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June 27, 2014

TO: The Honorable Terry McAuliffe, Governor of Virginia
The Honorable Members of the General Assembly of Virginia

Pursuant to the provisions of the Code of Virginia §§ 30-156 through 30-164 establishing the Virginia State Crime Commission and setting forth its purpose, I have the honor of submitting herewith the Commission's 2013 Annual Report.

Very truly yours,

Thomas K. Norment, Jr., Chair

2013 ANNUAL REPORT

VIRGINIA STATE CRIME COMMISSION

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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

SENATE APPOINTMENTS

The Honorable Thomas K. Norment, Jr., Chair
The Honorable Janet D. Howell
The Honorable Bryce E. Reeves

HOUSE OF DELEGATE APPOINTMENTS

The Honorable Robert B. Bell, Vice-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

ATTORNEY GENERAL

The Honorable Kenneth T. Cuccinelli, II
Patricia West (Designee)

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
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Website: http://vscc.virginia.gov

2013 Child Sexual Abuse Work Group Membership

Sergeant Rene Ball, Detective Bureau
Virginia Beach Police Department

Major Freddie Bolling
Henrico County Police

Marcie Clifton, Senior Special Agent
Bureau of Criminal Investigations , Virginia State Police

Camille Cooper, Director of Legislative Affairs
PROTECT

Ian Danielsen, Child Advocacy Center Coordinator
Richmond SCAN

Mary Dayve Devoy
Citizen

Beth Doucette
Assistant Commonwealth's Attorney, Campbell County

Lieutenant Christopher Eley
Henrico County Police

Andrea Erard, City Attorney
Town of West Point Attorney

Cathryn "Cat" Evans
Assistant Commonwealth's Attorney, City of Alexandria

Dr. Robin Foster, Director of Pediatric ER/VCU
Supervisor of Child Protection Team

Detective Robert Gray, Special Crimes Unit
Norfolk Police Department

Lori Green, Child Protective Services Unit
Va. Department of Social Services

Johnny Hall, Supervisory Special Agent
NOVA/DC ICAC Coordinator, Virginia State Police

Kristine Hall, Policy Director
Va. Sexual and Domestic Violence Action Alliance

Jeanine Harper, Executive Director
Richmond SCAN

Detective Kevin Hiner
ICAC Taskforce, Richmond Police Department

Thomas Johnstone, Assistant Attorney General
Office of the Attorney General

Rita Katzman, Child Protective Services Prgm. Mgr.
Va. Department of Social Services

Laurel Marks, Manager, Juvenile & Adult Services
Va. Department of Criminal Justice Services

Investigator Paul McCormick
Criminal Investigations Division
Augusta County Sheriff's Office

Mary O'Donnell, Assistant City Attorney
City of Alexandria

Kate O'Leary, Deputy City Attorney
City of Richmond

Nancy Oglesby, Deputy Commonwealth's Attorney
Henrico County

The Honorable Eric Olsen
Commonwealth's Attorney, Stafford County

Eric Reynolds, Assistant Attorney General
Office of the Attorney General

Patricia Rightmier, Family Services Trainer
Va. Department of Social Services

Jerri Smith, Law Enforcement Coordinator
Va. Department of Criminal Justice Services

Captain David Stone
Chesterfield County Police Academy

Bryn Swartz, Prosecutor, Computer Crime Section
Office of the Attorney General

2013 Executive Summary of Activities

Throughout 2013, the Virginia State Crime Commission (Crime Commission) held three meetings: September 3, November 14, and December 2. During the 2013 General Assembly Session, a total of one mandated study and six bill referrals were sent to the Crime Commission and approved for review. The Crime Commission also decided to continue the comprehensive study on illegal cigarette trafficking from the previous year. The Crime Commission continues to be involved in the Forensic Science Board's DNA Notification Project.

The Crime Commission was mandated by House Joint Resolution 595, which incorporated House Joint Resolution 730, to study the issue of child sexual abuse and consensual sexual conduct between school personnel and adult students. Specifically, staff was mandated to review the laws and policies governing the investigations of alleged child sexual abuse in the Commonwealth, and the feasibility of creating a criminal penalty for sexual conduct between secondary school teachers and adult students. Staff reviewed other states' laws on these issues, collected data and met with various representatives around the state to determine what changes should be made to the current procedures. A work group was created and convened twice to review the child sexual abuse portion of this study. The work group was comprised of 30 representatives with specific knowledge of child sexual abuse investigations.

Staff researched several other issues as a result of bill referrals to the Crime Commission during the 2013 Session of the General Assembly. Senate Bill 1273 and House Bills 1541 and 1991 dealt with expungement of charges in cases involving forced prostitution, as well as the disposition of minors engaged in forced prostitution. Staff also examined issues regarding the possibility of allowing prior sex offense convictions into evidence in later sex offense cases as a result of Senate Bill 1114 and House Bill 1766. House Bill 1919 included a review of joint motions for writs of actual innocence. Detailed study presentations can be found on the Crime Commission's website at: http://vscc.virginia.gov.

As a result of these studies, a number of legislative proposals were endorsed by the Crime Commission and were presented for consideration during the 2014 Session of the General Assembly. The Crime Commission's legislative package included bills dealing with illegal cigarette trafficking, child sexual abuse investigations, writs of actual innocence, and admission of prior sex offense convictions.

In addition to these studies, the Crime 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 that may be suitable for testing exists within old Department of Forensic Science case files.

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

Admission of Prior Sex Offenses

Executive Summary

Delegate Robert Bell and Senator Mark Herring introduced House Bill 1766 and Senate Bill 1114, respectively, during the 2013 Regular Session of the Virginia General Assembly. These nearly identical bills sought to allow previous sex abuse convictions to be entered into evidence in felony sex abuse cases where the victim was a minor. The bills were referred to the Crime Commission for review.

In the common law there has been a long standing disfavor against the admission of collateral or character evidence because it was feared that juries would concentrate on the bad reputation of the defendant and ignore the facts and circumstances of the criminal case. Around 1900, American courts began to allow collateral evidence if it was offered to help establish motive, opportunity, intent, preparation, plan, knowledge, identity, absence of mistake or accident, or if it demonstrated a common scheme or plan. All 50 states, including Virginia, follow this exception to the collateral/character evidence rule. This exception can and is being used in every state to admit collateral evidence in child sex abuse cases.

Within the common law, a specific exception, called the "lustful disposition," was created to allow collateral evidence in child molestation and incest prosecutions. This exception allows evidence of the unique nature of the relationship between the defendant and victim, including uncharged criminal conduct/acts against the victim, or a third party, to corroborate the victim's testimony. At least 35 states follow this exception, including Virginia. In 1994, the United States Congress passed Federal Rule of Evidence 414, which codified the "lustful disposition" exception. Since then, at least 12 states have codified a version of the "lustful disposition" exception either in statute or as a rule of evidence.

As a result of the study effort, the Crime Commission endorsed the following recommendation at its December 2, 2013, meeting:

Recommendation 1: Codify the "lustful disposition" rule without the qualifier that it only applies when a defendant is accused of a felony offense. A new statute could be created that would state "evidence of the defendant's conviction of another offense or offenses of sexual abuse is admissible and may be considered for its bearing on any matter to which it is relevant."

Background

House Bill 1766 (HB 1766)[1] was introduced by Delegate Robert Bell, and Senate Bill 1114 (SB 1114)[2] was introduced by Senator Mark Herring during the 2013 Regular Session of the General Assembly. Both bills sought to allow previous convictions to be admitted into evidence in sexual abuse cases committed against minors. The bills were referred, by letter, to the Crime Commission for study from both the Virginia

House Courts of Justice and the Senate Courts of Justice Committees. The bills specify that in felony child sexual abuse cases, the admission of the "defendant's conviction of another offense or offenses of sexual abuse is admissible and may be considered for its bearing on any matter to which it is relevant." The bills require a 14 day notice to the defendant if the prosecution plans on introducing the evidence and HB 1766 requires that the evidence must be subject to Virginia Rules of Evidence 2:403.

The subject matter of the bills contemplates the admission into evidence of previous sex convictions in the prosecution of child sex felonies. Previous convictions are referred to as collateral act evidence, also known as propensity or character evidence, which is evidence concerning a person's traits, reputation, or even previous criminal convictions/acts that are not the subject of a current criminal prosecution. There was strong presumption against the admission of character or collateral act evidence in the common law. It is not clear how long the presumption against this type of evidence has existed, but it may go back as far as the Glorious Revolution of 1688.[3] As one American jurist described, the basic reason for the ban on this type of evidence is rooted in the concept of a fair trial for the accused:

> It is a maxim of our law, that every man is presumed to be innocent until he is proved to be guilty. It is characteristic of the humanity of all the English speaking peoples, that you cannot blacken the character of a party who is on trial for an alleged crime. Prisoners ordinarily come before the court and the jury under manifest disadvantages. The very fact that a man is charged with a crime is sufficient to create in many minds a belief that he is guilty. It is quite inconsistent with that fairness of trial to which every man is entitled, that the jury should be prejudiced against him by any evidence except what relates to the issue; above all should it not be permitted to blacken his character, to show that he is worthless, to lighten the sense of responsibility which rests upon the jury, by showing that he is not worthy of painstaking and care, and, in short, that the trial is what the chemists and anatomists call *experimentum in corpore vili.*[4]

While it was generally held that character or collateral act evidence was inadmissible, early American courts were permitting collateral evidence, as long as it was not admitted to prove propensity.[5]

There was an exception in English common law for the crimes of fraud and forgery.[6] It was reasoned that because these two crimes involve dishonesty or deceptive behavior, evidence of the accused's reputation for honesty was probative on his "reputation for truthfulness." In 1849, British courts began to admit collateral evidence in criminal prosecutions beyond fraud and forgery, as long as the collateral evidence was relevant to an issue of fact in the prosecution.[7] American courts continued to follow the general inadmissibility of collateral evidence throughout the latter half of the 19th century.

In 1901, the New York Court of Appeals decided People v. Molineux, which permitted exceptions for the admission of collateral evidence. Specifically, the Court held that:

> The exceptions to the rule cannot be stated with categorical precision. Generally speaking, evidence of other crimes is competent to prove the specific crime charged when it tends to establish (1) motive; (2) intent; (3) the absence of mistake or accident; (4) a common scheme or plan embracing the commission of two or more crimes so related to each other that proof of one tends to establish the others; (5) the identity of the person charged with the commission of the crime on trial.[8]

This rule has been adopted by every jurisdiction in the United States either as a rule of evidence or by judicial decision,[9] and is reflected in Federal Rule of Evidence (FRE) 404(b).[10] This exception has been widely used to admit prior convictions and uncharged criminal activity in child sex abuse cases.[11]

In the years following the adoption of Molineux or a rule similar to FRE 404(b), courts began to adopt an additional exception within the rule's framework; the "lustful disposition." Under this exception, additional evidence of the defendant's particular relationship with the victim, or information which would show the defendants' "bent of mind" towards the victim or similar victims was considered admissible.[12] The Indiana Supreme Court adopted a typical version of this exception:

> Provided they are not too remote in time or otherwise, such other acts are relevant and admissible to show the "lustful disposition" of defendant as well as to show the existence and continuance of the illicit relation, to characterize and explain the act charged and to corroborate the testimony of the prosecutrix as to that act.[13]

The basic reason for the adoption of the rule was the recognition in the common law that molestation and incest cases are very different from rape and sexual abuse cases involving adults.[14] Consent is often the critical question in adult sexual abuse cases, but in molestation/incest cases the victim frequently "consents" to the abuse and consent is not an element of the crime. What the "lustful disposition" tries to do is help explain why the victim "consented" and how the defendant's actions compelled the victim to consent. There are at least 35 states, including Virginia, that have adopted the "lustful disposition" rule.[15]

In 1994, the United States Congress passed FRE 414, which essentially codified the "lustful disposition" rule.[16] This rule allows the broad admissibility of evidence; "(i)n a criminal case in which a defendant is accused of child molestation, the court may admit evidence that the defendant committed any other child molestation."[17] Additionally, the court may consider the evidence "on any matter to which it is relevant."[18] The federal prosecutor must disclose his intention to offer the evidence at least 15 days prior to trial. In addition, the evidence must go through the probative value versus prejudicial effect analysis required by FRE 403.[19] This rule has been upheld as constitutional by at least two federal appeals courts.[20]

Since the passage of FRE 414, there have been 14 states that have adopted similar statutes or rules broadening the admissibility of prior bad acts in child molestation cases.[21] None of these statutes or rules are as broad as FRE 414.[22] All of these states' statutes or rules require advanced notice from the prosecutor prior to trial, a prejudicial effect versus probative value analysis, and permit relevant prior convictions and uncharged criminal activity to be admitted. There are six of these states that have amended their rules of evidence to add a version of FRE 414/"lustful disposition".[23] For example, the Alaska rule adheres fairly closely to the traditional "lustful disposition" rule:

> (2) In a prosecution for a crime involving a physical or sexual assault or abuse of a minor, evidence of other acts by the defendant toward the same or another child is admissible if admission of the evidence is not precluded by another rule of evidence and if the prior offenses:
>
> > (i) occurred within the 10 years preceding the date of the offense charged;
> > (ii) are similar to the offense charged; and,
> > (iii) were committed upon persons similar to the prosecuting witness.[24]

There are seven of these states that have enacted general statutes, allowing the relaxed admissibility of this type of evidence in cases involving sexual offenses, to apply to cases with either minor or adult victims.[25] California's statute simply states, "(i)n a criminal action in which the defendant is accused of a sexual offense, evidence of the defendant's commission of another sexual offense or offenses is not made inadmissible by Section 1101 [the general prohibition of prior bad acts], if the evidence is not inadmissible pursuant to Section 352 [requirement that all evidence undergo the probative value vs. prejudicial effect test]."[26] And finally, both Missouri and Washington's statutes were overturned by their state supreme courts on narrow, state constitutional grounds.[27]

Virginia Law

Consistent with the trend in other states, while Virginia has long followed the general rule that character evidence is prohibited in criminal prosecutions, it has allowed for Molineux type exceptions.[28] In 2012, this exception was codified in the Virginia Rules of Evidence under Rule 2-404(b) and states:

> Evidence of other crimes, wrongs, or acts is generally not admissible to prove the character trait of a person in order to show that the person acted in conformity therewith. However, if the legitimate probative value of such proof outweighs its incidental prejudice, such evidence is admissible if it tends to prove any relevant fact pertaining to the offense charged, such as where it is relevant to show motive, opportunity, intent, preparation, plan, knowledge, identity, absence of mistake, accident, or if they are part of a common scheme or plan.[29]

In 1923, the Supreme Court of Virginia adopted a version of the "lustful disposition" rule.[30] The Stump case stated that in prosecutions of statutory rape, where consent is immaterial, such "evidence is admissible as tending to show the disposition of the defendant with respect to the particular act charged."[31] While the rule in Stump is worded slightly differently than other permutations of the "lustful disposition" rule, it still allows evidence that illustrates the defendant's inclination towards committing a particular act, against a particular victim.

Over time the lustful disposition has been both clarified and modified by Virginia courts. The Supreme Court of Virginia made it clear that testimony of previous, uncharged criminal acts between the minor victim and the defendant are permitted in a rape case.[32] The exception was expanded when, in Moore v. Commonwealth, acts the defendant committed against two pre-teen boys, were admitted into evidence in a rape prosecution involving his 12 year old step-daughter.[33] And, in a rape prosecution, evidence of a previous conviction for raping the same victim, in a separate offense, was held to be admissible.[34]

A more recent case illustrates how the "lustful disposition" exception is used along with the character evidence exception in Virginia Rule of Evidence 2-404(b) in a child sexual abuse case.[35] In Ortiz v. Commonwealth, the court allowed testimony from the victim concerning a pattern of sexual abuse that the defendant committed against her over the course of a few years.[36] The court reasoned that this testimony was permitted because it was "relevant for one or more of the following purposes: to show the conduct or attitude of Ortiz toward the child, to prove motive or method of committing the rape, to prove an element of the crime charged, or to negate the possibility of accident or mistake." Essentially, the court used both the "lustful disposition" and Virginia Rule 2-404(b), as grounds for the victim's testimony to be admitted. Furthermore, the court permitted the admission of a drug store receipt for vaginal cream and pornography seized from the defendant's house because it corroborated the victim's testimony and showed how the defendant had used both items to "groom" the victim, making it easier for the victim to consent to the sexual acts.[37] The court also added that this evidence, consistent with Virginia Rule 2-404(b), negated the defendant's explanation that the acts were an accident or mistake.[38]

Overall, the basic framework already exists under Virginia law to admit relevant prior convictions in child sex abuse cases. The convictions can be admitted under Virginia Rule of Evidence 2-404(b) or under the Virginia version of the "lustful disposition" exception.

Conclusion and Recommendations

The admission of collateral act evidence was disfavored in the common law. There has been an exception for evidence that focused on motive, opportunity, intent, preparation, plan, knowledge, identity, absence of mistake or accident, or if it was part of a common scheme or plan. This exception may and is being used in child sexual abuse cases.

The "lustful disposition" exception allows evidence of the unique nature of the relationship between the defendant and victim, including uncharged criminal conduct/acts against the victim, or a third party, to corroborate the victim's testimony. The "lustful disposition: exception is followed in Virginia. The federal government and 12 states have codified a version of the "lustful disposition" rule.

The Crime Commission reviewed study findings at its September 3, 2013, meeting and directed staff to draft legislation. As a result of the study effort, the Crime Commission endorsed the following legislative recommendation at its December meeting:

Recommendation 1: Codify the "lustful disposition" rule without the qualifier that it only applies when a defendant is accused of a felony offense. A new statute could be created that would state "evidence of the defendant's conviction of another offense or offenses of sexual abuse is admissible and may be considered for its bearing on any matter to which it is relevant."

Recommendation 1 was introduced by Delegate Robert Bell as House Bill 403 during the 2014 General Session of the Virginia General Assembly. The bill was amended and passed by both the Virginia House of Delegates and the Virginia Senate. The Governor recommended an amendment to the bill, which became law when the amendment was adopted by both the Virginia House of Delegates and the Virginia Senate on March 24, 2014.[39]

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[1] H.B. 1766, 2013 Gen. Assem., Reg. Sess. (Va. 2013).
[2] S.B. 1114, 2013 Gen. Assem., Reg. Sess. (Va. 2013).
[3] Thomas J. Reed, Reading Gaol Revisited: Admission of Uncharged Misconduct Evidence in Sex Offender Cases, 21 Am. J. Crim. L. 127, 156 (1993), *see also* People v. Jenness, 5 Mich. 305, 320 (1858).
[4] State v. Lapage, 57 N.H. 245, 289-90 (1876).
[5] 1A John Henry Wigmore, Evidence In Trials At Common Law § 357, at 336 (Tillers ed., rev. ed. 1983).
[6] See Regina v. Winslow, (1860) 8 Cox C.C. 397; Regina v. Oddy, (1851) 169 Eng. Rep. 499; 5 Cox. C.C. 210.
[7] 18 L.J.M.C. 215 (1849).
[8] People v. Molineux, 168 N.Y. 264, 293, 61 N.E. 286, 294 (1901).
[9] Basyle J. Tchividjian, Predators and Propensity: The Proper Approach for Determining the Admissibility of Prior Bad Acts Evidence in Child Sexual Abuse Prosecutions, 39 Am. J. Crim. L. 327, 379 (2012), *see also* **Hawaii**, HAW. REV. STAT. § 626-1 (West 2013); **Idaho**, I.R.E. 404 Idaho R. Evid. 404; **Indiana**, Ind. R. Evid. 404; **Iowa**, IA R 5.404; **Kentucky**, KRE 404 Ky. R. Evid. 404; **Louisiana**, La. Code Evid. Ann. art. 404; **Maine**, Me. R. Evid. 404; **Maryland**, Md. Rule 5-404; **Massachusetts**, MA R EVID § 404; **Michigan**, Mich. R. Evid. 404; **Minnesota**, Minn. R. Evid. 404; **Mississippi**, Miss. R. Evid. 404; **Montana**, Mont. R. Evid. 404; **Nebraska**, NEB. REV. STAT. § 27-404 (2013); **Nevada**, NEV. REV. STAT. ANN. § 48.045 (West 2013); **New Hampshire**, N.H. R. Evid. 404; **New Jersey**, N.J. R. Evid. 404; **New Mexico**, N.M. R. Evid. 11-404; **New York**, N.Y. CRIM. PROC. LAW § 60.40 (McKinney 2013); **North Carolina**, N.C. R. Evid. § 8C-1,8C-1404; **North Dakota**, N.D. R. Evid. 404; **Ohio**, Ohio Evid. R. 404; **Oregon**, OR. REV. STAT. ANN. § 40.170 (West 2013); **Pennsylvania**, Pa. R. Evid. 404; **Rhode Island**, R.I. R. Evid. 404; **South Carolina**, S.C. R. Evid. 404; **South Dakota**, S.D. CODIFIED LAWS § 19-12-5

(West 2013); **Tennessee**, Tenn. R. Evid. 404; **Texas**, Tex. R. Evid. 404; **Vermont**, Vt. R. Evid. 404; **West Virginia**, W. Va. R. Evid. 404; **Wyoming**, Wyo. R. Evid. 404.

