2014 ANNUAL REPORT

VIRGINIA STATE CRIME COMMISSION

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June 30, 2015

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 2014 Annual Report.

Very truly yours,

Thomas K. Norment, Jr., Chair

Table of Contents

Authority of the Crime Commission

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

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

Members of the Crime Commission

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 Richard L. Anderson
The Honorable C. Todd Gilbert
The Honorable Charniele L. Herring
The Honorable G. Manoli Loupassi
The Honorable Jennifer L. McClellan

ATTORNEY GENERAL

Cynthia E. Hudson (Designee) for Attorney General Mark R. Herring

GOVERNOR'S APPOINTMENTS

The Honorable Michael R. Doucette
Lori Hanky Haas
The Honorable Brian K. Roberts

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

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2014 Executive Summary of Activities

The Crime Commission held four Commission meetings in 2014: September 23, October 21, November 10, and December 2. During the 2014 General Assembly Session, a total of three mandated studies, five bill referrals, and three letter requests were sent to the Commission and approved for review. The Commission also decided to continue its comprehensive study on illegal cigarette trafficking. Additionally, staff was requested to assist in the implementation of statutorily created child abuse multi-disciplinary teams, which was passed as part of the Crime Commission's legislative package during the 2014 Session of the General Assembly. The Commission continues to be involved in the Forensic Science Board's DNA Notification Project.

The Commission was mandated by Senate Joint Resolution 24 to study the issue of expungement of juvenile records. Specifically, staff was directed to review all laws related to the confidentiality and retention of juvenile court records, report on at what time and by whom juvenile record information can be accessed, determine whether existing confidentiality and destruction of records laws are being complied with, examine the impact on youthful offenders of having a juvenile record, and make recommendations regarding improvements in the laws that would assist juvenile offenders while allowing law enforcement to maintain the safety of the citizens of the Commonwealth.

The Commission was mandated by Senate Joint Resolution 64 and House Joint Resolution 62 to study the issue of missing persons/search and rescue. Both resolutions, which were identical, focused upon the current state of readiness of Virginia's law enforcement and search and rescue efforts for rapid and well-coordinated deployment in all missing, endangered, and abducted person cases. Specifically, staff was mandated to study what needs to be done in order to get increased, large-scale rapid search and rescue coordination efforts, immediate notification to the Virginia Department of Emergency Management (VDEM) when a person is determined to be endangered or abducted, additional resources and staffing needs for VDEM and law enforcement, cross-training between command staff and VDEM's Search and Rescue Program, support services for families of missing persons and to implement other recommendations the Crime Commission deemed necessary.

The Commission was mandated by House Bill 885 to study sexual and domestic violence victim service agency funding. A work group was created to examine an efficient and comprehensive streamlining of current federal and state sexual and domestic violence victim service agency funding, including general funds, non-general funds, and special fund monies. The work group convened three times and

was comprised of over 30 representatives with specific knowledge of sexual and domestic violence agency funding.

Staff researched several additional issues as a result of bill referrals and study requests that were referred to the Commission during the 2014 Session of the General Assembly. Staff reviewed Senate Bill 353, which dealt with criminal history record checks and barrier crimes. Staff examined human trafficking, juvenile prostitution and the reporting of suspected cases of child human trafficking as a result of Senate Bill 373 and House Bill 486. Staff also reviewed House Bill 344 which sought to add penalties for impersonating another while engaging in the harassment of a third person, using a computer, as well as House Bill 707 that included a review of digital impersonation penalties and how such a statute should best be drafted. Staff conducted a brief review of sexting and existing child pornography laws as well. Presentations on special conservators of the peace and private police departments were provided by the Secretary of Public Safety, the Department of Criminal Justice Services, and the Virginia Association of Chiefs of Police.

