,092

Source: National Highway Traffic Safety Administration.

While national numbers that specifically attribute texting to accidents or fatalities are limited and not precise, the Virginia Department of Transportation began collecting data on accidents that involved texting in January 2012. This data was not readily available at the time of this report.

LEGAL ANALYSIS

According to the American Automobile Association, there are 40 states/jurisdictions, including Virginia and the District of Columbia, that penalize texting while driving.[22] Included in those 40 jurisdictions are the states surrounding Virginia. All five of the states surrounding Virginia, (Kentucky, Maryland, North Carolina, Tennessee, and West Virginia) penalize texting while driving as a fined offense, although unlike Virginia, each of these states has made it a primary offense.[23] Only Utah currently penalizes texting while driving with more than a fine. Utah, which permits a simple fine for texting while driving, also allows for the prosecution of criminal homicide if a "person operates a moving motor vehicle in a criminally negligent manner" while texting.[24] Additionally,

Utah has a statute criminalizing what is called "careless driving," where the commission of a traffic violation while "using a wireless telephone or other electronic device" could result in a sentence of up to 90 days in jail, and a possible license revocation if the violation causes a death.[25]

In 2009, the Virginia General Assembly passed a general prohibition against texting while driving, Va. Code § 46.2-1078.1.[26] This offense covers using a "handheld personal communication device" while operating a motor vehicle to:

- Manually enter multiple letters or text in the device as a means of communicating with another person; or,
- Read any email or text message transmitted to the device or stored within the device, provided that this prohibition shall not apply to any name or number stored in the device nor to any caller identification information.[27]

There are exceptions for being at a lawful stop, using GPS, emergency vehicles, and reporting an emergency. The penalty for a violation is a $20 fine for the first offense, and a $50 fine for any subsequent violation. Additionally, this prohibition is a secondary offense, which means the offense may only be charged when a person has already been stopped for another violation.

While the statute is relatively new, the number of charges and convictions has increased each year, as seen in Figure 2 below.

Figure 2: Va. Code § 46.2-1078.1-Total Charges and Convictions, FY10-FY12

Fiscal Year*	Total Charges	Total Convictions
2010	285	229
2011	422	334
2012**	511	414

Source: Virginia Criminal Sentencing Commission.

**Fiscal year in which the charge was concluded.*

*** Data do not include charges that were still pending at the end of FY12. Includes charges and convictions for subsequent offenses.*

In the Commonwealth, reckless driving is considered a criminal offense, rather than a traffic offense. The statutory scheme in the Commonwealth has a two pronged approach to defining reckless driving, by either general conduct which is covered under the general reckless driving statute, or 13 specific, also called *per se*, offenses.

The general reckless driving offense, Va. Code § 46.2-852, defines the offense as "irrespective of the maximum speeds permitted by law, any person who drives a vehicle on any highway recklessly or at a speed or in a manner so as to endanger the life, limb,

or property of any person shall be guilty of reckless driving." The penalty for a violation of this statute is a Class 1 misdemeanor. Case law has further defined the term "reckless" to mean "a disregard by the driver of a motor vehicle for the consequences of his act and an indifference to the safety of life, limb, or property."[28] The statute is broad enough to cover conduct that meets the standard of indifference to life, limb, and property, but "speculation and conjecture" is not sufficient to find guilt[29], nor is just intoxication by itself.[30]

While most cases concerning reckless driving point out what conduct will not suffice for a conviction under the statute, there are some decisions that provide a better understanding of prohibited "reckless" conduct. The Virginia Court of Appeals has held that evidence which suggests that a driver who crashed his motor vehicle, knowing he was sleepy and that there was a known defect with his car, was sufficient to infer reckless driving under the statute.[31] Additionally, the Virginia Court of Appeals has held that a driver, with local knowledge of a short merge lane, who speeds up, making it difficult for another driver to merge in front of him, is guilty of reckless driving, even when the other driver had the duty to yield.[32]