[10] "(2) Permitted Uses; Notice in a Criminal Case. This evidence may be admissible for another purpose, such as proving motive, opportunity, intent, preparation, plan, knowledge, identity, absence of mistake, or lack of accident. On request by a defendant in a criminal case, the prosecutor must: (A) provide reasonable notice of the general nature of any such evidence that the prosecutor intends to offer at trial; and (B) do so before trial--or during trial if the court, for good cause, excuses lack of pretrial notice." Fed. R. Evid. 404(b)(2).

[11] *See generally* State v. Yager, 236 Neb. 481, 483, 461 N.W.2d 741, 743 (1990) (testimony of two prior victims of defendant's fondling to refute accidental touching defense); State v. Lucas, 364 S.E.2d 12, 16-17 (W. Va. 1987) (holding similar prior molestations admissible to show why victim did not resist defendant); Calloway v. State, 520 So. 2d 665, 667 (Fla. Dist. Ct. App. 1988) (holding evidence of conduct of defendant with aunt of victim admissible to corroborate victim's story); State v. Aakre, 2002 MT 101, 309 Mont. 403, 46 P.3d 648 and overruled by Whitlow v. State, 2008 MT 140, 343 Mont. 90, 183 P.3d 861 (common plan or scheme for sexual assault cases).

[12] Tchividjian, *supra*, at note 9.

[13] Barker v. State, 188 Ind. 263, 120 N.E. 593 (1918).

[14] Reed, *supra*, at note 3.

[15] States that have the "lustful disposition" exception: **Alaska**, Burke v. State, 624 P.2d 1240, 1248 (Alaska 1980); **Arizona**, State v. Weatherbee, 158 Ariz. 303, 304, 762 P.2d 590, 591 (Ct. App. 1988); **Arkansas**, Flanery v. State, 362 Ark. 311, 313, 208 S.W.3d 187, 189 (2005); **Connecticut**, State v. DeJesus, 288 Conn. 418, 421, 953 A.2d 45, 49 (2008); **Delaware**, State v. Clough, 33 Del. 140, 132 A. 219 (Gen. Sess. 1925); **Colorado,** Laycock v. People, 66 Colo. 441, 182 P. 880 (1919); **Georgia**, Farmer v. State, 197 Ga. App. 267, 398 S.E.2d 235 (1990); **Idaho**, State v. Lippert, 145 Idaho 586, 594, 181 P.3d 512, 521 (Ct. App. 2007); **Illinois**, People v. Claussen, 367 Ill. 430, 11 N.E.2d 959 (1937); **Iowa**, State v. Spaulding, 313 N.W.2d 878, 879 (Iowa 1981) (incudes third parties, whenever close in time); **Kansas**, State v. Moore, 242 Kan. 1, 7, 748 P.2d 833, 837 (1987) *disapproved of by* Carmichael v. State, 255 Kan. 10, 872 P.2d 240 (1994); **Louisiana,** State v. McCollough, 149 La. 1061, 90 So. 404 (1922); **Maine**, State v. Seaburg, 154 Me. 162, 163, 145 A.2d 550, 551 (1958); **Maryland**, Vogel v. State, 315 Md. 458, 460, 554 A.2d 1231 (1989); **Massachusetts**, Com. v. Dwyer, 448 Mass. 122, 125, 859 N.E.2d 400, 405 (2006); **Mississippi,** Crawford v. State, 754 So. 2d 1211, 1216 (Miss. 2000); **Missouri**, State v. Johnson, 161 S.W.3d 920, 924 (Mo. Ct. App. 2005); **Nebraska**, State v. Baker, 218 Neb. 207, 352 N.W.2d 894 (1984); **New Hampshire**, State v. Desilets, 96 N.H. 245, 73 A.2d 800 (1950); **New Jersey**, State v. Cannon, 72 N.J.L. 46, 60 A. 177 (Sup. Ct. 1905); **New Mexico**, State v. Dodson, 67 N.M. 146, 353 P.2d 364 (1960); **New York**, People v. Lewis, 69 N.Y.2d 321, 506 N.E.2d 915 (1987); **North Carolina**, Gasque v. State, 271 N.C. 323, 156 S.E.2d 740 (1967); **North Dakota**, State v. Schell, 65 N.D. 126, 256 N.W. 416 (1934); **Oklahoma**, Hawkins v. State, 1989 OK CR 72, 782 P.2d 139; **Ohio**, State v. Jackson, 82 Ohio App. 318, 321, 81 N.E.2d 546, 548 (1948); **Oregon**, State v. McKay, 309 Or. 305, 307, 787 P.2d 479, 480 (1990); **Pennsylvania**, Com. v. Hacker, 2008 PA Super 239, 959 A.2d 380, 393 (Pa. Super. Ct. 2008) rev'd, 609 Pa. 108, 15 A.3d 333 (2011) (bolster the credibility); **Rhode Island**, State v. Robinson, 989 A.2d 965, 967 (R.I. 2010); **South Carolina**, State v. Richey, 88 S.C. 239, 70 S.E. 729 (1911); **South Dakota**, State v. Champagne, 422 N.W.2d 840, 843 (S.D. 1988); **Tennessee**, Burlison v. State, 501 S.W.2d 801 (Tenn. 1973); **Virginia**, Ortiz v. Com., 276 Va. 705, 710, 667 S.E.2d 751, 755 (2008); **Washington**, State v. Ray, 116 Wash. 2d 531, 539, 806 P.2d 1220, 1225 (1991); **Wisconsin**, State v. Hunt, 2003 WI 81, 263 Wis. 2d 1, 28, 666 N.W.2d 771, 784 (corroboration); **Wyoming**, Brown v. State, 736 P.2d 1110 (Wyo. 1987) (other than victim corroboration).

[16] Fed. R. Evid. 414. See also Tchividjian 327, 342, *supra* at note 9.

[17] Id.

[18] Id.

[19] Fed. R. Evid. 403.

[20] United States v. LeMay, 260 F.3d 1018 (9th Cir. 2001); United States v. Castillo, 140 F.3d 874 (10th Cir. 1998); United States v. Sandoval, 410 F. Supp. 2d 1071 (D.N.M. 2005).
[21] States with statutes similar to FRE 414: **Alaska**, Alaska R. Evid. 404; **Arizona**, ARIZ. REV. STAT. ANN. § 13-1420 (2013) and Ariz. R. Evid. 404; **California**, CAL. EVID. CODE § 1108 (West 2013); **Colorado**, COLO. REV. STAT. ANN. § 16-10-301 (West 2013); **Connecticut**, CT R REV § 4-5; **Florida**, FLA. STAT. ANN. § 90.404 (West 2013); **Illinois**, 725 ILL. COMP. STAT. ANN. 5/115-7.3 (West 2013); **Kansas**, KAN. STAT. ANN. § 60-455 (West 2013); **Louisiana**, LA. CODE EVID. ANN. art. 412.2 (2013); **Missouri**, MO. ANN. STAT. § 566.025 (West 2013), repealed; **Oklahoma**, OKLA. STAT. ANN. tit. 12, § 2414 (West 2013); **Texas**, TEX. CRIM. PROC. CODE ANN. art. 38.37 (West 2013), amended effective September; **Utah**, Utah R. Evid. 404(c); **Washington**, WASH. REV. CODE ANN. § 10.58.090 (West 2013).
[22] Tchividjian, *supra*, at note 9.
[23] Alaska R. Evid. 404(b)(2); Ariz. R. Evid. 404(c); CT R REV § 4-5(b); FLA. STAT. ANN. § 90.404(2)(b) (West 2013); KAN. STAT. ANN. § 60-455(c) (West 2013); LA. CODE EVID. ANN. art. 412.2 (2013); Utah R. Evid. 404(c).
[24] Alaska R. Evid. 404(b)(2).
[25] Ariz. R. Evid. 404; CAL. EVID. CODE § 1108 (West 2013); CT R REV § 4-5; FLA. STAT. ANN. § 90.404 (West 2013); 725 ILL. COMP. STAT. ANN. 5/115-7.3 (West 2013); KAN. STAT. ANN. § 60-455 (West 2013); OKLA. STAT. ANN. tit. 12, § 2414 (West 2013).
[26] CAL. EVID. CODE § 1108(a) (West 2013).
[27] Missouri's statute was overturned by its Supreme Court on a state constitution, due process issue. State v. Burns, 978 S.W.2d 759 (Mo. 1998). In Washington, its Supreme Court invalidated the law on the basis of separation of powers. State v. Gresham, 173 Wash. 2d 405, 269 P.3d 207 (2012).
[28] Roy v. Commonwealth, 191 Va. 722, 727, 62 S.E.2d 902, 904 (1951).
[29] Va. Sup. Ct. R. 2:404(b).
[30] Stump v. Commonwealth, 137 Va. 804, 119 S.E. 72, 73 (1923).
[31] Id.
[32] Waitt v. Commonwealth, 207 Va. 230, 234, 148 S.E.2d 805, 808 (1966).
[33] Moore v. Commonwealth, 222 Va. 72, 75, 278 S.E.2d 822, 824 (1981).
[34] Marshall v. Commonwealth, 5 Va. App. 248, 250, 361 S.E.2d 634, 636 (1987).
[35] Ortiz v. Commonwealth, 276 Va. 705, 667 S.E.2d 751 (2008).
[36] Id. at 276 Va. 705, 711, 667 S.E.2d 751, 755.
[37] Id. at 276 Va. 705, 716, 667 S.E.2d 751, 758.
[38] Id.
[39] 2014 Va., Acts ch. 782.

Child Sexual Abuse

Executive Summary

House Joint Resolution 595 was introduced by Delegate Manoli Loupassi during the 2013 Session of the General Assembly. The resolution incorporated Delegate David Albo's House Joint Resolution 730. Consequently, the resolution had two distinct parts, dealing with different subjects that were combined into one study resolution during the legislative process. The second part of the resolution specifically directed the Crime Commission to review:

> …(v) laws, regulations, policies, and training practices of the Commonwealth and its agencies governing reporting, investigation, and tracking of complaints of suspected child abuse, including suspected sexual abuse of a child and including such laws, regulations, policies, and training practices of or governing the Department of Social Services, local departments of social services, law enforcement agencies, schools, and child welfare agencies; (vi) variations or discrepancies in how the various agencies receive, investigate, and track alleged cases of child sexual abuse, particularly those variations or discrepancies that may create opportunities for individuals who are alleged to have committed child sexual abuse and who are the subjects of investigations to destroy evidence, intimidate victims, or otherwise interfere with the conduct of such investigation; (vii) recommendations for legislative, regulatory, and budgetary changes to reduce or eliminate variations or discrepancies in how the various agencies receive, investigate, and track alleged cases of child sexual abuse in order to increase the quality and effectiveness of child protective services, investigations of alleged child sexual abuse, and prosecutions of individuals alleged to have committed child sexual abuse in the Commonwealth.

In order to address this part of the study mandate, Crime Commission staff examined relevant literature, statutes, and regulations, convened two Work Group meetings, collected available data from relevant agencies, and disseminated surveys to local departments of social services, law enforcement agencies, criminal justice training academy directors, and Commonwealth's Attorneys. In addition, staff attended multiple meetings, trainings and conferences, and met with various individuals and representatives from several organizations and state agencies.

Child sexual abuse is a serious problem that can affect any community. Victims of child sexual abuse can experience many negative short- and long-term consequences. Similar to all sexual offenses, child sexual abuse is a highly underreported crime, making accurate incidence and prevalence rates difficult to estimate. Similarly, attrition rates tend to be high for cases that are reported.

The Virginia Department of Social Services (VDSS) provides oversight to 120 local departments, which operate autonomously. Within each local department, the child protective services (CPS) unit handles reports of child neglect and abuse that involve a caretaker. If a case is accepted by the local department, the case can either receive a family assessment or an investigation. Cases involving sexual abuse must receive an investigation, and cannot be handled through a family assessment. If a case is investigated, the burden of proof for a case to be considered founded is preponderance of the evidence. If the evidence does not meet this burden of proof, the case is considered unfounded. Retention times vary for founded, unfounded, and family assessment cases.

By statute, local departments are required to report all cases of child sexual abuse immediately to law enforcement and the Commonwealth's Attorney. The timeframe and burden of proof for investigations is very different for CPS and law enforcement. These differences can lead to investigatory concerns for both groups. Also, caseload levels are very high for both local departments and law enforcement. Staff turnover is a concern for both. Based on survey results, it appears that the vast majority of law enforcement and local DSS have a "very good" to "excellent" working relationship.

While basic law enforcement training appears to be adequate, it does appear that in-service/specialized training could be offered more frequently. On-line training in particular was highly desired. It was noted that there is currently no requirement for newly assigned detectives to complete any type of certification or specialized training. Findings also indicated that the mandated VDSS training for newly hired CPS workers needs to be made more available across the state, as well as specialized or continuing education for existing local DSS staff.

Teachers are required to complete mandatory training on child abuse and neglect as part of their licensure. School divisions are required to have a Memorandum of Understanding (MOU) with their local DSS concerning the investigation of child sexual abuse cases; however, it appears that compliance with this requirement is problematic. An additional concern is that the MOU is only required to address reports made *against* school personnel.

Child advocacy centers (CAC) have been shown to provide numerous positive outcomes in child sexual abuse cases by coordinating the investigation and promoting a child-focused environment. There are currently 16 CACs in Virginia. Local DSS reported that forensic interviews are being provided in most child sexual abuse cases, but there is a need to train additional personnel to increase availability in localities. The multi-disciplinary team (MDT) is the foundation of the CAC model. The need to implement MDTs, at a minimum, across the state was strongly encouraged by the Work Group, survey respondents, and others during the course of the study.

The Crime Commission reviewed study findings at its November and December 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 meeting:

Recommendation 1: Statutorily require the creation, maintenance, and coordination of a multi-disciplinary response to child sexual abuse under proposed new statute, Va. Code § 15.2-1627.5.

Recommendation 2: Amend Va. Code § 63.2-1505(B)(5) to extend the requirement for a CPS investigation to be completed from 45 days to 90 days, whenever a joint investigation is being conducted between law enforcement and local DSS, for child sexual abuse investigations.

Recommendation 3: Amend Va. Code § 63.2-1514 to extend the length of time unfounded records are maintained from 1 year to 3 years.

Recommendation 4: Amend Va. Code § 63.2-1511(D) to extend the scope of MOUs between school divisions and local DSS to include all types of child sexual abuse reports involving a student.

Recommendation 5: Amend Va. Code § 63.2-1503 to require a form be completed and signed by both agencies whenever a local DSS reports an incident of suspected child sexual abuse to local law enforcement. It would also require that any local DSS report the receipt of a complaint within *2 hours* to the attorney for the Commonwealth and the local law enforcement agency.

Recommendation 6: Amend Va. Code § 63.2-1505 to require that no new local DSS staff member may make any dispositional decisions in a case that involves an allegation of child sexual abuse, until they have received the required training.

Background

During the 2013 Regular Session of the Virginia General Assembly, Delegate Manoli Loupassi introduced House Joint Resolution 595 (HJR 595), which was amended to incorporate Delegate David Albo's HJR 730.[1] The resolution directed the Crime Commission to study and report on two distinct issues. The first issue dealt with legal, consensual sexual activity between students over the age of eighteen and school personnel. The second issue of the resolution dealt with child sexual abuse investigations, which is the focus of this report. Specific attention was placed on the laws, regulations, policies and training practices of the Commonwealth and its agencies governing the receipt, reporting, investigation, and tracking of complaints of alleged child sexual abuse, as well as examining any variations or discrepancies in such cases. This part of the resolution specifically directed the Crime Commission to review:

> …(v) laws, regulations, policies, and training practices of the Commonwealth and its agencies governing reporting, investigation, and tracking of complaints of suspected child abuse, including suspected sexual abuse of a child and including such laws, regulations, policies, and training practices of or governing the Department of Social Services, local departments of social services, law enforcement

> agencies, schools, and child welfare agencies; (vi) variations or discrepancies in how the various agencies receive, investigate, and track alleged cases of child sexual abuse, particularly those variations or discrepancies that may create opportunities for individuals who are alleged to have committed child sexual abuse and who are the subjects of investigations to destroy evidence, intimidate victims, or otherwise interfere with the conduct of such investigation; (vii) recommendations for legislative, regulatory, and budgetary changes to reduce or eliminate variations or discrepancies in how the various agencies receive, investigate, and track alleged cases of child sexual abuse in order to increase the quality and effectiveness of child protective services, investigations of alleged child sexual abuse, and prosecutions of individuals alleged to have committed child sexual abuse in the Commonwealth.[2]

General Literature Review

There are approximately 74.8 million children in the United States.[3] An estimated 3.7 million referrals of children being abused or neglected were received by state and local CPS in 2011.[4] Of this number, it is estimated that there were 681,000 unique child victims of child abuse and neglect:

- 79% involved neglect;
- 18% involved physical abuse;
- 9% involved sexual abuse; and,
- 10% involved other types of maltreatment including threatened abuse, parental drug/alcohol abuse, or lack of supervision.[5]

There are approximately 1.84 million children in Virginia.[6] An estimated 87,300 referrals of children being abused or neglected were received by local CPS departments in Fiscal Year 2013 (FY13). Of this number, it is estimated that 8,612 referrals were determined to be founded:

- 56% involved physical neglect;
- 26% involved physical abuse;
- 12% involved sexual abuse;
- 2% involved mental abuse;
- 2% involved medical neglect; and,
- 1% involved substance exposed infants.[7]

Overview of Child Sexual Abuse Trends

Before discussing the overall trends related to child sexual abuse, it must be emphasized that the discussion within this report is only a summary of the overall trends and patterns of the phenomena rather than an exhaustive discussion. A plethora of research on this topic and collateral subject matter exists. This report can be seen as a starting point to guide the reader in the direction of additional literature that may be of interest.

Child sexual abuse can be defined in many ways. In fact, it is arguably very difficult to find a single, working definition of child sexual abuse.[8] Some definitions are very broad while others are very narrow in scope. Further, it is important to note that there is no one single profile of someone who sexually abuses a child. Offenders can represent every age, socioeconomic status, race, ethnicity, education level, and religion.[9] Likewise, there is not one single profile of a victim.[10] For example, Putnam states "…sexually abused children constitute a very heterogeneous group with many degrees of abuse about whom few simple generalizations hold."[11]

However, there are some general trends that can be observed. First, in the majority of cases, the offender is known by the victim or the victim's family.[12] Second, females are more likely than males to experience child sexual abuse.[13] Third, most perpetrators are male.[14] Fourth, juveniles comprise approximately one-third of known perpetrators.[15] Fifth, children with disabilities are at a higher risk of victimization.[16] Some research has noted that children with disabilities are up to at least three times more likely than children without disabilities to be victims of sexual abuse.[17] Finally, victims who are exposed to other forms of abuse, neglect, instability, or conflict in their household are at a higher risk.[18]

More recent research has begun to examine the potential cross-over between internet child pornography and contact sex offenses. The results appear to be mixed, with some research supporting a correlation and others not finding support for the relationship.[19] Additional empirical research with improved methodologies and larger sample sizes is needed to explore this relationship further.

Research has consistently documented the potential short- and long-term physical and mental effects of childhood sexual abuse, including but not limited to: depression, anxiety, anger, fear, sleeping difficulties, STIs, pregnancy, sexualized behaviors, PTSD, poor self-esteem, sexuality issues, self-destructive behaviors, substance abuse, suicidal behavior, and eating disorders.[20] However, it is important to note that children's resiliency levels vary considerably.[21] Some children are well-adjusted due to strong protective factors while others adjust poorly.

Research has found a wide range of variance in disclosure and recantation rates.[22] Failure to disclose is common. If disclosed, it is very common for the disclosure to be delayed and for the disclosure to have a large impact on the victim and those surrounding him or her.[23] Disclosure is more of a process rather than an event. The level of support a child receives from caretakers is crucial to many potential outcomes, including levels of psychological distress, stress, trauma, as well as adjustment, treatment, and assistance in any related criminal investigation.[24] Recantation, when one discloses then retracts statements, may also occur in the disclosure process. This is especially seen when there is a lack of support from the non-offending parent or guardian, or other family members.[25] Lack of maternal support, in particular, has been shown to lead to higher recantation rates.[26] It is important that assistance and support be provided to caregivers as soon as possible as well.