As a result of these studies, a number of recommendations and police options were endorsed by the Commission with some being introduced as legislation during the 2015 Session of the General Assembly. The Commission's legislative package included bills dealing with digital impersonation and harassment, human trafficking, illegal cigarette trafficking, juvenile records, missing persons/search and rescue, private police departments, reproduction of child pornography, sexual and domestic violence agency funding, and special conservators of the peace.

The Commission continues to be involved in the Forensic Science Board's DNA Notification Project. The Commission's Executive Director serves as a member of the Forensic Science Board and is the Chair of the DNA Notification Subcommittee, which is charged with the oversight of the notification project.

In accordance with the Code of Virginia § 19.2-163.02, the Commission's Executive Director also serves as the designee on the Virginia Indigent Defense Commission.

Detailed study presentations for all of these studies can be found on the Commission's website at: http://vscc.virginia.gov.

Barrier Crimes

Executive Summary

Senate Bill 353 was introduced by Senator John Edwards during the Regular Session of the 2014 General Assembly. The main purpose of the bill was to rewrite several of Virginia's barrier crimes statutes. Barrier crimes are specific crimes, convictions for which result in the defendant becoming ineligible for certain kinds of employment or volunteering, or serving as a foster or adoptive parent. Currently, the statutes which list out the barrier crimes are written in a style that is difficult to read; instead of listing all of the offenses individually, they frequently refer to various categories of offenses found in specific Articles and Chapters of Title 18.2 of the Code of Virginia—for example, "sexual assault as set out in Article 7 (§ 18.2-61 *et seq*.) of Chapter 4 of Title 18.2." For a layperson who is not familiar with looking up offenses in the Code of Virginia, it can be difficult to ascertain which crimes are, and which crimes are not, barrier crimes. Another difficulty with having the barrier crimes statutes written in this style is that subsequent additions to a given Article in Title 18.2 may result in a minor offense inadvertently becoming a prohibition to employment. Also, serious offenses may be left out of the barrier crimes list, or a state agency may be forced to make a judgment call on whether a serious conviction counts as a barrier crime, a function that should be left to the legislature.

To avoid ambiguities, Senate Bill 353 proposed to rewrite the barrier crimes statutes by listing all of the disqualifying offenses by statute number, with a brief description of the offense; e.g., "Capital murder, as set out in § 18.2-31; First or second degree murder, as set out in § 18.2-32; Murder of a pregnant woman, as set out in § 18.2-32.1." However, this style still presents difficulties. If the written description does not fully capture all of the offenses contained in a Code section, then that offense would no longer be a barrier crime. For instance, if the rewritten statute lists as a barrier crime "Malicious bodily injury to a law-enforcement officer, as set out in § 18.2-51.1," then unlawful bodily injury to a law-enforcement officer in violation of § 18.2-51.1 would not be a barrier crime. Extreme care would need to be taken to ensure there was complete accuracy in the description of the offenses if this style were adopted by the legislature. And, there would still be the risk that if a statute were modified in the future with the addition of a new offense, that new offense would not be covered.

There are two other styles in which the barrier crimes statutes could be rewritten. One would be to simply list out all of the statute numbers, without providing descriptions of the offenses. This approach still creates problems, though. If a statute contains within it a minor or innocuous offense, listing the statute number would mean that the minor offense would become a barrier crime. If a written exception were made to exclude the minor offense, then this approach would essentially be a variation of Senate Bill 353 and would still pose all of the problems inherent with that approach.

The other style that could be used would be to list broad categories of crimes, without making any reference to the Code of Virginia. For instance, "any felony assault crime; robbery; carjacking; any crime of burglary; any felony crime involving the distribution of a controlled substance; etc." This approach would be easy for laypersons to read and apply, ambiguities would be minimal, and any interpretations that would need to be made by employers or state agencies should be no more difficult than the current requirement that convictions from other states also be considered to see if they are "similar" to any of the Virginia crimes listed in the barrier crimes statutes.