The General Assembly has also deemed specific acts to be reckless driving. There are 13 specific offenses, also referred to as *per se* offenses, meaning that if there is evidence that a driver committed one of the prohibited acts, he may be found guilty of reckless driving and punished consistent with a Class 1 misdemeanor. These specific offenses include:

- Overtaking or passing an emergency vehicle that is operating its lights or siren;[33]
- Operating a vehicle "not properly under control" or with "inadequate or improper adjusted" brakes;[34]
- Passing or overtaking a vehicle on a curve or approaching a grade or crest;[35]
- Driving a vehicle that is loaded in such a way as to obstruct the driver's view or prevent proper control of the vehicle;[36]
- Passing two vehicles abreast, going the same direction;[37]
- Driving two abreast in a single lane, in the same direction;[38]
- Overtaking or passing at a railroad crossing;[39]
- Failure to stop for a school bus;[40]
- Failure to give an adequate or timely signal when turning, slowing down, or stopping;[41]
- Driving too fast for conditions;[42]
- Exceeding the speed limit by 20 mph or more, or in excess of 80 mph;[43]
- Failing to stop at an entrance to a highway from a side road; and,[44]
- Racing two or more cars, on highways, roads, or parking lots open to the public.[45]

Based on the current Virginia statutory scheme, texting while driving could form the basis of a violation of Va. Code § 46.2-853 as long as the act of texting is shown to be "a disregard by the driver of a motor vehicle for the consequences of his act and an indifference to the safety of life, limb, or property." As a policy option, the General Assembly could make texting while driving a *per se* offense.

Conclusion

The concern with texting and driving is based on the evidence that it could be a significant cause of accidents. Studies have shown that drivers engaging in additional cognitive tasks, including talking on a cell phone or texting, are at a much greater risk for accidents. Additionally, recent studies on texting while driving have estimated that drivers who text pose a significant risk of accidents, in part, because their eyes leave the road much more often while texting. Statistics show that distracted driving, which texting while driving is a subset, is a factor in up to 16% of all highway fatalities.

Texting while driving is penalized as a fine in Virginia, just as it is in the states that border the Commonwealth, however, it is not a primary offense. In Virginia, reckless driving is considered a crime and not treated as a traffic infraction. In addition to a "general" reckless driving statute, there are 13 specific reckless driving infractions, and the General Assembly could create additional ones.

As a result of the study effort, the Crime Commission endorsed the following recommendation at its December 5, 2012, meeting:

Recommendation 1: Amend Va. Code § 46.2-853 (Driving a vehicle that is not under control) by adding the following language; *"Driving a motor vehicle that is not under proper control" includes driving a motor vehicle on any highway in the Commonwealth while simultaneously using a handheld personal communications device for any purpose other than verbal communication.*" The existing penalty for Va. Code § 46.2-853 would make texting while driving a reckless driving offense, punishable as a Class 1 misdemeanor.

Senator Thomas Norment introduced Senate Bill 1222 during the 2013 Regular Session of the Virginia General Assembly, based on the Crime Commission recommendation. The bill was amended to modify Va. Code § 46.2-868 to include a violation of the current texting while driving statute, Va. Code § 46.2-1078.1, as an additional $500 fine if done while also committing a violation of reckless driving. Additionally, texting while driving was designated as a primary offense, and the current fines for violations of this provision (Va. Code § 46.2-1078.1) were increased from $20 to $250 for the first offense, and from $50 to $500 for subsequent offenses. The bill was passed by both the Virginia Senate and Virginia House of Delegates as amended. The Governor proposed amendments that lowered the additional fine for a violation of Va. Code § 46.2-868 from $500 to $250, lowering the fine for violations of Va. Code § 46.2-1078.1 from $250 to $125 and $500 to $250, respectively, and added a requirement for DCJS to develop training for the enforcement of the new requirements. The Governor's amendments were accepted by the Virginia House of Delegates and the Virginia Senate and became law.[46]