Prosecution and Convictions

Child sexual abuse, similar to all types of sexually-based offenses, is a highly underreported crime.[27] As such, accurate incidence and prevalence rates are difficult to estimate.[28] There are many factors related to the prosecution of child sexual abuse cases.[29] The incidents that are reported tend to be very complicated, with little evidence, where the child's testimony oftentimes is the only piece of evidence. Even when evidence does exist, the decision to prosecute can still be difficult or controversial. For instance, some prosecutors may decline to prosecute due to insufficient evidence, a recantation, or because the low probability of obtaining a conviction does not justify subjecting the victim and their families to the stresses of prosecution and possibly a trial. As a consequence of these and many other factors, the attrition rate of child sexual abuse cases tends to be high.[30]

Staff requested the total number of circuit court charges and convictions for child sexual abuse-related offenses from the Virginia Criminal Sentencing Commission (VCSC) for FY10-FY13.[31] Figure 1 illustrates the total number of charges and convictions for each offense grouping:

Figure 1: Circuit Court Charges and Convictions, FY10-FY13*

Type of Offense	FY10		FY11		FY12		FY13**	
	Charges	Convictions	Charges	Convictions	Charges	Convictions	Charges	Convictions
Forcible Rape	159	74	171	68	162	54	204	66
Forcible Sodomy	313	117	282	110	284	69	238	90
Object Sexual Penetration	183	56	181	73	139	33	127	28
Aggravated Sexual Battery	855	409	646	315	771	299	723	302
Indecent Liberties	904	501	810	404	759	355	811	339
Carnal Knowledge	306	203	322	217	367	241	322	217
Obscenity	2,499†	866	1,959	1,165	3,848†	2,953††	2,916	1,434

Source: Supreme Court of Virginia, Circuit Court Management System; * FY in which the charge was concluded. ** Data do not include charges that were still pending at the end of FY13. † One individual was charged with over 800 counts of obscenity in FY10 and two individuals were charged with over 900 counts of obscenity in FY12. †† Two individuals were convicted of more than 900 counts of obscenity in FY12. Data does not include cases from Fairfax, Va. Beach, or Alexandria. Prince William joined the system in FY09.

As can be seen in the chart, in general, attrition rates are very high. Nearly all offense groupings have less than a 50% conviction rate, with the exception of carnal knowledge and obscenity-related charges, which appear to be slightly higher.

Child Sexual Abuse Work Group

The resolution also mandated that Crime Commission staff convene a work group to discuss the topic of child sexual abuse investigations. Representatives from the following agencies participated:

- Rural and urban local department of social services child protective services unit;
- Rural and urban law enforcement agency;
- Rural and urban prosecutor;
- Rural and urban city/county attorney;
- Virginia Department of Social Services, Division of Family Services;
- Virginia Department of Criminal Justice Services;
- Office of the Attorney General;
- Nationally accredited child advocacy center;
- Victim's rights organizations;
- Virginia Department of Education;
- Virginia Association of School Superintendents;
- Pediatric emergency room physician; and,
- Member of the public.

The Work Group met on June 20, 2013, and July 23, 2013, to discuss the issues delineated in the second part of HJR 595. Both meetings were particularly beneficial in helping staff understand the overall nature, process, and difficulties surrounding child sexual abuse investigations.

Virginia Department of Social Services and Local Departments

Overview

The Virginia Department of Social Services (VDSS) is a state supervised and locally administered social services system. It provides oversight and guidance to 120 local departments, which operate autonomously. It is a decentralized system where the local departments are independent in how they carry out the policies and procedures set by VDSS. Child Protective Services (CPS) is one of the many division programs that fall under VDSS. The goal of CPS is to "identify, assess, and provide services to children and families in an effort to protect children, preserve families, whenever possible, and prevent further maltreatment."[32]

The 120 local departments are responsible for receiving reports of abuse and neglect that involve a caretaker, conducting investigations to determine the validity of CPS reports, and providing services that enhance child safety and prevent further abuse and neglect to families and children.[33] A caretaker is defined as any individual having the responsibility of providing care for a child, to include the following:

- Parent or other person legally responsible for the child's care;
- Any other person who has assumed caretaking responsibility by virtue of an agreement with the legally responsible person;
- Persons responsible by virtue of their positions of conferred authority; and,
- Adult persons residing in the home with the child.[34]

Thus, the definition is broader than implied in that it includes not only parents and guardians, but also teachers, coaches, babysitters, child care facilities, clergy, and others who have a caretaker role. It does not include, for example, a complete stranger, Internet-based facilitation, or a neighbor with no authority from a parent or guardian to care for the child.

Under Va. Code § 63.2-100, a sexually abused child is *one* type of "abused or neglected child." Specifically, it includes any child under 18 whose parent, or any other person responsible for the care of the child, does any or all of the following: commits or allows to be committed any illegal sexual act upon a child including incest, rape, fondling, indecent exposure, prostitution; or, allows a child to be used in any sexually explicit visual material.

Referral Process

In general, local departments either receive referrals directly or through the VDSS Child Abuse and Neglect Hotline. A referral is defined as any report of suspected child abuse or neglect made to the local department or the VDSS Child Abuse and Neglect Hotline.[35] A referral is also called a complaint.

Referrals can come from a variety of sources, with most coming from schools and law enforcement, as shown in Figure 2 below:

Figure 2: Source of Referrals, FY12

Source of Referral	Number of Referrals	Percentage of Referrals
Schools (public and private), school staff, teachers	14,918	**20%**
Law enforcement	11,412	**16%**
Parent	7,110	**10%**
Counselor/therapist	5,422	**7%**
Relative	4,965	**7%**
DSS, social services, social workers	4,555	**6%**
Hospital, clinic, medical personnel	4,499	**6%**
Court probation	1,141	**2%**
Neighbor	1,065	**1%**
Mental Health	1,021	**1%**
Other/Unknown	17,218	**23%**
TOTAL	73,326	100%

Source: Va. Department of Social Services, Annual Report- Referral Reporter Source, Va. OASIS data.

A referral is accepted, or considered to be valid, if it meets the following four criteria:

- The victim is less than 18 years of age at the time of the report;
- The alleged abuser is the child's parent or other caretaker;
- The local department receiving the report has jurisdiction; and,
- The circumstances reported described alleged suspected child abuse or neglect.[36]

There are two different responses that can stem from a referral that has been accepted: a family assessment or an investigation. Family assessments are conducted when there is no statutory requirement to conduct an investigation and/or when there is no immediate concern for child safety.[37] For example, these types of cases could involve inadequate parenting or life management issues rather than dangerous practices or actions. There is no disposition made in a family assessment.

Unlike a family assessment, investigations are undertaken when there is an immediate concern for child safety or when required by Va. Code § 63.2-1506(c)(i), such as reports involving sexual abuse, a child fatality or cases involving non-familial caretakers. An investigation is also required upon the third valid CPS report in 12 months. The main point is that all accepted child sexual abuse cases should receive an investigation rather than a family assessment.

Virginia Code § 63.2-1505(B)(5) requires a CPS investigation to be completed within 45 days from the date of the report, with a possible extension to 60 days. In certain sexual abuse investigations or child fatalities, this timeframe may be suspended pending receipt of necessary reports. Unlike family assessments, investigations can have one of two dispositions: founded or unfounded. The burden of proof in CPS investigations is preponderance of the evidence. A founded disposition means that a review of the facts shows by a preponderance of the evidence that child abuse or neglect has occurred.[38] The level of severity for a founded case determines the length of its retention time within the Child Abuse and Neglect Central Registry, as will be discussed later. An unfounded disposition means that a review of the facts does not show by a preponderance of the evidence that child abuse or neglect occurred.[39]

When the disposition of a case is founded, the subject of the investigation may appeal the finding. There are three levels of administrative appeal.[40] First, the subject has 30 days to write to the local department for a conference. If not satisfied with the outcome at the local conference, the subject can then appeal for a review by a hearing officer by writing the Commissioner of VDSS for a state appeal hearing. Finally, if not satisfied by the results of the hearing, the subject can then petition for a judicial review in circuit court.

As mentioned earlier, there are varying retention times for each type of disposition, determined by the level of severity. The retention time for each is set by VDSS and the Library of Virginia. The length of retention time for each type of record is illustrated in Figure 3.

Figure 3: VDSS Record Retention Time

Type of Record	Length of Retention
Founded, Level 1 cases, involving sexual abuse	25 Years
Founded, Level 1 cases, not involving sexual abuse	18 Years
Founded, Level 2 cases	7 Years
Founded, Level 3 cases	3 Years
Family Assessments	3 Years
Unfounded*	1 Year*

* Unless there is a subsequent complaint involving the same parties within that 1 year time frame, per Va. Code § 63.2-1514.

Source: Va. Department of Social Services and the Library of Virginia.

Founded cases are classified into three tiers. Level 1 cases are the most serious, as they involve incidents that are likely to result in serious harm to the child, such as genital contact, multiple incidents of abuse over time, physical abuse requiring medical attention or neglect where the minimal needs of the child are rarely met. Level 2 cases involve incidents that are likely to result in moderate harm to the child. Level 3 cases involve incidents that are likely to result in minimal harm to the child. Family assessments are maintained for 3 years, whereas, unfounded cases are maintained for only 1 year unless there is a subsequent complaint involving the same parties within that 1 year time frame per Va. Code § 63.2-1514. There was concern expressed over the length of retention time for unfounded records by Work Group members and survey respondents. Reasons to extend the retention time for unfounded records included:

- Unfounded cases are typically more serious than family assessments and may involve alleged sexual abuse, but did not meet the preponderance of evidence standard.
- Family assessments, which are typically less serious, are kept for three years with no disposition.
- There is no history to reference, and collateral contacts are lost if same or similar subsequent allegations occur, which can impact a child's safety.

Data Tracking

Referrals to local departments are documented and tracked through a state automated system known as OASIS (Online Automated Services Information System). Figure 4 illustrates the breakdown of referrals by type of abuse or neglect in FY13.

Figure 4: Referrals by Disposition and Type of Abuse or Neglect, FY13

Type	Referrals	Accepted	Family Assessment	Investigated	Founded	Unfounded	Appealed
Medical neglect	2,731	2,126	1,504	500	201	268	26
Mental abuse	6,266	4,287	3,475	615	204	366	25
Physical abuse	22,150	16,884	10,772	5,253	2,205	2,789	180
Physical neglect	50,117	40,008	28,514	9,346	4,833	4,116	260
Sexual abuse	5,093	3,533	8	3,166	1,043	1,942	107
Substance Exposed Infants	955	850	668	127	80	39	1
Total	87,312	68,210	45,293	19,126	8,612	9,590	600

Source: Va. Dept. of Social Services, Va. OASIS and Va. Child Welfare Outcome Reports data. This table represents a count of the allegations contained in referrals. A referral can have more than one type of allegation.

Physical neglect comprises the largest referral category. In regards to child sexual abuse, there were nearly 5,100 referrals of which 3,533, or 69%, were accepted. At this point, the data appears to become unreliable. For instance, as discussed earlier, a family assessment should never be conducted for a sexual abuse case. Further, columns that should add up, do not. The number of family assessments should add to the total number of accepted, but does not. And, the number of founded and unfounded referrals should add to the total number investigated, but does not. It should be kept in mind that this statewide data collection system relies on the individual reporting practices, discretion, and decision making of 120 local departments using an antiquated data system. While there are significant data integrity concerns, it is the best available data. However, since these figures are used to inform public policy and other decisions, data integrity should be of utmost concern.

Law Enforcement Investigation Considerations

The purpose of this section is not to outline in detail the steps of a law enforcement investigation, but rather to highlight where CPS and law enforcement investigations intersect and where some difficulties can potentially arise between the two types of investigations.

Regardless of whether a referral is accepted, Va. Code § 63.2-1503(D)(i) requires local CPS departments to immediately report all cases of child sexual abuse to law enforcement and the Commonwealth's Attorney.[41] It is important to understand that

there are key differences in the burdens of proof, timeframes and objectives of CPS and law enforcement investigations. First, the burden of proof for CPS is preponderance of evidence; whereas, the burden for law enforcement investigations in the most complete sense and with a view towards conviction as the final goal, is proof beyond a reasonable doubt. Second, CPS is bound to complete their investigation in 45 days, unless a limited extension is granted. Law enforcement is under no such time constraints to complete their investigation. Third, CPS' objective is to determine the safety needs of the child and whether there is a need for services or alternative living arrangements. Law enforcement's primary objective is to gather evidence in preparation for a possible criminal trial. These key differences can lead to potential difficulties and misunderstandings between CPS and law enforcement, and emphasize why communication between the two agencies is extremely vital to the successful outcome of cases.

Law enforcement's authority to investigate child sexual abuse cases is broader than CPS' in Virginia: they carry out both caretaker *and* non-caretaker child sexual abuse investigations. Many law enforcement agencies reported that they conduct joint investigations with CPS for caretaker cases. It should be noted that in most joint investigations, cooperation between the two agencies appears to exist. However, even with cooperation some issues can still occasionally arise. Based on survey results and in speaking with practitioners, staff discovered that joint investigations involving child sexual abuse typically require more in-depth and collateral interviews, easily taking longer than 45, or even 60 days. Investigations, which often begin only with a child's testimony, can require a great deal of effort in substantiating such testimony with multiple interviews, visits to alleged location(s) of abuse, collection of any existing physical evidence, and the request of various types of employment, medical, and mental health records. While law enforcement is attempting to complete these efforts, CPS is often forced to make a disposition of unfounded or founded within 45 days without having all of the available evidence. An additional concern with this forced disposition date is that once a CPS disposition of founded is made, the CPS appeal process begins regardless of whether the law enforcement investigation is still pending. If an appeal is made, the appellant then has access to CPS investigatory records, which include victim testimony, the identity and statements of witnesses, and medical evidence, despite any efforts by CPS to redact information to protect prosecutorial evidence.[42]

There are additional investigatory concerns related to destruction of evidence, victim intimidation, interference and the loss of "element of surprise." While there are many different ways such concerns can appear in an investigation, perhaps the best way to illustrate this is with a vignette that aptly summarizes and combines the fact scenarios staff repeatedly received:

> *For instance, a child discloses an act of sexual abuse at school to a teacher. The teacher may then confer with a guidance counselor and/or principal who may also talk with the child. CPS will be called and law enforcement notified. Let us assume that the disclosure occurred towards the end of the school day and the alleged perpetrator resides with the child. Should the child be sent home? At this point in time, the non-offending parent may be contacted. Depending on what time of day it is and the availability of a child advocacy center may determine*

whether the child receives a forensic interview. As such, at this point in time, minimal fact interviews may be the only thing law enforcement has to know what to include in a search warrant, which specific questions to ask or which items to look for. Minimal facts may also be what CPS is using to develop the safety plan for the child. In the meantime, the non-offending parent may contact the alleged abuser, which destroys the "element of surprise" for law enforcement. Consequently, the abuser may destroy existing evidence, intimidate victim(s), and witness(es), and have time to prepare their story. Once the child is back with the non-offending parent, the child may be getting pressure or not believed. Recantations by the child may occur at this point. The child may then be subject to additional interviews by the Commonwealth's Attorney or medical personnel, if applicable.

It is during this time, before a forensic interview, that there is ripe opportunity for victim intimidation, destruction of evidence and interference, and recantation especially if the non-offending parent does not support the child.

Again, there are many scenarios that can unfold; the above vignette is just one. Other concerns mentioned in survey results and discussions include continuances by defense counsel,[43] as well as CPS conducting interviews after a suspect is arrested. Under Va. Code § 63.2-1503(M), if *Miranda* warnings are not given, any testimony given to the CPS worker is inadmissible in a court of law. Further, given all of the above, CPS investigators must also be concerned with respecting parental rights.

Survey Results

In order to gain a better understanding of child sexual abuse investigations, staff disseminated surveys to all directors of local departments, chiefs and sheriffs of primary law enforcement agencies, and all criminal justice training academy directors that provide law enforcement training.[44] Staff also informally surveyed Commonwealth's Attorneys. The formal survey response rates were as follows:

- 75% (90 of 120) of local department directors;
- 69% (93 of 135) of primary law enforcement agencies; and,
- 76% (22 of 29) of criminal justice training academy directors.
    - 80% (8 of 10) of regional training academies; and,
    - 74% (14 of 19) of independent training academies.

Law Enforcement Training

Recruits receive anywhere from 500 to over 1,500 hours of basic law enforcement training before becoming certified.[45] Of the total hours of training received, recruits receive approximately anywhere from 1.5 to 16 hours of training devoted to child sexual abuse. The median number allocated was 4 hours. The majority of responding academy directors, 76% (16 of 21), believe the minimum standards and training related to child sexual abuse is adequate for basic law enforcement training. However, academy directors and law enforcement agencies stressed the need for additional in-service and specialized training related to child sexual abuse investigations. Only 45% (10 of 22) of

responding academies provided any in-service training to law enforcement relating to child sexual abuse over the past 5 years. Respondents emphasized the desire for more on-line training opportunities relating to this subject.

Based on survey results and discussions with practitioners, it was determined that not all newly assigned detectives (general or specialty detectives) are *required* to complete any specialized training or certification. In fact, 54% (50 of 92) of responding law enforcement agencies reported that they do not require any specialized training for newly assigned detectives. Further, only 45% (10 of 22) of responding academies currently offer any courses that are designed specifically for newly appointed detectives. Virginia, however, requires certification or completion of specialized training for law enforcement in many other areas, such as general and specialty instructors, field training officers, school resource officers, K-9 handlers, child safety seat technicians and for the use of specific equipment including TASER, RADAR/LIDAR, patrol rifles and other firearms.[46]

Internet Crimes Against Children (ICAC) Investigations

While the focus of ICAC investigations was not directly within the purview of this study, the survey did address the topic due to some literature suggesting a potential correlation between contact offenses and internet child pornography among some offenders. Most responding law enforcement agencies, 88% (73 of 83), indicated that their detectives investigating "contact" child sexual abuse cases routinely searched and seized offenders' computers, digital recording devices, cell phones, and other sources of technology for evidence of child sexual exploitation and/or child pornography. Only 34% (32 of 93) of responding law enforcement agencies indicated that they had a specialized unit or division that handled ICAC-related cases. However, 70% (64 of 92) of law enforcement agencies indicated they were a member of an ICAC Task Force. Many agencies expressed the desire for more resources, funding, and training in this area to assist with the successful investigation and prosecution of these offenders.

CPS Worker Training

Newly hired CPS workers are required to complete a series of approximately 15 instructor-led courses within their first 24 months of employment. Specific training related to sexual abuse and sexual abuse investigations must be completed no later than the first 12 months of employment.[47] However, there appears to be some difficulty in readily meeting these requirements. Over one-third, or 36% (33 of 90), of local departments reported that CPS workers had to investigate child sexual abuse cases before completing all of the required VDSS training on sexual abuse. For those that did report this, the vast majority indicated that the worker was under the supervision of someone who had completed the training.

Based upon survey results, many local departments reported concerns with the availability and quality of the required training for CPS workers. The main concern was that the mandatory VDSS training was not provided frequently enough within a reasonable proximity. Training needs are high due to high staff turnover, and the local departments must often absorb the costs of travel for their staff when no trainings are

available in close proximity within the one year time frame. Results also indicated that many local departments felt that specialized/continuing education for existing CPS workers, supervisors and directors was lacking. However, it should be noted that VDSS recently implemented a requirement that 24 hours of yearly continuing education must be completed beginning in the third year of employment.[48]

Caseloads and Staff Turnover

Both law enforcement and CPS workers handle extremely high caseloads and often handle many different types of cases or investigations in addition to child sexual abuse. Survey results indicated that law enforcement agencies handled anywhere from 0 to 570 child sexual abuse cases per agency in FY12. This range gives a clear indication that some law enforcement agencies investigate very few, if any, cases; whereas, the larger jurisdictions handle much higher case loads. The caseload per detective ranged from 20 to 379 cases across agencies in FY12. Local departments also had high caseloads with anywhere from 0 to 280 referrals involving child sexual abuse per local department that were accepted in FY12. The caseload per CPS worker ranged from 12 to 360 referrals across departments in FY12.

Staff turnover can be an issue within some local departments. When asked if staff turnover was a problem, 44% (40 of 90) of local departments indicated that it was. The primary reasons cited for high turnover rates were low salaries, heavy caseloads, long hours, and burnout. Similar reasons can be cited for any issues with staff turnover in law enforcement agencies. Research has consistently demonstrated that CPS workers and law enforcement can experience vicarious trauma as a result of listening and being involved in traumatic events or wanting to help those who have experienced trauma.[49] Yet, based on survey results, only 38% (34 of 89) of local departments and 27% (25 of 93) of law enforcement agencies indicated that any debriefing or secondary traumatic stress prevention services were provided to their workers or detectives.

School Personnel Training

Teachers and other school personnel who have daily contact with students are in a key position to recognize indicators of child maltreatment. Under Va. Code § 63.2-1509, teachers are required to report suspected child abuse and neglect as a mandated reporter. They must only report their suspicions, rather than attempt to prove that such abuse or neglect occurred. Teachers are required to complete mandatory reporter training as part of their licensure. Reports can be made on the hotline, directly to a local department or via a school designee who makes the report to the local department. The school designee must then report back to the original mandated reporter on the status of the report. Teachers are immune from any civil or criminal liability in making a report, unless it is proven that such person acted in bad faith or with malicious intent. The failure to file a report as soon as possible, but not longer than 24 hours after having reason to suspect a reportable offense of child abuse or neglect, requires a fine of not more than $500 for the first failure and not less than $1,000 for any subsequent failure. There is a higher penalty, a Class 1 misdemeanor, if the person knowingly and intentionally fails to make a report in cases evidencing acts of rape, sodomy, or object sexual penetration.