At its December meeting, the Commission was presented with three options of how Virginia's barrier crimes statutes could be rewritten:

> **Policy Option 1:** Rewritten using only Code sections or statute numbers, with minimal extra wording.
>
> **Policy Option 2:** Rewritten by listing out all of the Code sections, with specific descriptions of the offenses included with the statute numbers. [This option is the style that is used in SB 353].
>
> **Policy Option 3:** Rewritten using broad descriptions of categories of offenses, without specific reference to either Code sections, or specific Articles and Chapters in the Code of Virginia.

After consideration, the Crime Commission made no motions on any of these options, and had no recommendations on the subject of rewriting Virginia's barrier crimes statutes.

Background

Senate Bill 353 (SB 353) was introduced by Senator John Edwards during the Regular Session of the 2014 General Assembly.[1] The bill was amended in the nature of a substitute in the Senate Rehabilitation and Social Services Committee, and passed by the Senate. It was then referred to the House Courts of Justice Committee, where it was left in Committee. A letter request was sent by the Committee to the Crime Commission, requesting that the bill be reviewed.

The focus of SB 353 was to reorganize various barrier crimes statutes throughout the Code of Virginia. Barrier crimes statutes are statutes which list a number of offenses; a conviction for any one of the listed offenses serves as a "barrier" to various types of employment. There are slightly different lists for different kinds of employment. Some of the barrier crimes statutes also apply to volunteer opportunities, or the ability to serve as a foster parent or to adopt children. The barrier crimes statutes that were the subject of SB 353 are all lengthy, containing many offenses, and are difficult to read. The object of SB 353 was to simplify the lists by reorganizing them, and enumerating the offenses in a different way—listing all of the crimes by statute number, preceded by a verbal description of the offense;

e.g. "Felony homicide, as set out in § 18.2-33." This differs from the current way in which these statutes are written—in general, the lists of offenses are referred to by Article and Chapter numbers in Title 18.2, and are given in terms of broad subject matter categories; e.g., "sexual assault as set out in Article 7 (§ 18.2-61 *et seq*.) of Chapter 4 of Title 18.2." However, it should be noted that the current statutes also refer to some specific offenses by statute number, e.g., "abduction as set out in subsection A or B of § 18.2-47."

The Crime Commission previously studied the issue of rewriting Virginia's barrier crimes statutes in 2011, in response to Senate Bill 1243 (2011), which was also introduced by Senator Edwards.[2] At the conclusion of the 2011 study, the Crime Commission made no motions and had no recommendations on the advisability of rewriting the barrier crimes statutes in a manner designed to make them easier to read.

The 2011 bill (SB 1243) differed from the current bill, SB 353, in a number of key aspects. Senate Bill 1243 only dealt with rewriting three Code sections: Va. Code §§ 37.2-314, 37.2-408.1, and 63.2-1719. Senate Bill 353 dealt with these Code sections, but also rewrote two additional statutes: Va. Code §§ 32.1-126.01 and 32.1-162.9:1. While SB 1243 ostensibly was drafted to make no substantive changes to the law, SB 353 did make a few substantive changes, and thus went beyond merely rewriting the list of crimes in each statute in a new manner. In SB 353, the list of exemptions for some of the statutes was modified; as an example, subsection F of Va. Code § 63.2-901.1 under current law specifies that even if an individual has been convicted of a felony drug possession offense, or a misdemeanor arson offense—both of which are barrier crimes pursuant to Va. Code § 63.2-1719—he will <u>not</u> be barred from serving as a kinship foster care parent, provided ten years have elapsed from the date of conviction.[3] This list of exemptions was expanded in SB 353. Senate Bill 353 also added a few new offenses to each of the barrier crimes statutes, such as penetrating the mouth of a child with a lascivious kiss in violation of § 18.2-370.6, and "causing or encouraging acts rendering children delinquent, as set out in § 18.2-371, when such acts result in a criminal homicide, as set out in subsection C of § 9.1-902, such that the person is required to register [as a sex offender]."