Acknowledgements

The Virginia State Crime Commission extends its appreciation to the following agencies and organizations for their assistance and cooperation on this study:

Virginia Department of Transportation

Virginia Criminal Sentencing Commission

[1] Justin Jouvenal, "Texting while driving law and Virginia legislature criticized by Fairfax judge," Washington Post September 1, 2012, http://articles.washingtonpost.com/2012-09-01/local/35494796_1_virginia-tech-transportation-institute-virginia-law-top-prosecutor.
[2] Id.
[3] *See* Fernando A. Wilson and Jim P. Stimpson, Trends in Fatalities from Distracted Driving in the United States, 1999 to 2008, 100 Am. J. Pub. Health 2213, 2215-16 (2010). Based on an estimate, the authors determine that there were 16,000 deaths as a result from texting and driving from 1998 to 2008.
[4] Overview of the National Highway Traffic Safety Administration's Distracted Driver Program, DOT HS 811 299 (2010); *see also* Distraction.Gov, the Official U.S. Government Website for Distracted Driving, http://www.distraction.gov/. NTHSA includes the following activities in distracted driving; Texting, using a cell phone or smartphone, eating and drinking, talking to passengers, grooming, reading (including maps), using a navigation system, watching a video, or adjusting a radio, CD player, or MP3 player.
[5] Id. available *at* http://www.distraction.gov/content/get-the-facts/index.html.
[6] Id.
[7] CTIA The Wireless Association, "Wireless Quick Facts," 2012, http://www.ctia.org/advocacy/research/index.cfm/aid/10323.
[8] Mary Madden and Amanda Lenhart, *Teens and Distracted Driving,* Pew Research Center (2009), http://pewresearch.org/pubs/1411/teens-distracted-driving-texting-cellphone-use.
[9] Press Release, National Safety Council, National Safety Council Estimates that At Least 1.6 Million Crashes are Caused Each Year by Drivers Using Cell Phones and Texting (Jan. 12, 2010), http://www.nsc.org/Pages/NSCestimatesl6millioncrashescausedbydrivers usingcellphonesandtexting.aspx.
[10] Adcock, A., Constable, R.T., Gore, J.C., and Goldman-Rakic, P.S., Functional neuroanatomy of executive processes involved indual-task performance, Proc. Natl. Acad. 97, 3567–3572 (2000); Calhoun, V.D., Pekar, J.J., McGinty, V.B., Adali, T., Watson, T.D., and Pearlson G.D., Different activation dynamics in multipleneural systems during simulated driving. Hum. Brain Mapp. 16, 158–167 (2002); Anttila, V., and Luoma, J., Surrogate in-vehicle information systems and driver behavior in an urban environment: A field study on the effects of visual and cognitive load, Transp. Res., Part F, 8, 121–133 (2005).
[11] Alm, H. and Nilsson, L., Changes in driver behavior as a function of hands free mobile phones—A simulator study, Accident Anal. Prev.,26, 441–451 (1994); Beede, K.E., Kass, S.J., Engrossed in conversation: The impact of cell phones on simulated driving performance, Accident, Anal. Prev. 38, 415–421 (2006); Brookhuis, K.A., de Vries, G., Waard, D., The effects of mobile telephoning on driving performance, Accident Anal. Prev. 23,309–316 (1991); Consiglio, W., Driscoll, P., Witte, M. and Berg, W.P., Effect of cellular telephone conversations and other potential interference on reaction time in a braking response, Accident, Anal Prev. 35, 495–500 (2003); Haigney, D.E., Taylor, R.G., and