Working Relationships

Survey results and Work Group discussions pointed to concerns with the handling of child sexual abuse reports by schools. Per Va. Code § 63.2-1511, local departments and local school divisions are required to have MOUs with each other. However, only 62% (53 of 85) of responding local departments reported having a MOU with local schools. Of further concern, the MOU is only required to address reports made *against* school personnel rather than all types of disclosures made by students.

When looking at the relationship between law enforcement and local departments, 92% (81 of 88) of local departments and 88% (82 of 93) of local law enforcement agencies reported having "very good" to "excellent" working relationships with one another. While not required by statute, 61% (56 of 91) of law enforcement and 61% (52 of 85) of local departments reported having a formal MOU with one another. It appears that law enforcement and CPS often respond together to allegations of child sexual abuse. Based on survey results, 74% (69 of 93) of law enforcement agencies and 78% (69 of 89) of local departments indicated that detectives "almost always" accompany CPS workers in responding to allegations of child sexual abuse. Some law enforcement agencies assist other law enforcement as well, with 33% (30 of 92) of law enforcement indicating that they conducted child sexual abuse investigations for other law enforcement agencies. The circumstances for when this is done varies, but examples include courtesy interviews for when a victim, witness or perpetrator is out-of-state or in a distant locality, for small departments that have no detectives to handle the investigation, and when there is a conflict of interest.

In short, collaboration and communication are important to successful child sexual abuse investigations. Virginia has long recognized this importance per Va. Code § 63.2-1507, which was enacted in 1975:

> *All law enforcement departments and other state and local departments, agencies and authorities and institutions shall cooperate with each child-protective services coordinator of a local department and any multi-discipline teams in the detection and prevention of child abuse.*

Child Advocacy Centers (CAC) and Multi-disciplinary Teams (MDT)

Child Advocacy Centers

Building upon a multi-disciplinary approach, in the mid-1980s, CACs were developed with the aim of improving for children the process of criminal investigations by coordinating the efforts of the different investigators and making the experience more child-friendly. A child advocacy center can be defined as "a child focused, facility-based program in which representatives from many disciplines, including law enforcement, child protection, prosecution, mental health, medical, victim advocacy, and child advocacy work together to conduct interviews and make team decisions about investigation, treatment, management and prosecution of child abuse cases."[50] In other words, CACs can be seen as packaging all of the best practices and responses for child sexual abuse investigations under one umbrella. This approach helps to avoid

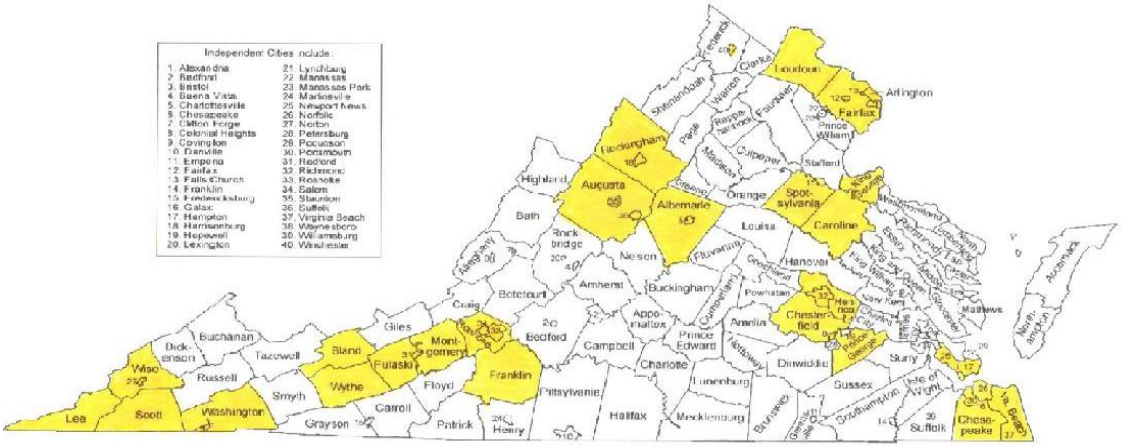
fragmentation and miscommunication in the investigation, which can have negative effects on the child, the child's family, and the prosecution of the case.

The services provided by CACs generally include a MDT approach, forensic interviewing services, child and family friendly facilities, victim advocacy and support, specialized medical evaluation and treatment, specialized mental health services, training, education and support for child abuse professionals, and community outreach and education.[51] This report will focus primarily on the first two listed services: MDTs and forensic interviewing.

Research has consistently demonstrated a number of positive outcomes with CAC implementation, including better coordinated response and investigations, cost savings, increased prosecution and conviction rates, increased forensic medical exams (when appropriate), increased referrals to mental health services, and increased satisfaction by caregivers.[52]

There are over 750 CACs nationwide, which serve children under the age of 18 who have suffered reported sexual or severe physical abuse. Accreditation standards for the CACs are set by the National Children's Alliance. Virginia's first CAC was established in 1998. Virginia now has 16 CACs that serve 30% (40 of 135) of Virginia's localities. Ten of these centers are accredited and six are associate members. Coordination and assistance to the 16 CACs is provided by the Children's Advocacy Centers of Virginia (CACVA), an accredited chapter of the National Children's Alliance. Figure 5 below illustrates the areas serviced by the 16 CACs. As one can see, there are still many areas that are underserved.

Figure 5: Localities Served by Virginia CACs



Source: Children's Advocacy Centers of Virginia, 2013.

In FY13, Virginia's CACs had 3,192 new children's cases referred to them. Of this number:

- 76% (2,414 of 3,192) for sexual abuse;
- 18% (577 of 3,192) for physical abuse;
- 9% (286 of 3,192) for physical neglect;
- 6% (211 of 3,192) for witness to violence; and,
- 2% (68 of 3,192) for other investigations.[53]

It should be noted that CACs will handle both caretaker and non-caretaker cases, and will complete courtesy interviews for other localities, states and the federal government.

Multi-disciplinary Teams (MDT)

Child advocacy centers emphasize the coordination of investigation and intervention services by bringing together professionals and agencies as a MDT to create a child-focused approach to child abuse cases. A MDT can be defined as "a group of professionals who represent various disciplines and work collaboratively to promote a thorough understanding of case issues and assure the most effective system response possible."[54] The MDT approach has been nationally accepted as a best response to child sexual abuse investigations for over a decade and can include representation from the following: prosecution, law enforcement, child protective services, mental health services, medical professionals, victim advocacy services, children's advocacy center (if applicable), and others as necessary.[55] For instance, some MDTs will include school personnel and military family services. Case review is one of the most important functions of the MDT process. MDTs will meet to share information on cases in an efficient manner, determine if any additional information or services are needed regarding the child or the child's family, and will assign specific tasks to appropriate members of the group. Staff completed a cursory 50-state review and discovered that *at least* 25 states statutorily require the establishment of MDTs.

Under Va. Code § 63.2-1503(K), local departments may develop MDTs for purposes of investigating child sexual abuse cases and to aid in recommendations regarding the prosecution of such cases. Based on survey responses, 57% (49 of 86) of local departments indicated they were a member of a MDT. Of the 49 teams, 34 indicated that they met monthly; others reported meeting weekly, bi weekly, bi-monthly, quarterly, or as needed depending on the number of cases being investigated or prosecuted. The Work Group and survey results all emphasized the importance of developing a MDT approach in <u>all</u> localities. The federal Children's Justice Act fund has been awarded to Virginia since 1990 thru DCJS. Since 1990, these funds have provided training and on-site technical assistance to localities wishing to establish MDTs. Further, CACVA, VDSS and DCJS have partnered together to offer pilot training and programming for localities interested in developing a MDT in their locality.

Forensic Interviews

A forensic interview is an approach to interviewing children where information is gathered in a child-sensitive, developmentally-appropriate and legally-defensible

manner.[56] It is imperative to schedule a forensic interview as soon as possible after a disclosure of child sexual abuse so that CPS, law enforcement and other involved parties can proceed as effectively as possible. This type of interview is distinct from the minimal fact interviews that CPS and/or law enforcement will gather for essential information. Forensic interviews are ideally completed at a CAC, but if one is not available they can be completed at local departments, police departments, sheriff's offices, hospitals, schools, or a child's home by an individual who is trained in conducting such interviews.

Because a child's testimony is often the only piece of initial evidence in a case, the success of a case can be largely dependent on proper interviewing procedures; otherwise, the case may end up not being tried in court. In Virginia, CACVA and DCJS coordinate multiple *ChildFirst* forensic interviewer trainings, which are 40-hour courses. Nearly all, 91% (81 of 89), of responding local departments reported that forensic interviews were conducted for most of their child sexual abuse cases. Exceptions would include cases involving infants or other very young children. In regards to availability, 70% (62 of 89) of local departments and 57% (52 of 92) of law enforcement agencies reported having at least one worker or officer who was qualified to conduct child forensic interviews. However, survey results and Work Group discussions emphasized the desire to increase the funding for and the availability of forensic interviewer training for more individuals across the state.

Summary and Conclusion

Child sexual abuse is a serious problem that affects all types of communities and families. The impact of child sexual abuse on victims is considerable with many experiencing various short- and long-term effects. Similar to all sexually-based offenses, child sexual abuse is a highly underreported crime, thus making prevalence and incident levels difficult to estimate. Similarly, prosecution and conviction rates are also low due to high attrition rates for the cases that are reported.

The Virginia Department of Social Services provides oversight to 120 local departments, which operate autonomously. Within each local department, the CPS unit handles reports of child neglect and abuse that involve a caretaker. If the case is accepted by the local department, the case can either receive a family assessment or an investigation. If investigated, the burden of proof for founded cases is preponderance of the evidence. If the evidence does not meet this burden of proof, the case is considered unfounded. Retention times vary for founded, unfounded, and family assessment cases. There is a concern by some that unfounded cases should be retained for a longer period of time.

Local departments are required to report all cases of child sexual abuse immediately to law enforcement and the Commonwealth's Attorney. The timeframe and burden of proof for investigations is very different for CPS and law enforcement. These disparities can lead to investigatory concerns. Caseload levels are very high for both local departments and law enforcement. Staff turnover is also a concern for both. Based on survey results, it appears that the vast majority of law enforcement and local DSS have a "very good" to "excellent" relationship.

While basic law enforcement training appears to be adequate, it does appear that in-service/specialized training could be offered more frequently. On-line training in particular was highly desired. It was noted that there is currently no requirement for newly assigned detectives to complete any type of certification or specialized training. Findings also indicated that the mandated VDSS training for newly hired CPS workers needs to be made more available across the state, as well as specialized or continuing education for existing CPS workers. Teachers are required to complete mandatory training on child abuse and neglect as part of their licensure. School divisions are required to have a MOU with their local DSS; however, it appears that this requirement is not being fully complied with. An additional concern is that the MOU is only required to address reports against school personnel.

Child advocacy centers have been shown to provide numerous positive outcomes in child sexual abuse cases by coordinating the investigation between CPS, law enforcement, and other entities and promoting a child-focused environment. There are currently 16 CACs in Virginia. Local DSS reported that forensic interviews are being provided in most child sexual abuse cases, but there is a need to train additional personnel to increase availability in some localities. The MDT is the foundation of the CAC model. The need to implement MDTs, at a minimum, across the state was strongly encouraged.

The Crime Commission reviewed study findings at its November and December 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 2, 2013, meeting:

Recommendation 1: Statutorily require the creation, maintenance, and coordination of a multi-disciplinary response to child sexual abuse under proposed new statute, Va. Code § 15.2-1627.5.

Recommendation 1 was introduced by Delegate Robert Bell as House Bill 334 during the 2014 General Session of the Virginia General Assembly. It was passed by the General Assembly and signed by the Governor on April 23, 2014.

Recommendation 2: Amend Va. Code § 63.2-1505(B)(5) to extend the requirement for a CPS investigation to be completed from 45 days to 90 days, whenever a joint investigation is being conducted between law enforcement and local DSS, for child sexual abuse investigations.

Recommendation 2 was introduced by Delegate C. Todd Gilbert as House Bill 709 during the 2014 General Session of the Virginia General Assembly. It was passed by the General Assembly and signed by the Governor on April 3, 2014.

Recommendation 3: Amend Va. Code § 63.2-1514 to extend the length of time unfounded records are maintained from 1 year to 3 years.

Recommendation 3 was introduced by Delegate Charniele Herring as House Bill 682 during the 2014 General Session of the Virginia General Assembly. It was left in the House Health, Welfare, and Institutions Committee.

Recommendation 4: Amend Va. Code § 63.2-1511(D) to extend the scope of MOUs between school divisions and local DSS to include all types of child sexual abuse reports involving a student.

Recommendation 4 was introduced by Delegate Charniele Herring as House Bill 683 during the 2014 General Session of the Virginia General Assembly. It was passed by the General Assembly and signed by the Governor on March 31, 2014.

Recommendation 5: Amend Va. Code § 63.2-1503 to require a form be completed and signed by both agencies whenever a local DSS reports an incident of suspected child sexual abuse to local law enforcement. It would also require that any local DSS report the receipt of a complaint within *2 hours* to the attorney for the Commonwealth and the local law enforcement agency.

Recommendation 5 was introduced in both the Virginia Senate and House of Delegates. Senator Janet Howell introduced Senate Bill 332 and Delegate Robert Bell introduced House Bill 405 during the 2014 General Session of the Virginia General Assembly. Senate Bill 332 was passed by the General Assembly and signed by the Governor on March 24, 2014. House Bill 405 was passed by the General Assembly and signed by the Governor on April 4, 2014.

Recommendation 6: Amend Va. Code § 63.2-1505 to require that no new local DSS staff member may make any dispositional decisions in a case that involves an allegation of child sexual abuse, until they have received the required training.

Recommendation 6 was introduced in both the Virginia Senate and House of Delegates. Senator Janet Howell introduced Senate Bill 331 and Delegate Robert Bell introduced House Bill 404 during the 2014 General Session of the Virginia General Assembly. Senate Bill 331 was passed by the General Assembly and signed by the Governor on March 24, 2014. House Bill 404 was continued to the 2015 Session by the House Courts of Justice Committee.

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Virginia Association of Chiefs of Police

Virginia Criminal Sentencing Commission

Virginia Department of Criminal Justice Services

Virginia Department of Social Services

Virginia Law Enforcement Agencies

Virginia Sheriffs' Association

Virginia State Police

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[1] H.J.R. 595, 2013 Gen. Assemb., Reg. Sess. (Va. 2013); H.J.R. 730, 2013 Gen. Assemb., Reg. Sess. (Va. 2013).
[2] Id.
[3] U.S. Department of Health and Human Services, Administration for Children and Families, Child Maltreatment, 2011 (2012).
[4] Id.
[5] Id. Note: Figures total to more than 100% as a child can be a victim of multiple types of abuse in a case.
[6] Id.
[7] Virginia Department of Social Services, Online Automated Services Information System (OASIS) data.
[8] *See*, for example, Haugaard, J.J., The challenge of defining child sexual abuse. *American Psychologist*, 55, 1036-1039 (2000).
[9] *See* Putnam, F.W., Ten-year research update review: Child sexual abuse. *American Academy of Child & Adolescent Psychiatry*, 42(3), 269-278 (2003) and Toledo, A.V., & Seymour, F., Interventions for caregivers of children who disclose sexual abuse: A review. *Child Psychology Review*, 33, 772-781 (2013) for further overview of topics.
[10] Id.
[11] Putnam, *supra* note 9, at p. 269.
[12] *See*, for example, Babatsikos, G., Parents' knowledge, attitudes and practices about preventing child sexual abuse: A literature review. *Child Abuse Review*, 19, 107-129 (2010); Finklehor, D., et al., Victimization of children and youth: A comprehensive, national survey. *Child Maltreatment*, 10(1), 5-25 (2005).
[13] Putnam, *supra* note 9; Snyder, H.N., Sexual assault of young children as reported to law enforcement: Victim, incident and offender characteristics, in *A NIBRS Statistical Report*, U.S. Dep't of Justice: Washington, D.C. (2000).
[14] Snyder, *supra* note 13.
[15] Finklehor, D. et al., Juveniles who commit sex offenses against minors. *Juvenile Justice Bulletin*, Office of Juvenile Justice and Delinquency Prevention, U.S. Dep't of Justice (2009).

[16] *See* McEachern, A.G., Sexual abuse of individuals with disabilities: Prevention strategies for clinical practice. *Journal of Child Sexual Abuse,* 21(4), 386-398 (2012) and Putnam, *supra* note 9 for literature overview.
[17] Id.
[18] *See*, for example, Saunders, B.E., Understanding children exposed to violence: Toward an integration of overlapping fields. *Journal of Interpersonal Violence,* 18(4), 356-376 (2003); Walker, E.C., et al., Childhood sexual abuse, other childhood factors, and pathways to survivors' adult relationship quality. *Journal of Family Violence,* 24, 397-406 (2009).
[19] *See*, for example, Bourke, M.L., & Hernandez, A.E., The "Butner Study" redux: A report on the incidence of hands-on child victimization by child pornography offenders. *Journal of Family Violence,* 24, 183-191 (2009); McCarthy, J.A., Internet sexual activity: A comparison between contact and non-contact child pornography offenders. *Journal of Sexual Aggression,* 16(2), 181-195 (2010); Seto, M.C., & Eke, A.W., The criminal histories and later offending of child pornography offenders. *Sexual Abuse,* 17, 201-210 (2005); Webb, L., et al., Characteristics of internet child pornography offenders: A comparison with child molesters. *Sexual Abuse,* 19, 449-465 (2007); Wolak, J., et al., Child pornography possessors arrested in internet-related crimes: Findings from the *National Juvenile Online Victimization Study*. National Center for Missing and Exploited Children (2005).
[20] Putnam, and Toledo, *supra* note 9, for existing overviews of topics.
[21] Id.; McClure, F.H., et al., Resilience in sexually abused women: Risk and protective factors. *Journal of Family Violence,* 23, 81-88 (2008); McElheran, M., et al., A conceptual model of post-traumatic growth among children and adolescents in the aftermath of sexual abuse. *Counseling Psychology Quarterly*, 25(1), 73-82 (2012).
[22] London, K., et al., Disclosure of child sexual abuse: What does the research tell us about the ways that children tell? *Psychology, Public Policy, and Law*, 11(1), 194-226 (2005); Malloy, L.C., & Lyon, T.D., Caregiver support and child sexual abuse: Why does it matter? *Journal of Child Sexual Abuse,* 15(4), 97-103 (2006).
[23] *See* Toledo, *supra* note 9, for a more in-depth review.
[24] Id.
[25] *See*, for example, Malloy, *supra* note 22.
[26] Id.
[27] *See*, for example, National Crime Victimization Survey.
[28] *See*, for example, Putnam, *supra* note 9.
[29] *See*, for example, Brewer, K.D., et al., Factors related to prosecution of child sexual abuse cases. *Journal of Child Sexual Abuse,* 6(1), 91-111 (1997); Cross, T.P, et al., Prosecution of child abuse: A meta-analysis of rates of criminal justice decisions. *Trauma, Violence, & Abuse,* 4(4), 323-340 (2003); Stroud, D., et al., Criminal investigations of child sexual abuse: A comparison of cases referred to the prosecutor and those not referred. *Child Abuse & Neglect,* 24(5), 689-700 (2000).
[30] This trend in attrition rates tends to be apparent in nearly all sexually-based offenses.
[31] Total Circuit Court charges and convictions are presented for the following statutes: **Forcible Rape**: § 18.2-61(A)(iii), § 18.2-67.5:1; **Forcible Sodomy**: § 18.2-67.1(A)(1); **Object Penetration**: §18.2-67.2(A)(1); **Aggravated Sexual Battery**: § 18.2-67.3(A)(1)-(3)-(4)(a); **Indecent Liberties**: § 18.2-370(A)-(B)-(C)-(D)(i)-(ii), § 18.2-370.1(A)-(B); **Carnal Knowledge**: § 18.2-63(A)-(B); and, **Obscenity/Child Pornography Offenses**: § 18.2-379, § 18.2-386.1, § 18.2-356(ii), § 18.2-374.4, §18.2-374.1(b)(1)-b(2)-(b)(3)-(b)(4), § 18.2-374.1:1(A)-(B)-(C)(i)-(C)(ii), § 18.2-374.3(b)-(c)-(d)-(e).
[32] Virginia Department of Social Services, 2013.
[33] Id.
[34] 22 VA. ADMIN. CODE § 40-705-10, (2013).
[35] 22 VA. ADMIN. CODE § 40-705-50, (2013).
[36] 22 VA. ADMIN. CODE § 40-705-50, (2013).
[37] 22 VA. ADMIN. CODE § 40-705-50, (2013).
[38] 22 VA. ADMIN. CODE § 40-700-30, (2013).
[39] 22 VA. ADMIN. CODE § 40-705-10, (2013).
[40] 22 VA. ADMIN. CODE § 40-705-190, (2013).