The other large difference between SB 1243 and SB 353 is that SB 353 would have completely deleted Va. Code § 63.2-1719 from the Code of Virginia, and in its place, inserted that list of crimes into every statute in the Code which is currently cross-referenced with Va. Code § 63.2-1719. This resulted in SB 353 being a much lengthier bill than SB 1243, for instead of having one lengthy list of crimes contained in Va. Code § 63.2-1719, there were multiple, identical lengthy lists of those crimes.

Options for Rewriting Virginia's Barrier Crimes Statutes

The current style in which the barrier crimes statutes are written is to refer to broad sections of Title 18.2, rather than listing out all of the crimes individually. As an example, instead of listing the felony crimes of unlawful wounding or bodily injury, malicious wounding or bodily injury, malicious bodily injury to a law-enforcement

officer, aggravated malicious wounding, throwing an object from a place higher than one story, strangulation, etc., the barrier crimes statutes typically refer to "assaults and bodily woundings as set out in Article 4 (§ 18.2-51 *et seq*.) of Chapter 4 of Title 18.2."[4] Similarly, instead of listing out the felony sexual assault crimes of rape, forcible sodomy, object sexual penetration, aggravated sexual battery, carnal knowledge, etc., the statutes refer to "sexual assaults as set out in Article 7 (§ 18.2-61 *et seq*.) of Chapter 4 of Title 18.2."[5] While a few offenses are listed individually, such as "possession of child pornography as set out in § 18.2-371.1:1,"[6] the vast majority of crimes that are included in the statutes are referred to via their Article and Chapter numbers, with a brief description of the type of offense.

There are a number of advantages to listing out the offenses in this manner. The barrier crimes statutes themselves are much shorter than if all of the offenses were written out. Referring to "all of the assaults and bodily woundings as set out in Article 4," takes much less space in the Code of Virginia than proceeding to list the twenty or so assault offenses that are included in Article 4. The other advantage to writing out the barrier crimes statutes in this way is that new crimes automatically become incorporated into the barrier crimes list. When the crime of strangulation, in violation of Va. Code § 18.2-51.6, was added to Title 18.2 in 2012, it immediately was a barrier crime, without any of the barrier crimes statutes having to be amended.[7]

There are also disadvantages to listing the barrier crimes offenses by means of broadly referring to all offenses, or all relevant offenses, in given Articles and Chapters of Title 18.2. It can be difficult to tell quickly if a given criminal conviction qualifies as a barrier offense, especially when a non-attorney is reviewing a criminal history record, and is not familiar with using the Code of Virginia. Even worse, ambiguities can arise, as serious offenses can be included in a given Article or Chapter of Title 18.2, but do not meet the description provided in the barrier crimes statute. By way of illustration, it is a barrier crime to be convicted of "arson as set out in Article 1 (§ 18.2-77 *et seq*.) of Chapter 5 of Title 18.2."[8] Included in Article 1 of Chapter 5 of Title 18.2 is the Class 2 misdemeanor of setting off a smoke bomb, in violation of Va. Code § 18.2-87.1. Should this offense be considered a barrier crime? An even more serious offense in Article 1 of Chapter 5 of Title 18.2 is the Class 5 felony of making a bomb threat, in violation of Va. Code § 18.2-83. Strictly speaking, bomb threats are not arson crimes. Therefore, should making a bomb threat qualify as a barrier offense? Ambiguities of this nature lead to employers and state agencies having to make judgment calls that should be made by the legislature. The last inherent disadvantage of listing barrier crimes by reference to Article and Chapter numbers is that it becomes all too easy for a minor offense to inadvertently become a barrier crime when it is present or is added to a given Article in Title 18.2. One example that is frequently given is the Class 4 misdemeanor of carelessly setting brush on fire, in violation of Va. Code § 18.2-88. This arson offense is located in Article 1 of Chapter 5 of Title 18.2, and therefore is undeniably a barrier crime, per the definition given.[9] The result is that people who were convicted decades ago of throwing a lit cigarette out of a moving car onto the shoulder of a public highway may find themselves unable to work in a child day care center, for example.[10]