Westerman, S.J., Concurrent mobile (cellular) phone use and driving performance: Task demand characteristics and compensatory processes, Transp. Res., Part F 3, 113–121 (2000).
[12] Just, M.A., Keller T.A, and Cynkar, J., A decrease in brain activation associated with driving when listening to someone speak, Esliver Brain Research, 70-80 (2008).
[13] Id.
[14] *See, eg.*, David L. Strayer et al., A comparison of the cell phone driver and the drunk driver, 48 J. Hum. Factors & Ergonomics Soc'y 381, 388-90 (2006).
[15] Adam M. Gershowitz, TEXTING WHILE DRIVING MEETS THE FOURTH AMENDMENT: DETERRING BOTH TEXTING AND WARRANTLESS CELL PHONE SEARCHES, 54 Ariz. L. Rev. 577, 583 (2012).
[16] Simon Hosking et al., Monash University Accident Research Centre, The effects of text messaging on young novice driver performance 1, 22 (Feb. 2006), available at http://www.distraction.gov/research/PDF-Files/Effects-of-Text-Messaging.pdf.
[17] Id.
[18] New Data from VTTI Provides Insight into Cell Phone Use and Driving Distraction, Va. Tech. Transp. Inst. (July 27, 2009), http:// opi.mt.gov/pdf/DriverEd/RR/09VTTI_CellPhonesDistraction.pdf.
[19] Id.
[20] DOT HS 811 299, *supra* note 4.
[21] National Highway Traffic Safety Administration's Traffic Safety Facts, Research Note: Distracted Driving 2009, DOT HS 811 379 (2009); National Highway Traffic Safety Administration's, Traffic Safety Facts, Research Note: Distracted Driving 2010, DOT HS 650 379 (2010).
[22]AAA Exchange, *Distracted Driving Laws*, June 2012, http://exchange.aaa.com/wp-content/uploads/2012/06/AAA-Distracted-Driving-Laws-6-12.pdf.
[23] KY. REV. STAT. ANN. § 189.292 (West 2012); MD. CODE ANN., TRANSP. § 21-1124.1 (West 2012); N.C. GEN. STAT. ANN. § 20-137.4A (West 2012); TENN. CODE ANN. § 55-8-199 (West 2012); W. VA. CODE ANN. § 17C-14-15 (West 2012).
[24] UTAH CODE ANN. § 76-5-207.5 (West 2012). This statute covers a person using a "handheld wireless communication device," which includes texting.
[25] UTAH CODE ANN. § 41-6a-1715 (West 2012).
[26] 2009 Va. Acts. ch. 661.
[27] VA. CODE ANN. § 46.2-1078.1 (West 2012).
[28] Powers v. Commonwealth, 211 Va. 386, 177 S.E.2d 628 (1970).
[29] Id.
[30] Hall v. Commonwealth, 25 Va. App. 352, 488 S.E.2nd 651 (1997).
[31] Kennedy v. Commonwealth, 1 Va. App. 469, 399 S.E.2nd 905 (1997).
[32] Robinson v. Commonwealth, 48 Va. App. 623, 633 S.E.2nd 737 (2006).
[33] VA. CODE ANN. § 46.2-829 (West 2012).
[34] VA. CODE ANN. § 46.2-853 (West 2012).
[35] VA. CODE ANN. § 46.2-854 (West 2012).
[36] VA. CODE ANN. § 46.2-855 (West 2012).
[37] VA. CODE ANN. § 46.2-856 (West 2012).
[38] VA. CODE ANN. § 46.2-857 (West 2012).
[39] VA. CODE ANN. § 46.2-858 (West 2012).
[40] VA. CODE ANN. § 46.2-859 (West 2012).
[41] VA. CODE ANN. § 46.2-860 (West 2012).
[42] VA. CODE ANN. § 46.2-861 (West 2012).
[43] VA. CODE ANN. § 46.2-862 (West 2012).
[44] VA. CODE ANN. § 46.2-863 (West 2012).
[45] VA. CODE ANN. § 46.2-865 (West 2012).
[46] 2013 Va. Acts. ch. 790.