[41] Note: Some local departments have a MOU with law enforcement indicating that law enforcement is responsible for contacting the Commonwealth's Attorney.
[42] Information compiled from survey results, Work Group meetings and discussions with practitioners.
[43] *See also*, for example, American Prosecutors Research Institute, *Investigation and prosecution of child abuse* (3rd ed.). Thousand Oaks, CA: Sage (2004).
[44] Copies of the Law Enforcement Academy Director, Law Enforcement Agency, and Local DSS Director Survey are available upon request.
[45] Virginia Department of Criminal Justice Services' (DCJS) minimum standard is 480 hours. Recruits are also required to complete an additional 100 hours minimum of field training.
[46] Certification or specialized training is typically either required by DCJS and/or by the specific law enforcement agency.
[47] They are required to complete a 2-day course on sexual abuse and a 3-day course on child sexual abuse investigations.
[48] Per Title 1.5.2 of the Va. Dept. of Social Services Child & Family Services Manual, Effective March 1, 2013.
[49] *See*, for example, Sprang, G., Secondary traumatic stress and burnout in child welfare workers: A comparative analysis of occupational distress across professional groups. *Child Welfare*, 90(6), 149-168 (2011); Tovar, L.A., Vicarious traumatization and spirituality in law enforcement. *FBI Law Enforcement Bulletin*, (July 2011).
[50] National Children's Alliance, 2013.
[51] Id.
[52] *See*, for example, Crime Against Children Research Center. Executive summary: Findings from the UNH multi-site evaluation of children's advocacy centers (2006); Miller, A., & Rubin, D., The contribution of children's advocacy centers to felony prosecutions of child sexual abuse. *Child Abuse & Neglect*, 33, 12-18 (2009); Formby, J., et al., Cost-benefit analysis of community responses to child maltreatment: A comparison of communities with and without child advocacy centers. Research Report No. 06-3, National Children's Advocacy Center, Huntsville, AL (2006); Bonach, K., et al., Exploring nonoffending caregiver satisfaction with a children's advocacy centers. *Journal of Child Sexual Abuse*, 19(6), 687-708 (2010); Cross, T.P., et al., Child forensic interviewing in child advocacy centers: Empirical data on a practice model. *Child Abuse & Neglect*, 31(10), 1031-1052 (2007); Walsh, W.A. et al., Which sexual abuse victims receive a forensic medical examination? The impact of children's advocacy centers. *Child Abuse & Neglect*, 31, 1053-1068 (2007).
[53] Data from Children's Advocacy Centers of Virginia, FY13. Figures are larger than 100% due to cases involving more than one type of abuse or neglect.
[54] Chandler, N., Children advocacy centers: Making a difference one child at a time. *Journal of Public Law & Policy*, 28(1), 315-338 (2006).
[55] Ells, M., Forming a multi-disciplinary team to investigate child abuse: Portable guides to investigating child abuse. Office of Juvenile Justice & Delinquency Prevention, U.S. Dept. of Justice (2000).
[56] National Children's Advocacy Center, 2013.

Consensual Sexual Conduct between School Personnel and Adult Students

Executive Summary

House Joint Resolution 595 was introduced by Delegate Manoli Loupassi during the 2013 Session of the General Assembly. The resolution incorporated Delegate David Albo's House Joint Resolution 730. Consequently, the resolution had two distinct parts, dealing with different subjects that were combined into one study resolution during the legislative process. The first part of the resolution specifically directed the Crime Commission to review:

> (i) the availability of penalties for sexual conduct between secondary school students 18 years of age and older and teachers;
> (ii) the reasons why sexual conduct between teachers and other school personnel who maintain a custodial or supervisory relationship with students under the age of 18 is subject to criminal penalties while the same conduct with students 18 years of age or older is not;
> (iii) the feasibility of penalizing sexual conduct between teachers or other school personnel and students age 18 or older;
> (iv) the number of cases involving sexual conduct between teachers or other school personnel and students 18 years of age or older each year.

In order to address this part of the study mandate, Crime Commission staff examined literature, statutes, and regulations, collected available data from relevant agencies, and disseminated surveys to public school division superintendents and private school principals. In addition, staff met with various individuals and representatives from multiple organizations and state agencies.

Virginia law currently does not have a criminal penalty for consensual sexual conduct between school personnel and students who are eighteen years of age or older. However, at least 15 other states have made such conduct criminally illegal, including Alabama, Arkansas, Connecticut, Iowa, Kansas, Louisiana, Michigan, Missouri, North Carolina, Ohio, Oklahoma, Pennsylvania, South Carolina, Texas, and Washington. Based on survey results disseminated by Crime Commission staff, *at least* 14 incidents of this nature have occurred in Virginia public school divisions over the past 5 years. Furthermore, approximately 25% of responding public school superintendents reported not having a policy that addresses relationships between school employees and students.

The Crime Commission reviewed study findings at its November and December meetings. No motion was made on any legislation pertaining to sexual relationships between school personnel and adult students.

Background

There are approximately 1.2 million students enrolled in Virginia public schools.[1] The total number of students enrolled that are eighteen years of age and older varies significantly during the course of the school year. For example, the number of students 18 years of age or older enrolled in public schools in October 2012 was 23,839, as compared to 88,407 enrolled during June 2013.[2]

According to the Virginia Department of Education, there are 132 public school divisions in Virginia, which include approximately 325 high schools. Figures provided by the Virginia Council for Private Education indicated that there are approximately 220 private schools that could potentially enroll students over the age of 17. Within these schools, there are approximately 158,454 individuals with an active Virginia teaching/education license.[3] However, it should be noted that there are many other adult personnel employed by schools, including substitute and student teachers, coaches, administrators, after-school activity instructors and coordinators, and other staff.

Survey Results

Staff distributed a secure, electronic survey to all public school superintendents and all private school principals that could have students eighteen years of age or older enrolled.[4] All responses were strictly confidential. The response rate for public school division superintendents was 77% (101 of 132) and 44% (98 of 222) for private school principals.

Both surveys asked for the total number of incidents involving school personnel having sexual relations with a student eighteen years of age or older, occurring over the past five academic years. If there was an incident reported, respondents were asked to indicate the year of the reported incident, the type of school employee involved (teacher, substitute teacher, coach, etc.), how the incident was resolved (suspended, forced to resign, fired, etc.), and, whether the individual, if a teacher, lost his license. Schools were also asked if they had a written policy regulating relationships between school personnel and students; whether it was required that such incidents be reported to either a superintendent or principal; and, to what degree they suspected that such incidents were not being reported to them.

None of the responding private school principals reported any incidents of sexual relations between school personnel and students eighteen years of age or older over the past five years. Eleven public school division superintendents reported that at least one such incident occurred in their school division over the past five years. In the 11 public school divisions, there were 14 total incidents of sexual relations involving a school

employee and a student eighteen years of age or older. Of the total incidents, 8 the employee was fired, in 3 the employee was forced to resign, in 1 the employee resigned, in 1 the employee retired, and for 1 incident, the survey response did not indicate how the matter was resolved. More specifically:

- 7 involved a teacher
  - 2 were fired, 3 were forced to resign, 1 resigned, and 1 retired.
- 4 involved a coach
  - 3 were fired, 1 did not indicate how resolved.
- 2 involved other staff/employee
  - Both were fired.
- 1 involved a substitute teacher
  - Individual was fired.

When asked whether they had a written policy that regulated relationships between school personnel and students, 74% (73 of 99) of responding public school division superintendents and 87% (81 of 93) of private school principals indicated that they currently had such a policy. Of those with a written policy, results indicated that the policy applied to *all* school personnel.

Nearly all, 93% (90 of 97), of responding public school division superintendents, indicated that principals are required to report such incidents to them. Similarly, 89% (79 of 89) of private school principals indicated that school employees are required to report such incidents to them. The vast majority of responding superintendents (97%) and all private school principals believed that it was "unlikely" to "very unlikely" that such incidents were not being reported to them.

Legal Overview

Virginia Code § 18.2-370.1 punishes as a Class 6 felony the taking of indecent liberties with a minor under the age of eighteen by a person who maintains a custodial or supervisory relationship over the child. Under Virginia law, there is no criminal penalty for consensual sexual conduct that takes place between school personnel and students eighteen years of age and older.

However, 15 states were identified that have made such conduct criminally illegal: Alabama,[5] Arkansas (if student is less than 21),[6] Connecticut,[7] Iowa,[8] Kansas,[9] Louisiana (if student is under 21 and offender is more than 4 years older),[10] Michigan (if student is special needs and less than 26),[11] Missouri,[12] North Carolina,[13] Ohio,[14] Oklahoma (if student is less than 20),[15] Pennsylvania (if offender has direct care, supervision, guidance or control over the student),[16] South Carolina,[17] Texas (if more than a 3 year age difference or relationship started after teacher began job),[18] and Washington (if student is less than 21 and offender is more than 5 years older).[19]

In all cases where these criminal statutes have been challenged, they have been upheld. The exception was Arkansas' statute, where the original statute was struck down, but has since been re-written by the legislature and not yet challenged.[20]

Summary and Conclusion

This study focused on consensual sexual conduct between school personnel and students who are 18 years of age and older. Such conduct is not illegal under current Virginia law. At least 15 other states, however, have been identified where such conduct has been made illegal. Based on survey results, *at least* 14 incidents have occurred in Virginia public school divisions over the past 5 years. Approximately 25% of superintendents reported not having a policy that addresses relationships between school personnel and students.

There were two policy options considered by the Crime Commission:

- Should sexual conduct between school employees and students who are 18 years of age and older be made illegal?

- Should schools be required to have a written policy that regulates relationships between school employees and students?

The Crime Commission made no motion to endorse either option at its December meeting.

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Private School Principals

Public School Division Superintendents

Virginia Council for Private Education

Virginia Department of Education

[1] Virginia Department of Education, Fall Membership, 2013.
[2] Virginia Department of Education, October 2012 and June 2013 figures.
[3] Virginia Department of Education, Figure as of May 30, 2013.
[4] Copies of the Public School Division Superintendent and Private School Principal Survey are available upon request.
[5] ALA. CODE § 13A-6-81 (West 2013).
[6] ARK. CODE ANN. § 5-14-125 (a)(6) (West 2013).
[7] CONN. GEN. STAT. ANN. § 53a-71(a)(8) (West 2013).
[8] IOWA CODE ANN. § 709.15(3)(a) (West 2013).
[9] KAN. STAT. ANN. § 21-5512(a)(9) (West 2013).
[10] LA. REV. STAT. ANN. § 14:81.4 (2013).

[11] MICH. COMP. LAWS ANN. § 750.520d(1)(f)(i)-(ii) (West 2013).
[12] MO. ANN. STAT. § 566.086 (West 2013).
[13] N.C. GEN. STAT. ANN. §§ 14-27.7(b), 14-202.4 (West 2013).
[14] OHIO REV. CODE ANN. § 2907.03(7) (West 2013).
[15] OKLA. STAT. ANN. tit. 21, § 1111(A)(8) (West 2013).
[16] 18 PA. STAT. ANN. § 3124.2(a.2) (West 2013).
[17] S.C. CODE ANN. § 16-3-755(C)-(D) (2013).
[18] TEX. PENAL CODE ANN. § 21.12 (West 2013).
[19] WASH. REV. CODE ANN. § 9A.44.093(1)(b) (West 2013).
[20] Paschal v. State, 388 S.W.3d 429 (2012).

Forced Prostitution

Executive Summary

During the 2013 Regular Session of the Virginia General Assembly, three bills were introduced that dealt with the crime of prostitution. House Bill 1541 and Senate Bill 1273 both would have permitted the expungement of police and court records related to an arrest, charge, or conviction for prostitution if the person had been abducted and "induced to engage in prostitution through the use of force, intimidation, or deception." Senate Bill 1273, as amended, would have limited expungement to those cases where the person had been abducted before the age of 16, and would only apply to prostitution offenses that occurred before the person had turned 21. House Bill 1541 did not contain those limitations, and additionally provided an affirmative defense to a charge of prostitution, if the conditions of abduction and coercion applied. The third bill, House Bill 1991, created a nearly identical affirmative defense to a charge of prostitution, if the situation of coercion applied, yet without a requirement of abduction. House Bill 1991 also would have decriminalized juvenile prostitution; any juvenile found to have engaged in prostitution would not have committed a crime, but would be subject to a CHINS petition, pursuant to Va. Code § 16.1-228. (It would still be a crime under the bill for a person to solicit any person, including a juvenile, for purposes of prostitution). These bills were referred to the Crime Commission for review.

The public policy in Virginia is to limit expungement of police and court records to those cases where an individual is actually innocent of the crime for which they were arrested or charged, or if he has received an absolute pardon from the governor. If a person is convicted, or even if his case is taken under advisement and then dismissed, he cannot receive an expungement. Changing the expungement statute, as proposed by House Bill 1541 and Senate Bill 1273, to permit a person convicted of prostitution to expunge their record, would represent a major change in Virginia policy. A practical concern with allowing prostitution convictions to be expunged is that, as they are misdemeanors, most Commonwealth's Attorneys will not have files on these cases, especially in instances where the charge to be expunged occurred years prior.

The common law affirmative defense of duress to a criminal charge currently exists in Virginia, as stated in Sam v. Commonwealth, 13 Va. App. 312 (1991), and other cases from Virginia's appellate courts. This defense requires that the defendant prove the threat made against him, or a member of his family, be imminent, if not immediate. Even more importantly, the defense of duress can only be asserted if the defendant did not have any opportunity to avoid the threatened harm, other than by committing the crime. The affirmative defenses proposed by House Bill 1541 and House Bill 1991 are qualitatively similar to the existing defense of duress, but do not require proof of either the imminence of the threat, or that the defendant had no opportunity to avoid committing the crime of prostitution because of that threat. As such, they would also represent a substantial change in public policy in Virginia.

Both the available academic literature, and interviews with law enforcement and victim advocates, reveal that juvenile prostitutes are especially vulnerable to physical and psychological abuse by pimps. Many pimps begin their recruitment of young women by promising love, affection, and a better life, sometimes even playing the role of a boyfriend. Through a gradual process, the juveniles are groomed, conditioned, and then introduced to the world of prostitution. At this point, they are subjected to physical violence and/or emotional manipulation to keep them compliant and prevent them from leaving.

Recognizing that juvenile prostitutes are victims, a number of states recently have amended their statutes, either specifically prohibiting juveniles from ever being prosecuted for prostitution, or mandating that for a first prostitution offense, the juvenile be treated as a child in need of services, rather than as a delinquent or a criminal defendant. By decriminalizing juvenile prostitution, and requiring that a juvenile discovered to have engaged in prostitution be treated as a child in need of services, pursuant to Va. Code § 16.1-228, House Bill 1991 would be adopting a similar approach in Virginia. However, all available data indicates that very few juveniles are ever actually arrested for prostitution in Virginia, and typically five or fewer juveniles per year are ever proceeded against with a delinquency petition for engaging in prostitution. These figures indicate that Virginia is already handling juvenile prostitutes with a social services approach, rather than through the criminal justice system.

The Crime Commission considered these findings and the available data at its September meeting. Members took no action and made no recommendations on any of the three bills.

Background

During the 2013 Regular Session of the Virginia General Assembly, three bills were introduced that dealt with the crime of prostitution and situations where a defendant is alleged to have been forced into this activity. House Bill 1541 (HB 1541), introduced by Delegate Vivian Watts, would have permitted the expungement of police and court records related to an arrest, charge, or conviction for prostitution if the person had been abducted and was induced to engage in prostitution through the use of force, intimidation, or deception; it would also have created an affirmative defense to a charge of prostitution if a situation of abduction and inducement applied to the defendant.[1] Senate Bill 1273 (SB 1273), introduced by Senator Adam Ebbin, was initially identical to HB 1541, but was amended in the Senate Courts of Justice Committee; the affirmative defense provision was removed from the bill, and the expungement provisions would only apply if the person had been abducted before the age of 16, and only to offenses of prostitution that occurred before the petitioner had turned 21.[2] House Bill 1991 (HB 1991) was introduced by Delegate Jennifer McClellan, and would have prohibited any juvenile from being criminally charged with prostitution; instead, a juvenile found to have engaged in prostitution would be considered to be "a child in need of services as defined in § 16.1-228."[3] House Bill 1991 also contained an affirmative defense to prostitution available for adult defendants, similar to that proposed by HB 1541; the defendant would only be required to prove that he was induced to engage in prostitution through the use of force, intimidation, or deception, however, and would

not have to additionally prove that he had been abducted.[4] All three bills were left in the House Courts of Justice Committee, and a letter was sent to the Crime Commission, asking for the subject matter of the bills to be reviewed.

To carry out this study request, a literature review was completed on the topic of prostitution, specifically focusing on studies that examined juvenile prostitution, and prostitutes that worked for pimps. Meetings were held with key stakeholders, including law enforcement officers, prosecutors, the Office of the Attorney General of Virginia, the FBI Behavioral Analysis Unit III, and advocates for victims of prostitution and human trafficking. The relevant statutes and case law in Virginia were reviewed, and data on arrests and prosecutions for prostitution-related offenses was collected. Finally, an informal survey was sent to the Court Service Unit (CSU) directors throughout the state, to inquire as to the frequency with which instances of juvenile prostitution are encountered.

Expungement

In Virginia, the expungement of police and court records related to a criminal charge is limited, by declared public policy, to instances where a citizen is "innocent," or has been "absolutely pardoned for crimes for which they have been unjustly convicted. . . ."[5] In line with this statutory language, Virginia's appellate courts have repeatedly held that expungement is limited to instances where a person is actually innocent, and therefore cannot be used when a person has received a deferred disposition, even if he was ultimately found "not guilty."[6] This focus upon innocence makes Virginia's expungement statute different from the laws found in many other states, where even actual convictions can be expunged after a period of time.[7]

Thus, under Va. Code § 19.2-392.2, a person who has been found guilty of a crime cannot seek an expungement unless he has received an absolute pardon or has been granted a writ of actual innocence. To amend this section to permit an expungement of an actual conviction, as proposed by HB 1541 and SB 1273, would be a significant change in Virginia's public policy. If this change were made, an additional public policy question would arise—how would prosecutors respond to such petitions for expungement, especially those involving very old convictions? Prostitution is a misdemeanor offense,[8] and as a matter of office management, many Commonwealth's Attorneys do not keep files from misdemeanor cases for extended periods of time.

Duress as an Affirmative Defense

Virginia currently recognizes the common law affirmative defense of duress. As applied in Virginia, to obtain an acquittal, the defendant must affirmatively prove that he committed the criminal offense only because of a threat of death or serious injury.[9] The threat can be against either the defendant or members of the defendant's family, and while the threat of harm does not have to be immediate, it must be at least imminent.[10] However, for the affirmative defense of duress to apply, the defendant must reasonably believe that performing the criminal conduct was the only opportunity to avoid the imminent threat. If the defendant had the opportunity to avoid committing the crime,

and could also have avoided the threatened harm against him or his family, he cannot assert the defense of duress.[11]

The affirmative defenses proposed in HB 1541 and HB 1991 resemble the common law defense of duress, but differ from it in several key particulars. While the defendant must prove that he was "induced to engage in prostitution through the use of force, intimidation, or deception by another," and in HB 1541 must also prove that he was abducted, there is no requirement that this threat be immediate or imminent. Additionally, there is no requirement under either of the bills that the defendant must avoid committing the crime if he has any reasonable opportunity to do so, such as by contacting law enforcement or appealing to a member of the general public for help. While these differences may make it easier for a defendant to successfully assert such a defense in court, they also represent a significant departure from the common law and Virginia's current policy of only allowing the defense of duress in carefully defined circumstances, where, essentially, the defendant had "no other choice."

Juvenile Prostitution

Literature Review

Recent studies, as well as anecdotal observations made by law enforcement and service providers, indicate a number of general trends relating to juvenile prostitution in the United States today. Female prostitutes are more likely than male prostitutes to have a pimp; one study estimates that nearly 75% of juvenile females work for a pimp.[12] According to one study, the median age that juvenile girls enter into prostitution is 14.9 years, with a range of 12.8 years to 17 years.[13] It has also been asserted that the average age of entry into prostitution is between 11 and 13 years of age for boys, and between 12 and 14 years of age for girls.[14]

Contrary to popular belief, recruitment of juveniles for prostitution, at least in the United States, does not usually take the form of abrupt kidnapping or violence, at least initially. Rather, it has been frequently reported by law enforcement and service providers that pimps will gradually "win" over their victims with promises of love, a better life, or material comforts. The men who work as pimps are incredibly skillful at grooming, recruiting, and then controlling the juvenile victims who work for them. They frequently use a combination of physical violence and emotional manipulation; their victims often develop intense loyalty towards their pimps, some out of fear, and others out of feelings of dependence or emotional attachment, akin to Stockholm syndrome.[15] For example: "Pimps first seek out young girls at bus stations, shelters, malls, arcades, and on the Internet, preying on those who appear vulnerable. A pimp will first act as a 'boyfriend,' promising love and a better life while playing on a young girl's previously identified vulnerabilities."[16] A common recruitment tool is a promise of a better life, and after the juvenile begins to be exploited, they are often threatened and assaulted to ensure continued obedience.[17] After recruitment, the victims are habituated to the idea of working as a prostitute, often with a complex series of rules, portrayed as a "lifestyle," or a code of conduct. The purpose of these rules is to firmly establish the dominance of the pimp in the minds of the juveniles.