The style in which the barrier crimes are written in SB 353 (and in SB 1243) is to list all of the criminal statutes individually, with a brief description of the offense given before the statute number. For example, "Capital murder, as set out in § 18.2-31; First or second degree murder, as set out in § 18.2-32; Murder of a pregnant woman, as set out in § 18.2-32.1; [etc.].[11] Writing the barrier crimes in this way has the advantage of more clearly identifying which crimes are barrier crimes and which are not, making the statute easier for laypersons to read and understand. Ostensibly, this style also avoids creating ambiguities, which is another benefit. However, there are a number of disadvantages of writing out the barrier crimes in this manner. If a new criminal statute is placed in Title 18.2, it does not automatically become a barrier crime, unless the new statute is also inserted into the barrier crimes statute. On the other hand, if a new crime is inserted into an existing statute, it could result in a minor offense suddenly becoming a bar to employment or becoming a foster or adoptive parent. For instance, if a new Class 4 misdemeanor were added to a statute that is listed as a barrier crime, the new misdemeanor might become a barrier crime in its own right, even if that was not the specific intent of the legislature.

The main disadvantage of writing out the barrier crimes in the manner proposed by SB 353 and SB 1243 is that the brief descriptions of the offenses provided before the statute numbers have the potential to inadvertently exclude some serious offenses from being barrier crimes. For example, SB 353 includes as a barrier crime, "Malicious bodily injury to law-enforcement officers, firefighters, search and rescue personnel, or emergency medical service providers, as set out in § 18.2-51.2."[12] Because of the descriptive preface, this language would mean that the serious offense of unlawful bodily injury to a law-enforcement officer, firefighter, etc., would not be a barrier crime, even though it is also contained in Va. Code § 18.2-51.2. Inadvertent omissions are even more likely to occur, however, when a serious crime is incorporated as a subsection into an existing Code section, but is qualitatively different from the other offense or offenses in that section. As an example, SB 1243 listed as a barrier crime "Possession of child pornography, as set out in § 18.2-374.1:1."[13] This language would exclude as a barrier crime the Class 4 felony of operating an Internet website for the purposes of facilitating payment to access child pornography, as defined by subsection D of that statute.[14] If Virginia's barrier crimes statutes are to be written in a style that includes both a statute number and a brief descriptive preface, extreme care must be taken to make sure the descriptive preface is both accurate and completely covers all of the offenses within the statute that are meant to be barrier crimes. Subsequent modifications to a statute by the legislature in later years will greatly increase the chances that an inadvertent omission or inclusion will occur.

Two other possible options for writing the barrier crimes statutes should be mentioned. One would be to have a statute that simply lists out a lengthy series of statute numbers, with no descriptions included. The difficulty with this approach is that if any statute contains a minor offense that should not be a barrier crime, that minor offense would be included as a barrier crime, unless a written exclusion was added. However, once written exclusions start to be added to the list, the barrier

crimes statute would essentially become a variation of the ones proposed by SB 1243 and SB 353.

The other option for writing a barrier crimes statute would be to focus on broad categories of criminal offenses, without referencing specific Articles and Chapters in Title 18.2. For example:

> "*Barrier crime" means a conviction of any offense involving: a felony violation of a protective order, murder or manslaughter; felony assault or unlawful or malicious bodily injury or wounding; misdemeanor assault; felony abduction; any felony offense involving a firearm or other weapon; robbery; extortion; any felony offense involving the making or communicating of a threat; any felony offense involving the possession of explosive, radiological, infectious biological, or other toxic materials; any felony offense involving arson; felony stalking; sexual assault; any felony offense involving prostitution or pandering; any felony offense involving consensual sexual activity with a minor or indecent liberties; incest or bestiality; child pornography; any felony offense involving the abuse and neglect of a minor or an incapacitated adult; burglary or any offense involving felony trespass; any offense involving employing or permitting a minor to assist in an act which would be a violation of an obscenity law; any felony offense involving the manufacture, possession, distribution or attempt to obtain a controlled substance or marijuana; any felony offense involving a prisoner or incarcerated person.*