Law enforcement generally observes a strong correlation between working as a street prostitute and drug use. One study found that prostitutes who began working as juveniles had higher rates of cocaine, alcohol and marijuana use than prostitutes who began working as adults.[18] However, according to information gathered anecdotally by service providers from a number of pimps and former juvenile prostitutes, there is active discouragement of "hard" drug use; the pimps felt that hard drugs, such as cocaine and heroin, made the juveniles unreliable, less productive, and increased the chances of arrest, which would cut into the pimp's profits. Law enforcement and service providers report that it is becoming more common for juvenile prostitutes, or their pimps, to advertise their services on the Internet, in lieu of "working the street."[19] A recently observed pattern is for a pimp to travel between states, or even across the country, with anywhere from two to five girls, only staying in a given city for a week or two at a time. Even if a pimp prefers to stay in one area, he will quickly move if necessary to avoid arrest, or to isolate and further control a juvenile who is becoming resistant or giving signs that she is planning on leaving.[20]

Because of loyalty to their pimp, and/or the fear of the legal system and possibly going to jail, many juvenile prostitutes will adamantly deny that they are, in fact, working for a pimp. One law enforcement officer has expressed the opinion that if an arrested juvenile prostitute is not placed in a secure facility, her first instinct will be to flee immediately, and then contact either her pimp or the lead prostitute to whom she reports. This loyalty also explains why law enforcement and victim advocates report that successfully gaining the trust of a juvenile prostitute takes a different approach from the techniques used for other categories of victims, and necessitates multiple interviews, conducted in a patient, non-threatening manner. Frequently, juvenile prostitutes display symptoms equivalent to post-traumatic stress disorder, even after they have left the world of prostitution.[21] Successful recovery requires treatment and therapy; otherwise, the juvenile is likely to return to prostitution. And, the life expectancy of juvenile prostitutes who do not successfully transition away from the world of prostitution is very low.[22]

It is recognized that the problems of juvenile prostitution are different from those created by prostitution engaged in by adults. Determining the best approach to handling juveniles who engage in prostitution has become a widely debated topic in recent years. Arguments can be made that such juveniles should be seen as victims, not criminals, and the best response when they are encountered by law enforcement is not to arrest them, but to arrange for them to receive services and counseling.[23] Therefore, their cases should not proceed through the criminal justice system. Alternatively, it can be argued that because these juveniles are not just engaged in criminal activity, but are also involved in an extremely dangerous lifestyle, only the strict structure of the criminal justice system, and its clear sanctions for failure to comply with the terms of probation, offer these juveniles a realistic chance at rehabilitation.[24] A middle approach between these two extremes of thought is also possible.

In summary, the main arguments discussed in the literature *against* arresting juveniles for prostitution offenses and handling their cases in a criminal justice context are:

- Juvenile prostitutes are not willing criminals, but are victims.
- The fear of being arrested and forced into detention makes juveniles more reluctant to obtain help from authorities.
- The age and mental development of juvenile prostitutes is more deserving of treatment than punishment.
- Federal trafficking laws treat juveniles used for purposes of prostitution as victims.[25]
- There is a dissonance between treating the juvenile as a victim of a sex crime or statutory rape, and at the same time treating the juvenile as a criminal offender for participating in the same act.

The main arguments *for* arresting juvenile prostitutes and handling their cases in the criminal justice system are:

- Doing so provides law enforcement with an effective tool for protecting these juveniles from themselves.
- The secure structure of the criminal justice or juvenile justice system may be the only way to effectively provide assistance and services to juvenile victims of prostitution.
- Without a period of detention, juvenile prostitutes are likely to return to prostitution very quickly.
- Handling cases of juvenile prostitution in the criminal justice system is an effective means of gaining the cooperation of juveniles, usually in a plea bargain context, so that they will agree to testify against pimps and traffickers.
- If juvenile prostitution is not treated as a criminal offense, it can provide a recruitment tool for pimps; e.g., "Don't worry, even if the police stop you, they can't arrest you or put you in jail."

Virginia Prostitution Data

Over the five year period of Calendar Year 2008 (CY08) through CY12, there were nearly 4,000 prostitution-related arrests made in Virginia.[26] Of this total, only two were juveniles. The breakdown of the arrests was as follows: approximately 1,694 arrests were for prostitution in violation of Va. Code § 18.2-346(A) (both juveniles were in this category); approximately 883 arrests were for solicitation of a prostitute in violation of Va. Code § 18.2-346(B); and an additional 342 arrests were made, but it is unclear from the data if they were for prostitution or solicitation.

Focusing directly upon prostitution, data was gathered on the number of charges and convictions for Va. Code § 18.2-346(A) in general district, juvenile and domestic relations, and circuit courts in Virginia, from Fiscal Year 2009 (FY09) through FY13. None of these charges or convictions should involve juveniles. This data is illustrated in Figure 1.

Figure 1: Va. Code § 18.2-346(A)- Charges and Convictions

Court	Fiscal Year Charge Concluded				
	FY09	FY10	FY11	FY12	FY13†
General District Court*- Charges	503	613	599	488	630
General District Court**- Convictions	376	424	368	330	421
Circuit Court***- Charges	5	6	2	5	3
Circuit Court- Convictions	1	3	0	6	1
J&DR****- Charges	1	3	0	0	1
J&DR- Convictions	0	1	0	0	1

† Data do not include charges that were still pending at the end of FY13. * The total number of charges and convictions in general district court are the minimum number as there were additional charges and convictions that were classified as Va. Code 18.2-346 in general and not by subsection (A) or (B). ** Source: Sup. Court of Va.- General District Court Case Mgt. System. *** Source: Sup. Court of Va.- Circuit Court Mgt. System. Does not include cases from Fairfax or Alexandria. Prince William joined the system in FY09 and Va. Beach left the system in FY09. **** Source: Sup. Court of Va.- J&DR Court Case Mgt. System. Data only includes adults whose charges were handled in J&DR Court. Data prepared by Virginia Criminal Sentencing Commission.

For information on the number of juveniles charged with a prostitution-related offense, the Virginia Department of Juvenile Justice was contacted. As seen in Figure 2, very few juveniles are the subject of a delinquency petition for a prostitution-related offense, i.e., are charged with such a crime. For prostitution itself, under Va. Code § 18.2-346(A), typically 5 juveniles a year or less are ever served with a petition.

Figure 2: Total Juveniles with Prostitution Petitioned Intakes, FY09-FY13

Type of Offense	FY09	FY10	FY11	FY12	FY13
§ 18.2-346(A)- Prostitution	3	3	5	2	4
§ 18.2-346(B)- Solicitation of prostitution	1	0	1	0	2
§ 18.2-348- Aiding/assisting in procurement	0	0	0	0	1
§ 18.2-347- Maintain or frequent a bawdy place	0	0	2	0	3
§ 18.2-356(i)- Receive money for procurement/placing person to engage in sex	0	0	0	0	2
TOTAL INTAKES	**4**	**3**	**8**	**2**	**12**

Source: Virginia Department of Juvenile Justice

To examine the possibility that juvenile prostitution is encountered more frequently than these figures would indicate, an informal survey was sent out to the 35 juvenile and domestic relations district Court Service Units (CSUs), asking if they had encountered any instances of a juvenile involved in prostitution or human trafficking in the past three years. Sixty-nine percent (24 of 35) of the CSUs responded to the survey. Seventy-one percent (17 of 24) of the responding CSUs reported no instances of juvenile prostitution being encountered; 29% (7 of 24) reported at least one instance. The seven CSUs that did report having encountered juvenile prostitution provided a total number of 31 instances, perhaps an indication that juvenile prostitution is not evenly distributed across the state, but is concentrated in several key areas.

The one conclusion that can be safely made from all of the available data, though, is that it is extremely rare for a juvenile who is discovered by law enforcement to be engaging in prostitution to be handled through Virginia's criminal justice or juvenile justice systems.

Recent Statutory Changes in Other States

A number of states have recently modified their statutes related to juvenile prostitution, moving in a general direction of treating the offense as one better handled through counseling and social services, rather than through the criminal justice or juvenile justice system. For example, Tennessee completely decriminalized juvenile prostitution; law enforcement is required to release any juveniles discovered to be engaging in prostitution to the custody of a parent or legal guardian, as well as provide the phone number for the national human trafficking resource center hotline.[27] In New York, if a juvenile (under the age of 16)[28] is arrested for prostitution, he is statutorily required to be treated as a status offender, rather than designated as delinquent. The family court may, in its discretion, revert the case to a delinquency petition if the juvenile has previously committed a prostitution offense, or if the minor is unwilling to cooperate

with the specialized services ordered by the court.[29] In Washington, a juvenile's first offense for prostitution must be diverted out of the juvenile court; a second offense, however, may be treated as a delinquency.[30]

In Minnesota and Michigan, juveniles under the age of 16 cannot be prosecuted for prostitution at all.[31] This is also true in Connecticut, with the additional requirement that juveniles who are 16 or 17 are presumed to have been coerced into committing the offense, and can only be prosecuted if this presumption is rebutted.[32] Similar to Connecticut, in Vermont, juveniles (under the age of 18) cannot be prosecuted for prostitution, if they are deemed to be victims of sex trafficking.[33] And in Illinois, no juvenile can be prosecuted for prostitution; the juvenile can only be held in temporary protective custody in the child welfare system, not a secure facility, and law enforcement must immediately initiate a child abuse investigation.[34]

Proposed Statutory Change in Virginia

House Bill 1991 would effect changes in Virginia similar to those that have recently been made in several other states. Juvenile prostitution would effectively be decriminalized, as no juvenile could be proceeded against with a criminal petition for the crime of prostitution. (It would still be a crime to solicit a juvenile for purposes of prostitution, though). Instead, the juvenile would become the subject of a CHINS petition, pursuant to Va. Code § 16.1-228.

Decriminalizing prostitution for juveniles could create a number of unintended consequences. For example, if a juvenile were discovered to be engaging in prostitution, it could be difficult, legally, for law enforcement to detain him; without a crime being committed, the authority of law enforcement to detain a person is much more limited. In those circumstances, the law enforcement officer would have to rely upon an argument that the child was in need of services, and that there was a "clear and substantial danger to the child's life or health."[35] While acting as a prostitute would probably constitute such a "clear and substantial danger," it would not allow for immediate detention, automatically, under current Virginia law. Another practical difficulty could arise in instances when a juvenile is advertising for sexual services on a website. With no crime being committed by the juvenile, it could be difficult for law enforcement to obtain a search warrant, or further investigate the situation.

Even if a juvenile was taken into custody for prostitution, with juvenile prostitution having been decriminalized, it is not clear if he could then be placed in a secure facility. With prostitution having effectively been made a status offense, it would arguably be a violation of Va. Code § 16.1-248.1(1) to place the juvenile in secure detention, merely for being a child in need of services. Legally, a juvenile who is a resident of Virginia and is in need of services can be placed in a shelter, but not secure detention, and then only if the juvenile refuses to return home, and no parent, guardian, or other person is willing to provide proper supervision and care.[36] A juvenile who is a resident of another state could be placed in a secure facility, pursuant to Va. Code § 16.1-248.1(1), but only if there already exists a verified petition or warrant for him. Otherwise, the juvenile from out-of-state would be placed in a shelter, and not a secure facility.[37]

Lastly, while the objective of handling juvenile prostitutes in a social services setting, rather than treating them as criminals, is valid, the existing data indicates that this is already what is being done in the Commonwealth, whenever juvenile prostitution comes to the attention of the court system.

Conclusion

The Crime Commission reviewed information and data relating to juvenile prostitution, as well as the issues of expungement and the defense of duress under current Virginia law, at its September meeting. The following policy considerations were presented:

- Should Virginia's expungement statute be amended, to permit the expungement of police and court records for convictions of prostitution, or charges of prostitution when the defendant was not actually innocent of the offense, if the petitioner could prove he was induced to perform in prostitution through force, intimidation or deception?

- Should a new affirmative defense to prostitution be created, similar to the existing defense of duress, that would apply to situations where the defendant was abducted for the purposes of prostitution, and/or was induced to engage in prostitution through the use of force, intimation or deception?

- Should juvenile prostitution be decriminalized, so that a juvenile found to be engaging in prostitution would be treated as a child in need of services, and not be proceeded against with a delinquency petition?

- Should juvenile prostitution remain a criminal offense, but the law be amended to require that upon the successful completion of probation, a juvenile charged with prostitution would have the charge dismissed?

No motions were made for any of the policy considerations, and no action was taken by the Commission on these issues.

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FBI Behavioral Analysis Unit III

Local Court Service Units

Virginia Criminal Sentencing Commission

Virginia Department of Juvenile Justice

Virginia State Police

[1] H.B. 1541, 2013 Gen. Assemb., Reg. Sess. (Va. 2013).
[2] S.B. 1273, 2013 Gen. Assemb., Reg. Sess. (as engrossed by Virginia Senate, February 4, 2013).
[3] H.B. 1991, 2013 Gen. Assemb., Reg. Sess. (Va. 2013).
[4] Id.
[5] VA. CODE ANN. § 19.2-392.1 (2013).
[6] Gregg v. Commonwealth, 227 Va. 504 (1984).
[7] For example, in West Virginia, within defined limitations and not including certain offenses, a single misdemeanor conviction or multiple convictions arising from the same transaction may be expunged, provided the offense was committed when the defendant was between the ages of 18 and 26. W. VA. CODE § 61-11-26 (2013).
[8] VA. CODE ANN. § 18.2-346(A) (2013).
[9] Sam v. Commonwealth, 13 Va. App. 312 (1991).
[10] Id. An example of an immediate threat would be a loaded gun pointed at the defendant's head. An imminent threat would be a threat that is not directly immediate, but is still impending and present, such as a threat to drive a short distance to the defendant's house and kill a member of the defendant's family, if help in carrying out a crime is not immediately given.
[11] Pancoast v. Commonwealth, 2 Va. App. 28 (1986).
[12] Finkelhor, D., & Ormrod, R. Prostitution of juveniles: Patterns from NIBRS. *Juvenile Justice Bulletin*, Office of Juvenile Justice and Delinquency Prevention, U.S. Dept. of Justice (2004).
[13] Clarke, R.J., et al. Age at entry into prostitution: Relationship to drug use, race, suicide, education level, childhood abuse, and family experiences. *Journal of Human Behavior in the Social Environment*, 22, 270-289 (2012).
[14] Statement of Ernie Allen, President of Nat'l. Cntr. Missing & Exploited Children, to Cong. Subcomm. on Crime, Terrorism, & Homeland Security, page 4, September 15, 2010.
[15] Julich, S. Stockholm syndrome and child sexual abuse. *Journal of Child Sexual Abuse*, 14(3), 107-129 (2005).
[16] Annitto, M. Consent, coercion, and compassion: Emerging legal responses to the commercial sexual exploitation of minors. *Yale Law and Policy Review*, 30(1), p. 13 (2011).
[17] Albanese, J. Commercial sexual exploitation of children: What do we know and what do we do about it? *National Institute of Justice Special Report*, Office of Justice Programs, U.S. Dept. of Justice (2007).
[18] Clarke, *supra* note 13.
[19] *See* Allen, *supra* note 14.
[20] *See, e.g.*, People v. Doe, 935 N.Y.S.2d 481 (2011).
[21] *See*, for example, Fortier, M.A., et al. Severity of child sexual abuse and revictimization: The mediating role of coping and trauma symptoms. *Psychology of Women Quarterly*, 33(3), 308-320 (2009).
[22] Potterat, J.J., et al. Mortality in a long-term open cohort of prostitute women. *American Journal of Epidemiology*, 159(8), 778-785 (2004).
[23] *See* Annitto, *supra* note 16.
[24] Id.
[25] 18 U.S.C. § 1591 (2013).
[26] Virginia State Police, *Crime in Virginia*, Arrest data, 2008-2012.
[27] TENN. CODE ANN. § 39-13-513(D) (West 2013).
[28] Under New York law, persons aged 16 or older are automatically treated as adults in the criminal justice system. N.Y. PENAL LAW § 30.00(1) (McKinney 2013).
[29] N.Y. FAM CT. ACT § 311.4(3) (McKinney 2013).

[30] WASH. REV. CODE § 13.40.070(7) (West 2013).
[31] MINN. STAT. ANN. § 260B.007(6)(b)(1) (West 2013); MICH. COMP. LAWS ANN. § 750.448 (West 2013).
[32] CONN. GEN. STAT. § 53a-82(c) (West 2013).
[33] VT. STAT. ANN. TIT. 13, § 2652(c)(1)(A) (West 2013).
[34] 720 ILL. COMP. STAT. 5/11-14(d) (West 2013).
[35] VA. CODE ANN. § 16.1-246(B) (2013).
[36] VA. CODE ANN. § 16.1-248.1(B) (2013).
[37] Id.

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 Crime 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. At the conclusion of the study, the Crime Commission recommended a number of statutory changes, including increasing the penalties for cigarette trafficking. Concurrently, the Crime Commission unanimously agreed to continue the study for an additional year, both to monitor the ongoing trafficking situation in Virginia, and to see what impact the proposed statutory changes would have.

Virginia appears to have continuing problems with cigarette trafficking. This was detailed in a number of newspaper reports throughout the year, typically involving the arrests of various traffickers. Such issues were independently confirmed by confidential briefings provided by various law enforcement agencies involved in active, on-going investigations. However, because the increased penalties went into effect only on July 1, 2013, it is still too early to be able to accurately examine what impact, if any, they are having on cigarette trafficking overall in the state, and on the types and lengths of sentences received by traffickers. Conversations with various prosecutors throughout the state did reveal a number of improvements that could be made to Virginia's existing statutes.

The Crime Commission reviewed findings and data at its November and December meetings and directed staff to draft legislation to address them. As a result of the study effort, the Crime Commission endorsed the following legislative recommendations at its December meeting:

Recommendation 1: Create a prima facie presumption that the contents of an unopened pack of cigarettes meet the legal definition of a "cigarette," as provided in Va. Code § 58.1-1000. This would eliminate the possible need to call an expert witness during a criminal trial for testimony that a particular brand of cigarettes contains nicotine.

Recommendation 2: Rewrite the trafficking statute, Va. Code § 58.1-1017.1, to make clear that a prosecutor does not have to prove a defendant is not an "authorized holder," as an element of the offense. Attempting to prove a negative in court is difficult and time-consuming, and is not required in comparable criminal statutes, such as drug possession.

Recommendation 3: Amend the forfeiture statute that applies to counterfeit and trafficked cigarettes, Va. Code § 19.2-386.21, so that law enforcement officers can make use of forfeited cigarettes for legitimate, undercover operations. Under the current wording of the statute, these cigarettes must be destroyed, and cannot be used for any law enforcement purposes. Law enforcement should also be given the explicit authority to possess unstamped cigarettes, if they need to do so while conducting an undercover operation.

Recommendation 4: Increase the required civil penalties which accompany a conviction for cigarette trafficking under Va. Code § 58.1-1017.1, by making them mandatory minimums. To provide a more effective deterrent against traffickers, the required civil penalties should be no less than $5,000 for a first offense; no less than $10,000 for a second offense within 36 months; and no less than $50,000 for a third or subsequent offense within 36 months.

Recommendation 5: Prohibit anyone convicted of trafficking cigarettes from ever again qualifying as an "authorized holder."

Recommendation 6: Because cigarette trafficking almost always involves activity occurring in multiple jurisdictions, it should be added to the list of crimes that can be investigated by multi-jurisdictional grand juries.

All of these recommendations were introduced in the Regular Session of the 2014 General Assembly of Virginia, and were passed into law, going into effect on July 1, 2014.

The Crime Commission also noted that because there are unique difficulties in combatting a form of crime that involves activity that occurs both inside Virginia and in other states, and that often necessitates forensic accounting and examining financial records for effective enforcement efforts, consideration should be given to the creation of a specialized, state-wide unit dedicated to investigating cigarette trafficking. Finally, the Crime Commission endorsed providing continued training on the subject of cigarette trafficking in Virginia to law enforcement, Commonwealth's Attorneys, and judges.

Background

During the 2012 Regular Session of the Virginia General Assembly, Senate Joint Resolution (SJR) 21, introduced by Senator Janet Howell, was passed, which directed the Crime Commission to study and report on a number of topics involving illegal cigarette trafficking, including a focus on the prevalence of this crime in Virginia and how it can be combatted.[1] At the conclusion of the study, a final report was published that examined cigarette trafficking both broadly and in the context of Virginia's role as a source state for black market cigarettes. This published report should be referred to for a comprehensive overview of the topic.[2] Based upon its findings, the Crime Commission recommended a number of statutory changes, including increasing the penalties for cigarette trafficking.[3] At the time, the Crime Commission unanimously voted to extend the study for an additional year, for the purpose of monitoring the ongoing trafficking

situation in Virginia, and to see what impact any proposed statutory changes might have.

All of the Crime Commission's recommended statutory changes from 2012 were enacted into law during the 2013 Regular Session of the Virginia General Assembly, becoming effective on July 1, 2013.

- The penalties for trafficking tax-paid cigarettes were increased. Previously, the penalty for trafficking more than 25 cartons was a Class 2 misdemeanor, and a second or subsequent offense was a Class 1 misdemeanor.[4] The penalties were increased as follows:

    - Trafficking more than 25 cartons, but less than 500 cartons, was made a Class 1 misdemeanor, and a second or subsequent offense was made a Class 6 felony; and,

    - Trafficking 500 cartons or more was made a Class 6 felony for a first offense, and a Class 5 felony for a second or subsequent offense.[5]

- The penalties for trafficking unstamped cigarettes, i.e., cigarettes for which the state excise tax has not been paid, were similarly increased. Previously, the penalty for trafficking unstamped cigarettes was a Class 2 misdemeanor, for quantities up to 3,000 packs, and a Class 6 felony if the quantity was 3,000 packs or greater.[6] The penalties were increased as follows:

    - The qualifying threshold for this offense was lowered to 500 packs; trafficking less than 500 packs was made a Class 1 misdemeanor, and a second or subsequent offense was made a Class 6 felony; and,

    - Trafficking 500 or more packs was made a Class 6 felony, with a second or subsequent offense at that quantity level being made a Class 5 felony.[7]

- Trafficking stamped cigarettes was added to the qualifying offenses for Virginia's RICO statute.[8]

- Virginia Code § 19.2-386.21, which permitted law enforcement officers to seize and forfeit all "fixtures, equipment, materials, and personal property" used in connection with the sale or possession of counterfeit cigarettes, was expanded to also include non-counterfeit, trafficked cigarettes.[9]

- The knowing distribution or possession with the intent to distribute counterfeit cigarettes was made a criminal offense; prior to this change, the distribution of counterfeit cigarettes only carried a civil penalty.[10] The penalties were established as follows:

    - If the quantities involved are less than 10 cartons, the offense is a Class 1 misdemeanor;

  - If 10 or more cartons are involved, the offense is a Class 6 felony;[11] and,

  - Any subsequent offense, regardless of the number of cartons involved, is a Class 6 felony.[12]

- The Virginia Department of Taxation, and the Office of the Attorney General of Virginia were authorized, though not mandated, to accept the electronic receipt of reporting forms from tobacco manufacturers and wholesalers.[13]

- The Virginia Department of Taxation was authorized to accept electronic payments for tax stamps.[14]

To comply with the directive to continue the cigarette trafficking study for an additional year, numerous meetings and interviews were held with representatives from cigarette manufacturers, cigarette wholesalers and retailers, 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, the Virginia Department of Alcoholic Beverage Control (ABC), and the Federal Bureau of Alcohol, Tobacco, Firearms and Explosives (ATF). The Crime Commission also participated on the Virginia Department of Criminal Justice Service's (DCJS) tobacco trafficking task force during the year. Previous data sources, such as the Virginia Department of Taxation, the Virginia State Police, and the Virginia Criminal Sentencing Commission (VCSC), were contacted for updated figures. Additionally, assistance was provided to DCJS in creating a training curriculum for law enforcement officers on the topic of cigarette trafficking. Staff also provided a number of trainings to law enforcement, Commonwealth's Attorneys, the Virginia Wholesalers and Distributors Association, and the Virginia Municipal League.

Update: Trends in Cigarette Trafficking

Virginia still has the second lowest cigarette excise tax rate in the country, while the mid-Atlantic and New England states directly north of Virginia continue to have some of the highest tax rates in the country as seen in Figure 1 below. In fact, during 2013, Massachusetts raised their cigarette excise tax rate an additional one dollar, to $3.51 per pack.

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	1.78
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	1.31
Idaho	0.57	Pennsylvania	1.60
Illinois	1.98	Puerto Rico	2.23
Indiana	0.995	**Rhode Island**	**3.50**
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	**3.51**	**Virginia**	**0.30**
Michigan	2.00	Washington	3.025
Minnesota	2.83	West Virginia	0.55
Mississippi	0.68	Wisconsin	2.52
Missouri	**0.17**	Wyoming	0.60

Source: Federation of Tax Administrators, updated and rates current as of January 1, 2014, http://www.taxadmin.org/fta/rate/cigarette.pdf (last visited April 22, 2014). In addition, it should be noted that New York City has an additional tax of $1.50 per pack. Information on the tax rates for the District of Columbia, Guam, Puerto Rico, and the Northern Marianas Islands comes from the National Conference of State Legislatures, updated and rates current as of August 1, 2013, http://www.ncsl.org/research/health/2011-state-cigarette-excise-taxes.aspx#Table2 (last visited April 22, 2014); and from Campaign for Tobacco-Free Kids, updated and rates current as of December 3, 2013, https://www.tobaccofreekids.org/research/factsheets/pdf/0097.pdf (last visited on April 22, 2014).

As a result of these tax disparities, the actual tax costs of cartons (10 packs) or cases (60 cartons) of cigarettes vary greatly between states, creating the opportunity for traffickers to make huge profits by illegally avoiding required taxes, smuggling cigarettes from Virginia to higher tax states.

- 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
  - Massachusetts: $35.10
  - 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
  - Massachusetts: $2,106.00
  - New York: $2,610.00
  - **New York City: $3,510.00**

Simple multiplication reveals that the tax differential between Virginia and New York City for ten cases of cigarettes, an amount that could be tightly packed into a large automobile, is $33,300. If a van is used, 50 cases of cigarettes can be transported in one trip, with a total tax differential of $166,500. And, if a U-Haul or moving truck is used, 200 cases of cigarettes can be transported at a time, resulting in a tax differential of $666,000. While the amount of profit a trafficker will make from a trip is less than the total tax differential, due to costs and to having to offer his cigarettes to retailers at a reduced price from the legal wholesale price in the area, the amounts of money that can be made in a short period of time by trafficking cigarettes is frighteningly large.

Police intelligence reports indicate that the allure of illegal profits from this area of crime has indeed been irresistible to various organized crime groups. They are continuing to establish operations in the Commonwealth, with a noted increase in the number of fictitious retail businesses opened up in the past year that are purchasing large quantities of cigarettes from wholesalers. As these "businesses" are not selling cigarettes to the public, but are instead moving them out-of-state, no sales tax is being collected or paid on these cartons—money which should be going to the Commonwealth and the localities. Even more worrisome than this loss of revenue is the increase in attendant crimes which is being noticed by law enforcement, as cigarette traffickers begin to establish more of a presence in the state. Credit card fraud, burglaries of retail establishments where primarily cartons of cigarettes are stolen, money laundering schemes, and armed robberies between competing gangs, have all been observed in connection with cigarette traffickers, and appear to be on the increase. These ancillary crimes, which directly harm Virginians, are the indirect result of cigarette trafficking and its rise in the Commonwealth.

Update: Virginia Cigarette Data

The Virginia State Police were contacted to see if there had been any increase in the number of cigarettes seized by their Criminal Interdiction and Counter-Terrorism Unit. From January 2012 to October 2012, approximately 1,941 cartons of cigarettes were seized, along with $226,360 in cash, during the course of normal drug interdiction efforts.[15] During the same time frame of one year later, from January 2013 to October 2013, the Virginia State Police seized approximately 6,775 cartons of cigarettes, along with $45,749 in cash.[16]

The NVCTB was contacted regarding their continuing enforcement efforts against cigarette trafficking. They reported completing approximately 3,000 inspections of retail establishments per year across their 18 jurisdictions in northern Virginia. They estimate that they have seized approximately 140,000 packs of illicit cigarettes since 2007; and approximately 55,000 packs of cigarettes in the last two years.

The Tobacco Enforcement Unit (Unit) in the Office of the Attorney General of Virginia reported that they conducted 145 retail inspections in Virginia in 2012, and seized 114,569 packs of cigarettes. From January 2013 through November 6, 2013, they conducted an additional 159 inspections, and seized 2,923 packs of cigarettes. During the course of their investigations, they continue to identify a number of fictitious businesses that are clearly involved with cigarette trafficking.[17] In 2011, this Unit only identified 5 fictitious businesses; in 2012 they identified 6 such businesses; and as of November of 2013, they identified 25 fictitious businesses.[18]

The Virginia Department of Taxation reported that, with regard to cigarettes, they conducted 565 on-site inspections of retailers over the last two years, as well as 9 on-site inspections of wholesalers. No instances of non-compliance were found with any of the wholesaler stamping agents. As for the retailers who were inspected, 177 assessments for non-compliance were issued, and the Department collected $142,374.

The Virginia Department of Alcoholic Beverage Control (Virginia ABC) does have some involvement with cigarettes. A large majority of the establishments that have a license to sell alcohol also sell cigarettes, and technically, Virginia ABC enforcement agents may enforce all of the laws of the Commonwealth, not just those that involve alcohol. In addition, Virginia ABC agents conduct periodic underage buyer tobacco checks. Virginia ABC reported that they conducted 7,309 inspections of establishments last year, in the course of their regular duties of enforcing Virginia's alcohol laws. In addition, they conducted 933 underage buyer checks for tobacco. Individual Virginia ABC agents have also been involved with local law enforcement in a number of cigarette trafficking investigations.

Conversations with local law enforcement in different parts of the state, as well as with the NVCTB, indicate that cigarette trafficking is continuing to be a common occurrence in the Commonwealth. Having previously ascertained that Virginia appears to be the largest single source for black market cigarettes in New York City,[19] the Office of the Sheriff of New York City was contacted for updated figures on their cigarette seizures. From August 1, 2011, to August 2, 2012, the Tobacco Task Force of the New York City

Sheriff's Office seized 4,982 cartons of contraband cigarettes, of which 2,053 (41%) were identified as coming from Virginia.[20] From August 3, 2012 to October 7, 2013, the Sheriff's Office seized approximately 4,222 cartons of contraband cigarettes, of which 2,142 cartons (51%) were identified as coming from Virginia.[21]

Recent Press Articles

A number of large criminal conspiracies to traffic cigarettes from Virginia have been reported in the press, further indication that the state-wide scope of the problem has continued unabated.

In April 2012, Onesimo Marcelino and three defendants were arrested in New York for trafficking cigarettes. Between May of 2010 and when they were arrested, they purchased over 111,000 cartons of cigarettes in Virginia and transported them to New York; payment was made with "millions in cash, thousands of grams of cocaine, an expensive SUV, and two firearms."[22] Marcelino had two previous convictions for cigarette trafficking in New York, and a previous conviction for possession of counterfeit cigarette tax stamps. On September 28, 2012, he was sentenced to 11 years in federal prison.[23]

In May 2013, a multi-agency police investigation of a cigarette smuggling ring led to 16 arrests in New York and Virginia.[24] This criminal conspiracy, involving Palestinians who were believed to be associated with both Hamas and Hezbollah operatives, was smuggling up to 20,000 cartons of cigarettes a week into New York City.[25] The cigarettes were bought in bulk from a wholesaler in Virginia, transported to and stored in Delaware, and then trafficked into New York City. It is estimated that a $22 million dollar profit was generated by this criminal ring.[26] Five months later, two of the leaders of the ring, Basel Ramadan and Yousseff Odeh, were additionally charged with attempting to orchestrate a murder-for-hire plot, while they were incarcerated in Rikers Island jail in New York City, to eliminate possible witnesses against them.[27]

On May 8, 2013, seven individuals were arrested in Rhode Island in connection with a cigarette smuggling ring. Between July 2011 and the time of their arrest, Wissam Khalil and his co-conspirators purchased more than 30,000 cartons of cigarettes in Virginia and transported them to Rhode Island, where it is estimated they generated more than $1.2 million in illegal sales.[28]

On November 9, 2013, three residents of New Jersey were arrested in Stafford, Virginia, after the clerk of a convenience store became suspicious; one of the defendants presented a Florida identification, but was in a vehicle with New Jersey license plates. All three defendants had been purchasing multiple cartons of cigarettes, using phony gift cards, from convenience stores located along the Jefferson Davis Highway.[29]

And, on March 28, 2014, it was reported that Thaer Khashman and John Taveras, of New York City, and Harvey Luna, of Elizabeth, New Jersey, were facing multiple charges in Shenandoah County Circuit Court for selling more than 3,000 packs of cigarettes that were purchased in Virginia, and then sold in New York City.[30] Khashman and Taveras are also charged with money laundering.[31]

These five examples illustrate how the large amounts of money that can be gained from cigarette trafficking are attracting criminals to Virginia.

Virginia Criminal Sentencing Commission Data

The VCSC was contacted for updated figures on the number of charges and convictions in Virginia courts for various cigarette offenses related to tax avoidance, improper record keeping, cigarette trafficking, and possession of counterfeit or illegal cigarettes.[32] Figure 2 illustrates the number of charges filed in general district courts for misdemeanor cigarette-related offenses. It appears that charges filed for violations of local ordinances have decreased in the past three fiscal years. Also noteworthy is that in the first fiscal year (FY14) after it became a crime in Virginia to possess stamped cigarettes for purposes of trafficking, 104 charges were filed in general district courts.[33] Conviction data for these offenses in the general district courts thru FY13 is provided in Figure 3. No conviction data was yet available for FY14. Figures 4 and 5 illustrate circuit court charges and convictions for cigarette-related offenses. The data from the circuit courts indicates that few charges are filed, and few convictions are obtained, for these types of cigarette offenses.

Figure 2: General District Court Charges for Cigarette-related Offenses, FY10- FY14*

Code	Description	FY10	FY11	FY12	FY13**	FY14†
§ 3.2-4212(D,i)	Sell or distribute cigarettes not in directory, < 3000 pkgs.	0	0	0	2	0
§ 3.1-336.10(D,i) / § 3.2-4212(D,i)	Sell or distribute cigarettes not in directory	n/a	n/a	n/a	n/a	0
§ 3.2-4212(D,ii)	Possess, import, etc., cigarettes not in directory, < 3000 pkgs.	0	2	0	0	0
§ 4.1-103.01(B)	Dealers fail to allow inspection of records	0	1	0	0	0
§ 58.1-1007	Fail to keep records on purchase, sale of cigarettes (Excise Tax)	0	1	0	0	0
§ 58.1-1009	Cigarettes, unlawful sale of revenue stamps	0	0	1	1	0
§ 58.1-1009	Revenue stamps not purchased from Tax Dept.	1	8	2	0	0
§ 58.1-1017(B)	Cigarettes without stamp, sale, purchase, possess, < 3000 pkgs.	21	7	15	8	0
§ 58.1-1017(C)	Cigarettes without stamp, sale, purchase, possess, > 3000 pkgs.	2	10	53	12	3
§ 58.1-1021	Fail to keep records on purchase, sale of cigarettes (Use Tax)	0	0	0	1	0
§ 58.1-1033	Violation of restrictions	0	3	0	0	0
Local Cigarette Tax Ordinance	Local Cigarette Tax Ordinance Violation	158	107	64	7	1
§ 58.1-1017.1	Possession with intent to distribute tax-paid, contraband cig.	n/a	n/a	n/a	102	10
§ 58.1-1017.1	Possession with intent to distribute tax-paid, contraband cig., subseq.	n/a	n/a	n/a	2	0

Source: Supreme Court of Virginia - General District Court Case Management System. *Fiscal year in which the charge was concluded (nolle prossed, dismissed, sentenced, etc.); **Data do not include charges that were still pending at the end of FY13; † Charges filed since July 1, 2013 thru November 9, 2013.

Figure 3: General District Court Convictions for Cigarette-related Offenses, FY10- FY13*

Code	Description	FY10	FY11	FY12	FY13**
§ 3.2-4212(D,ii)	Possess, import, etc., cigarettes not in directory, < 3000 pkgs. (M1)	0	2	0	0
§ 58.1-1007	Fail to keep records on purchase, sale of cigarettes (Excise Tax) (M2)	0	1	0	0
§ 58.1-1010	Illegal sale of unstamped cigarettes by wholesale dealers (M2)	0	0	0	1
§ 58.1-1017(B)	Cigarettes without stamp, sale, purchase, possess, < 3000 pkgs. (M2)	10	7	22	7
§ 58.1-1021	Fail to keep records on purchase, sale of cigarettes (Use Tax) (M2)	0	0	0	1
Local Cigarette Tax Ordinance	Local Cigarette Tax Ordinance Violation (M2)	33	36	19	3
§ 58.1-1017.1	Possession with intent to distribute tax-paid, contraband cig. (M1)	n/a	n/a	n/a	68
§ 58.1-1017.1	Possession with intent to distribute tax-paid, contraband cig., subseq. (M2)	n/a	n/a	n/a	2
Total Convictions/Counts		43	46	41	82

Source: Supreme Court of Virginia - General District Court Case Management System. *Fiscal year in which the charge was concluded (nolle prossed, dismissed, sentenced, etc.); **Data do not include charges that were still pending at the end of FY13.

Figure 4: Circuit Court Charges for Cigarette-related Offenses, FY10-FY14*

Code	Description	FY10	FY11	FY12	FY13**	FY14†
§ 58.1-1009	Cigarettes, unlawful sale of revenue stamps (F6)	0	1	0	0	0
§ 58.1-1009	Revenue stamps not purchased from Tax Dept. (F6)	0	8	0	2	0
§ 58.1-1017(B)	Cigarettes without stamp, sale, purchase, possess, < 3000 pkgs. (M2)	8†	11	0	0	0
§ 58.1-1017(C)	Cigarettes without stamp, sale, purchase, possess, > 3000 pkgs. (F6)	0	32	12	9	0
§ 58.1-1033	Violation of restrictions (F5)	0	1	0	0	0
§ 58.1-1017.1	Possession with intent to distribute tax-paid, contraband cig. (M1)	0	n/a	n/a	4†	2†
§ 58.1-1017.1	Intent/distribute >= 100,000 tax paid cigarettes	0	n/a	n/a	n/a	2
Total Charges/Counts		8	53	12	15	4

Source: Supreme Court of Virginia – Circuit Court Case Management System. *Fiscal year in which the charge was concluded; **Data do not include charges that were still pending at the end of FY13. † These charges were the result of appeals from General District Court. The Circuit Court Case Management System does not include cases from Fairfax or Alexandria. Prince William joined the system in FY09 and Virginia Beach left the system in FY09. † Charges filed since July 1, 2013 thru November 9, 2013.

Figure 5: Circuit Court Convictions for Cigarette-related Offenses, FY10-FY13*

Code	Description	FY10	FY11	FY12	FY13**
§ 58.1-1009	Cigarettes, unlawful sale of revenue stamps (F6)	0	1	0	0
§ 58.1-1009	Revenue stamps not purchased from Tax Dept. (F6)	0	4	0	1
§ 58.1-1017(B)	Cigarettes without stamp, sale, purchase, possess, < 3000 pkgs. (M2)	7†	6	4	5
§ 58.1-1017(C)	Cigarettes without stamp, sale, purchase, possess, > 3000 pkgs.(F6)	0	8	1	4
§ 58.1-1017.1	Possession with intent to distribute tax-paid, contraband cig. (M1)	N/A	N/A	N/A	2†
§ 58.1-1017.1	Possession with intent to distribute tax-paid, contraband cig., subseq. (M2)	N/A	N/A	N/A	0
Total Convictions/Counts		7	19	5	12

Source: Supreme Court of Virginia – Circuit Court Case Management System. *Fiscal year in which the charge was concluded; **Data do not include charges that were still pending at the end of FY2013. † These charges were the result of appeals from General District Court. The Circuit Court Case Management System does not include cases from Fairfax or Alexandria. Prince William joined the system in FY2009 and Virginia Beach left the system in FY2009.

Continuing Vulnerabilities In Virginia

Numerous meetings with law enforcement and prosecutors revealed that while the changes to the law effective in 2013 have greatly assisted in enforcement efforts against cigarette trafficking in Virginia, there remain a number of areas where improvements could be made. Some of these reflect systemic weaknesses in Virginia due to multiple, uncoordinated investigations. A related vulnerability is that diverse sources of important information relevant to uncovering trafficking rings are not brought together in an organized manner. Finally, a number of difficulties in effectively prosecuting these cases were identified that could be remedied through statutory change.