Using this approach, the statute would not be overly lengthy, would avoid most ambiguities, and would not run the risk of accidentally including or omitting new offenses in later years due to amendments made to Title 18.2. Arguably, employers and state agencies would have less need to make judgment calls when presented with these broad categories, than they would when considering the current statutory language. Any judgment calls they would need to make would be no greater than what is inevitably required when a barrier crimes statute includes "or an equivalent offense in another state."[15]

Summary

In 2011, while reviewing SB 1243, the Crime Commission was presented with the issue of whether or not some of Virginia's barrier crimes statutes should be rewritten, in order to make them easier to read. At that time, the Commission made no motions and took no positions on the subject. In 2014, this same issue of whether or not the lengthy barrier crimes statutes in the Code of Virginia should be rewritten, was again presented to the Crime Commission for their consideration.
At its December meeting, the Commission was presented with three options of how Virginia's barrier crimes statutes could be rewritten:

Policy Option 1: Rewritten using only Code sections or statute numbers, with minimal extra wording.

Policy Option 2: Rewritten by listing out all of the Code sections, with specific descriptions of the offenses included with the statute numbers. [This option is the style that is used in SB 353].

Policy Option 3: Rewritten using broad descriptions of categories of offenses, without specific reference to either Code sections, or specific Articles and Chapters in the Code of Virginia.

After consideration, the Crime Commission made no motions on any of these options, and had no recommendations on the subject of rewriting Virginia's barrier crimes statutes.

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[1] S.B. 353, 2014 Gen. Assemb., Reg. Sess. (Va. 2014).
[2] S.B. 1243, 2011 Gen. Assemb., Reg. Sess. (Va. 2011).
[3] VA. CODE ANN. § 63.2-901.1(F) (2014).
[4] VA. CODE ANN. § 63.2-1719 (2014).
[5] Id.
[6] Id.
[7] 2012 Va. Acts chs. 577, 602.
[8] VA. CODE ANN. § 63.2-1719 (2014).
[9] Id.
[10] VA. CODE ANN. § 63.2-1725 (2014).
[11] *Supra* note 1.
[12] *Supra* note 1.
[13] *Supra* note 2.
[14] Someone can be guilty of this serious offense, without ever being in possession of child pornography, as the gravamen of the offense is financial. This oversight in the description of Va. Code § 18.2-374.1:1 was corrected in SB 353, where the description was changed to "Possession, reproduction, distribution, or facilitation of child pornography, as set out in § 18.2-374.1:1." *Supra* note 1.
[15] VA. CODE ANN. § 63.2-1719 (2014). Whenever a barrier crimes statute includes "equivalent offenses from another state," interpretations will become necessary. For example, would a statute from another state that makes it a felony to trespass in a residence, be equivalent to one of our burglary statutes? What if the statute included all of the elements of one of our burglary statutes, but was a misdemeanor? Interpretations can never be completely eliminated, if a barrier crimes statute is to be effective, include more than a handful of offenses, and have as a component the requirement that its offenses be compared with those of other states.

Digital Impersonation and Harassment

Executive Summary

During the 2014 Regular Session of the Virginia General Assembly, House Bill 344, patroned by Delegate Scott Taylor, and House Bill 707, patroned by Delegate Todd Gilbert, were introduced to criminalize the online impersonation of another person with the intent to harass and intimidate others. These bills were left in the House Courts of Justice Committee, and referred by letter to the Crime Commission for review.