The systemic weaknesses are created, in part, by Virginia's current system of multiple law enforcement agencies, each of which are autonomous, and which could theoretically become involved in investigating the same gang or group of conspirators, without knowing other investigations were simultaneously taking place. This inherent difficulty is aggravated by the nature of cigarette trafficking, which almost always involves the transportation of black market cigarettes through multiple jurisdictions before they are taken out of the state. Without a coordinated response between agencies, there is a risk that one law enforcement agency could inadvertently interfere with another agency's investigation or surveillance operation. Additionally, to effectively combat multi-state trafficking rings, coordination with other state agencies and federal authorities is necessary.

In terms of the valuable sources of information which are not collated, the Virginia Department of Taxation, the State Corporation Commission, the Virginia State Police, local law enforcement, the Attorney General's Office, NVCTB, and tobacco manufacturers and wholesalers each may possess valuable data, which, when evaluated in a comprehensive manner, could provide valuable leads for the investigation of cigarette trafficking gangs and their ongoing crimes. For example, the Virginia Department of Taxation may have information that a retail business has cancelled its "sales and use tax" certificate; if the business is still operating, not only is that a crime in and of itself, but it may be a sign that cigarette trafficking is occurring. They may also possess tax records which demonstrate the business is greatly under-reporting their expected income, based upon their cigarette sales volume. These records may assist local law enforcement agencies that begin an investigation of a suspected cigarette trafficking operation, based upon observations of suspicious behavior, but later encounter difficulties handling the forensic accounting and tax record analyses that are needed to prepare the case for prosecution. At the same time, the State Corporation Commission may have information that the retail business has recently cancelled or failed to maintain its corporate status, another possible indication that trafficking is occurring. In other words, the ability to synthesize records can provide important leads that may uncover a trafficking ring and assist law enforcement with deconfliction concerns.[34]

Frequently, manufacturers and wholesalers will have information on suspicious levels of sales activity—amounts far too large for a given store, or even a geographic area. However, they have reported uncertainty as to which agency is the best one for them to report their findings: the State Police, the Office of the Attorney General, or local law

enforcement? Because there is no central registry for wholesalers to easily verify the continued good standing of "sales and use tax" certificates of retailers, wholesalers may inadvertently sell large quantities of cigarettes to traffickers who are operating a fictional storefront as a cover for their illegal operations. And, because there is no registry of all retailers who sell tobacco products, the Virginia Department of Taxation and the Tobacco Enforcement Unit of the Attorney General's Office are not currently able to identify all retail locations which might be the focus of an audit.

Similarly, law enforcement does not have ready access to information on large purchases of cigarettes made to individuals at "cash and carry" wholesalers. And, while local law enforcement may gain valuable information during the course of an investigation on ancillary crimes committed by a trafficking gang, such as credit card fraud or money laundering, they may not have the critical criminal intelligence that the State Police may have that connects the conspirators in Virginia with known criminal groups in other states.

As for current difficulties which exist with Virginia's laws, prosecutors identified a number of issues they have had while prosecuting cigarette trafficking cases. One is simply that if a defendant argues that the contents of the pack of cigarettes that are entered into evidence have not been proven, beyond a reasonable doubt, to meet the definition of a "cigarette," as defined by Va. Code § 58.1-1000, there is no easy response by the Commonwealth. As the definition specifies that cigarettes must contain nicotine, the only remedy to this argument is to call in an expert witness who can testify that the cigarettes in that specific brand do, in fact, contain nicotine.

A similar defense argument that can be difficult to respond to is that the Commonwealth is required to prove that a defendant is not, in fact, an "authorized holder."[35] Requiring the Commonwealth to prove a "negative" can be difficult; in some cases, obtaining testimony from a representative of the Virginia Department of Taxation may be necessary to prove that the defendant is not operating a legitimate retail business. Normally, when a criminal statute contains language making it inapplicable to certain persons, or under certain circumstances, it becomes an affirmative defense on the part of the defendant to demonstrate that the inapplicability applies in his own case. By way of illustration, Virginia's marijuana possession statute specifically states that the "provisions of this section shall not apply to members of…law enforcement agencies…for the performance of their duties."[36] This clause does not require prosecutors to prove that the defendant in a marijuana possession case is not, in fact, a law enforcement officer.

Another difficulty reported by some prosecutors and law enforcement is that while cigarette trafficking was made a RICO offense in 2013, it is not a crime that can be investigated by a multi-jurisdictional grand jury.[37] As cigarette trafficking almost always involves multiple jurisdictions, the inability to present these cases to a multi-jurisdictional grand jury has been frustrating for some prosecutors.

While Va. Code § 19.2-386.21 allows prosecutors to forfeit trafficked cigarettes that have been seize by law enforcement, the wording of the statute then requires that the cigarettes be destroyed. Prosecutors mentioned that the work of filing information and

having a court hearing, for a forfeiture action that will only result in the cigarettes being destroyed, simply is not worth their time. Law enforcement has complained that they could make use of these cigarettes for undercover operations, and it is a waste of a valuable resource to simply burn trafficked cigarettes that they seize. Law enforcement also mentioned that they would like the cigarette taxation statutes to be amended so as to make clear that they may possess unstamped cigarettes, if necessary, in the normal course of their duties.

Lastly, it was suggested that Virginia statutorily prohibit anyone who has been convicted of a cigarette trafficking offense from ever again qualifying as an "authorized holder." This could prove an effective deterrent to traffickers who, even after being convicted, continue to establish false businesses as a means of hiding their trafficking operations.

Conclusion

The Crime Commission reviewed the information on Virginia's continuing problems with cigarette trafficking, as well as the vulnerabilities that were identified. Policy options based upon the vulnerabilities identified in some of Virginia's current statutes were presented for consideration by the Crime Commission. As a result of the study effort, the Crime Commission endorsed the following legislative recommendations at its December meeting:

Recommendation 1: Create a prima facie presumption that the contents of an unopened pack of cigarettes meet the legal definition of a "cigarette," as provided in Va. Code § 58.1-1000. This would eliminate the possible need to call an expert witness during a criminal trial for testimony that a particular brand of cigarettes contains nicotine.

Recommendation 1 was introduced by Senators Bryce Reeves and Janet Howell as Senate Bill 352 during the Regular Session of the 2014 Virginia General Assembly. It was passed by the General Assembly and signed by the Governor on March 24, 2014.

Recommendation 2: Rewrite the trafficking statute, Va. Code § 58.1-1017.1, to make clear that a prosecutor does not have to prove a defendant is not an "authorized holder," as an element of the offense. Attempting to prove a negative in court is difficult and time-consuming, and is not required in comparable criminal statutes, such as drug possession.

Recommendation 2 was introduced by Senators Thomas Norment and Janet Howell as Senate Bill 489 during the Regular Session of the 2014 Virginia General Assembly. It was passed by the General Assembly and signed by the Governor on April 7, 2014.

Recommendation 3: Amend the forfeiture statute that applies to counterfeit and trafficked cigarettes, Va. Code § 19.2-386.21, so that law enforcement officers can make use of forfeited cigarettes for legitimate, undercover operations. Under the current wording of the statute, these cigarettes must be destroyed, and cannot be used for any law enforcement purposes. Law enforcement should also be given the explicit authority

to possess unstamped cigarettes, if they need to do so while conducting an undercover operation.

Recommendation 3 was introduced by Senators Bryce Reeves and Janet Howell as Senate Bill 365 during the Regular Session of the 2014 Virginia General Assembly. It was passed by the General Assembly and signed by the Governor on March 31, 2014.

Recommendation 4: Increase the required civil penalties which accompany a conviction for cigarette trafficking under Va. Code § 58.1-1017.1, by making them mandatory minimums. To provide a more effective deterrent against traffickers, the required civil penalties should be no less than $5,000 for a first offense; no less than $10,000 for a second offense within 36 months; and no less than $50,000 for a third or subsequent offense within 36 months.

Recommendation 4 was introduced by Senators Thomas Norment and Janet Howell as Senate Bill 478 during the Regular Session of the 2014 Virginia General Assembly. It was passed by the General Assembly and signed by the Governor on March 31, 2014.

Recommendation 5: Prohibit anyone convicted of trafficking cigarettes from ever again qualifying as an "authorized holder."
Recommendation 5 was introduced by Senators Bryce Reeves and Janet Howell as Senate Bill 364 during the Regular Session of the 2014 Virginia General Assembly. It was passed by the General Assembly and signed by the Governor on March 31, 2014.

Recommendation 6: Because cigarette trafficking almost always involves activity occurring in multiple jurisdictions, it should be added to the list of crimes that can be investigated by multi-jurisdictional grand juries.

Recommendation 6 was introduced by Senators Bryce Reeves and Janet Howell as Senate Bill 366 during the Regular Session of the 2014 Virginia General Assembly. It was passed by the General Assembly and signed by the Governor on April 3, 2014.

All six of these recommendations were also introduced in a single bill, House Bill 853, introduced by Delegate Todd Gilbert during the Regular Session of the 2014 Virginia General Assembly. It was passed by the General Assembly and was signed by the Governor on March 31, 2014.

The Crime Commission considered the general idea of having a state-wide, centralized unit dedicated to cigarette trafficking. Such a unit could assist local law enforcement with specialized investigations, could coordinate between departments, could facilitate interactions with federal and other state agencies, and could serve as a clearing house for important criminal intelligence. Having full time investigators who are experienced in forensic accounting and financial audits would greatly assist in uncovering and prosecuting cigarette trafficking rings and those who engage in large-scale tax fraud connected with cigarettes. The Crime Commission recommended that, subject to other work-load responsibilities, the specific details of creating such a unit be examined. The creation of model protocols for conducting undercover operations involving cigarette traffickers was also recommended. Finally, the Crime Commission endorsed providing

continued training on the subject of cigarette trafficking in Virginia to law enforcement, Commonwealth's Attorneys, and judges.

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National White Collar Crime Center
Northern Virginia Cigarette Tax Board

Office of the Attorney General of Virginia - Tobacco Enforcement Unit

R. J. Reynolds

S&M Brands

Shenandoah County Sheriff's Office

The Smith Group

Virginia Criminal Sentencing Commission

Virginia Department of Taxation

Virginia State Police

Virginia Wholesalers and Distributors Association

[1] S.J.R. 21, 2012 Gen. Assemb., Reg. Sess. (Va. 2012).
[2] *See* Va. State Crime Comm'n, Illegal Cigarette Trafficking, S. Doc. 5, 2013 Gen. Assemb., Reg. Sess. (2013).
[3] Id.
[4] VA. CODE ANN. § 58.1-1017.1 (2012).
[5] 2013 Va. Acts chs. 567, 623.
[6] VA. CODE ANN. § 58.1-1017 (2012).

[7] 2013 Va. Acts chs. 570, 624.
[8] 2013 Va. Acts ch. 626. Trafficking unstamped cigarettes was already a RICO offense. VA. CODE § 18.2-513 (2012).
[9] 2013 Va. Acts ch. 627.
[10] VA. CODE ANN. § 18.2-246.14 (2012).
[11] 2013 Va. Acts ch. 625.
[12] Id.
[13] 2013 Va. Acts ch. 381.
[14] Id.
[15] Va. State Crime Comm'n, Illegal Cigarette Trafficking, S. Doc. 5, 2013 Gen. Assemb., Reg. Sess. at 18 (2013).
[16] The large increase in the number of cartons seized, with the concurrent drop in the amount of cash seized, during drug interdiction efforts, may indicate that drug trafficking gangs are increasingly turning to cigarettes as a means of "currency," especially for purposes of transporting their profits.
[17] These are "retail" businesses that purchase large quantities of cigarettes from wholesalers, or other retailers, and whose "premises" are in clearly non-commercial areas, such as a private apartment, an abandoned building, or a commercial storage facility. Due to the sensitivity of on-going investigations, specific locales and details of investigations are not mentioned in this report, unless they have previously been reported by the press.
[18] Although based on anecdotal evidence, law enforcement reported their general impression that "smurfing," or traveling from retail location to retail location, and purchasing small quantities of cigarettes, seemed to have decreased in 2013, compared to the previous two years. In lieu of that, they reported seeing more evidence of fraudulent businesses being created for the purposes of purchasing large quantities of cigarettes at one time from wholesalers. This observation is consistent with the increase in fictitious businesses identified by the Tobacco Enforcement Unit.
[19] Va. State Crime Comm'n, Illegal Cigarette Trafficking, S. Doc. 5, 2013 Gen. Assemb., Reg. Sess. at 8-9 (2013).
[20] Id. at 9.
[21] Information provided by the New York City Sheriff's Office, e-mail correspondence, Oct. 16, 2013.
[22] Frank Green, *Contraband cigarette trafficker sentenced to 11 years in prison*, RICHMOND TIMES DISPATCH, January 17, 2013, http://www.timesdispatch.com/news/contraband-cigarette-trafficker-sentenced-to-years-in-prison/article_2f32199c-eca0-5c44-b941-353ec70a8dbc.html?mode=jqm.
[23] Id.
[24] Brittany Brady, *NY cigarette-smuggling ring may have terror link*, CNN, May 17, 2013, http://www.cnn.com/2013/05/17/us/new-york-cigarette-ring/.
[25] Greg B. Smith & Oren Yaniv, *Terrorists may get money from regional, cheap cigarette smuggling ring: Ray Kelly*, NY DAILY NEWS, May 17, 2013, http://www.nydailynews.com/new-york/terrorists-money-regional-cigarette-smugglers-ray-kelly-article-1.1346120.
[26] Id.
[27] Brian Shane, *Cigarette smuggling suspects charged in murder plot*, USA TODAY, October 17, 2013, http://www.usatoday.com/story/news/nation/2013/10/17/cigarette-smuggling-murder-for-hire-plot/3004063/. This is consistent with general law enforcement observations that the cigarette trafficking gangs are slowly becoming more violent in their approach to conducting and safeguarding their operations.
[28] Press Release, FBI-Boston, Federal Indictment Unsealed as Rhode Island State Police and Federal Agents Arrest Seven (May 8, 2013), *available at* http://www.freerepublic.com/focus/news/3017308/posts (last visited on April 24, 2014).
[29] Keith Epps, *Jersey men charged in gift-card fraud*, FREE LANCE-STAR, Nov. 12, 2013, http://news.fredericksburg.com/newsdesk/2013/11/12/jersey-men-charged-in-gift-card-fraud/.
[30] Joe Beck, *Three cigarette smuggling cases emerge in court*, NORTHERN VIRGINIA DAILY, Mar. 28, 2014, http://www.nvdaily.com/news/2014/03/three_cigarette_smuggling_cases_emerge_in_court-print.html.
[31] Id.

[32] As with the original study in 2012, data figures were not requested for offenses that involve the sale of cigarettes to minors, as these crimes were outside the scope of the study and its focus on illegal trafficking.
[33] This criminal offense was first created in 2012, and went into effect on July 1 of that year. 2012 Va. Acts chs. 362, 472.
[34] Deconfliction refers to the process whereby one law enforcement agency contacts another, to ensure that the investigations or arrests made will not conflict with, or jeopardize, an ongoing investigation by the other agency.
[35] The statute that makes it illegal to distribute, or possess with the intent to distribute, tax paid cigarettes, i.e., the cigarette trafficking statute, specifically mentions that this crime does not apply to "authorized holders." VA. CODE § 58.1-1017.1 (2013).
[36] VA. CODE § 18.2-250.1(B) (2013).
[37] VA. CODE § 19.2-215.1 (2013).

Joint Motion for Writ of Actual Innocence

Executive Summary

During the 2013 Regular Session of the Virginia General Assembly, Delegate Charniele Herring introduced House Bill 1919, which sought to allow a defendant and the Commonwealth's Attorney to jointly file a petition for a writ of actual innocence. The bill was referred to the Crime Commission for review.

Crime Commission staff collected literature and obtained data related to the number of petitions filed for a writ of actual innocence. The Crime Commission reviewed study findings at its September meeting and directed staff to draft legislation on two key issues. As a result of the study effort, the Crime Commission endorsed the following legislative recommendations at its December meeting:

Recommendation 1: Allow Commonwealth's Attorneys to join in petitions for writs of actual innocence, thereby allowing incarcerated persons to receive a bond hearing, pending a decision on the writ.

Recommendation 2: Amend Va. Code § 17.1-513 to allow for the bond hearing to be held in circuit court.

Background

Virginia's writs of actual innocence are created by statute. Virginia Code § 19.2-327.2 authorizes the Supreme Court of Virginia to issue a writ of actual innocence to a person who can prove that they are innocent of the crime for which they were convicted, if the proof is based upon biological evidence. The second statute, Va. Code § 19.2-327.10 allows for the same process to occur through the Virginia Court of Appeals if the convicted person has nonbiological evidence that may prove innocence.

House Bill 1919 (HB 1919) was introduced by Delegate Charniele Herring during the 2013 Regular Session of the Virginia General Assembly.[1] As introduced, the bill would allow a Commonwealth's Attorney to join a petition for a writ of actual innocence, which would then allow, under the bill, the possible release of a prisoner following a bond hearing. The bond hearing would be heard by the circuit court where the conviction occurred.

House Bill 1919 was introduced as a result of the Jonathan Montgomery case in Hampton, Virginia. Mr. Montgomery was convicted of sexual assault in 2008; however, the victim came forward in late 2012 and recanted her story, claiming Mr. Montgomery was innocent of the crime for which he was convicted.[2] A Hampton circuit court, with the concurrence of the Hampton Commonwealth's Attorney, vacated the conviction,

without the proper legal authority. The Attorney General of Virginia asked the Virginia Court of Appeals to exonerate Mr. Montgomery of his conviction. Mr. Montgomery's writ of actual innocence case was put on hold until the perjury case for his accuser was resolved. There is no procedural vehicle in Virginia that would have allowed Mr. Montgomery to be released from prison while the proceedings moved forward, other than a conditional release by the Governor. Allowing a Commonwealth's Attorney to file jointly for a writ of actual innocence, with a subsequent bond hearing, would allow wrongfully convicted persons to be released on bond pending the decision on the writ by the Virginia Court of Appeals or the Supreme Court of Virginia.

House Bill 1919 proposes the creation of two new Virginia Code sections. Virginia Code § 19.2-327.2:1 would allow for a joint petition to be filed in the Supreme Court of Virginia and Va. Code § 19.2-327.10:1 would allow for a joint petition to be filed in the Virginia Court of Appeals.

It is important to note that both proposed statutes would then allow the petitioner to apply for a bond. If the hearing is held in the circuit court, as proposed by the bill, then Va. Code § 17.1-513 would need to be amended. Currently, circuit courts do not have the subject matter jurisdiction to hold bond hearings for writs of actual innocence. It should also be noted that a Commonwealth's Attorney would not be able to initiate a petition for a writ, only join in a petition for a writ of actual innocence.

Virginia Data

Crime Commission staff requested data from the Supreme Court of Virginia and the Virginia Court of Appeals to obtain a better understanding of petitions filed based on biological and nonbiological evidence.

The statute regarding actual innocence petitions filed in the Virginia Supreme Court went into effect in 2002. Since July 1, 2002, there have been 49 petitions filed with the Supreme Court of Virginia based on biological evidence.[3] Of those 49 petitions, 39 were refused, and 4 were granted. There were 2 petitions that were docketed, 3 that were procedurally dismissed, and 1 that was withdrawn or dismissed.

The statute regarding actual innocence petitions filed in the Virginia Court of Appeals went into effect in 2004. Since July 1, 2004, there have been 243 petitions filed with the Virginia Court of Appeals based on nonbiological evidence. Of the 243 petitions filed, 3 writs were granted and the conviction was vacated. One petition was withdrawn and 4 are still pending.[4] The remaining 235 petitions were dismissed. A case that is dismissed has typically been reviewed on the merits and it has been determined that the petitioner is not entitled to be deemed innocent of the crime for which he was convicted. Subsequently, the petition for actual innocence is dismissed because it has no merit.

Conclusion

Because Virginia's writ of actual innocence is created by statute, the Code of Virginia could be amended to allow a Commonwealth's Attorney to jointly file a petition for a writ of actual innocence. If a petition is joined, then the petitioner could be released on bail pending a decision on the writ by the appellate court. Further changes would need to be made to the Code of Virginia to determine where the bond hearing would be held.

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

Recommendation 1: Allow Commonwealth's Attorneys to join in petitions for writs of actual innocence, thereby allowing incarcerated persons to receive a bond hearing, pending a decision on the writ.

Recommendation 2: Amend Va. Code § 17.1-513 to allow for the bond hearing to be held in circuit court.

Delegate Charniele Herring introduced House Bill 671 during the 2014 Regular Session of the Virginia General Assembly, based on the Crime Commission recommendation. The bill was continued to the 2015 Session by the House Courts of Justice Criminal Subcommittee.

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[1] H.B. 1919, 2013 Gen. Assem., Reg. Sess. (Va. 2013).
[2] *Available at*: http://wtkr.com/2012/11/15/woman-accused-of-lying-in-jonathan-montgomery-case-appears-in-court/.
[3] Data was last updated September 3, 2013.
[4] Data was last updated August 13, 2013.