The primary goal of the bills was to punish certain forms of speech. Because of this subject matter, great care must be taken to ensure the bills' language falls within the permissible constitutional standards for restrictions on speech. Case law from both the Virginia appellate courts and the U.S. Supreme Court allow for criminal punishment for certain kinds of speech. However, these restrictions must be limited to forms of unprotected speech, such as threats, obscenity, and fraud. The proposed change in House Bill 344 involves a narrow addition to the existing computer harassment statute, Va. Code § 18.2-152.7:1. The new addition is consistent with existing case law that permits this type of unprotected speech to be criminalized.

The change proposed by House Bill 707, however, involves the creation of a new statute, which would criminalize the "credible impersonation" of a living individual on an Internet website, with the intent to harass, intimidate, or defraud another. The U.S. Supreme Court has indicated that lying by itself cannot be punished unless there are additional elements in the speech that place it outside of constitutional protection. The concern with the language in House Bill 707 is that it could possibly allow protected speech to be punished. The "defraud" portion of the bill's language can clearly be made criminal conduct. The "intimidate" portion might be made criminal, although it would be more constitutionally sound to tie this action to actual or implied threats to physical safety. The "harass" portion of House Bill 707 is the most problematic, since the term "harass" covers a broad category of activity. To the extent that "harassment" includes generally protected forms of speech, such as reviews or editorials, it could end up being used as a new form of criminal libel in Virginia.

The Crime Commission reviewed House Bill 344 and House Bill 707, and the relevant case law, at its October meeting. Staff was directed to draft statutory language, similar to House Bill 707, that would be constitutional, and would still create a penalty for impersonating another with the intent to injure them or a third party. This language, in both a limited and more expansive form, along with a modified version of the language from House Bill 344, was presented at the December meeting. Three policy options were presented for consideration:

Policy Option 1: Amend the computer harassment statute, Va. Code § 18.2-152.7:1, by adding a subsection B, making the current Class 1 misdemeanor of computer harassment a Class 6 felony if it is done by someone who has assumed another's identity. (This language is identical to House Bill 344, with the addition of the verb "defraud" added to the existing subsection A of the statute, so that a person would be guilty if he coerced, intimidated, harassed, or defrauded another person with a computer).

Policy Option 2: Create a new statute, making it a crime to impersonate another online, even if there is no obscene speech involved, but the impersonation was done with the intent to defraud, or to communicate a direct threat.

Policy Option 3: Create a new statute, identical to that proposed in Policy Option 2, but in place of making it a crime to communicate a direct threat, insert broader language of "maliciously injure another," with such injury including "injury to character or reputation, or credit rating or score."

After deliberation, the Crime Commission unanimously voted to endorse Policy Option 1. No motions were made for Policy Options 2 or 3. Policy Option 1 was introduced by Delegate Todd Gilbert as House Bill 1845 during the 2015 Regular Session of the Virginia General Assembly. The bill was left in the House Courts of Justice Committee.

Background

During the Regular Session of the 2014 General Assembly, House Bill 707 (HB 707)[1] and House Bill 344 (HB 344)[2] were introduced by Delegate Todd Gilbert and Delegate Scott Taylor, respectively. Both bills sought to criminalize the digital impersonation of a person with the intent to harass another person. These bills were left in the House Courts of Justice Committee Criminal Law Committee and a letter request was sent to the Crime Commission for review.

House Bill 707 proposed a new Class 1 misdemeanor that would punish an individual who "credibly impersonates a living individual" through or on a website "with the intent to harass, intimidate, or defraud." The bill also defined the term "website" to include blogs, social networking sites, and any other online account, or by other electronic means. There was also an exception in this bill that would allow a law enforcement officer to impersonate a person "in the performance of his duties."

Online impersonation was addressed in HB 344 by modifying the existing computer harassment statute, Va. Code § 18.2-152.7:1. This bill proposed the addition of a new subsection B to the existing language of the statute, which punishes any person who uses a computer or computer network to communicate threatening or obscene acts. The new language in subsection B would apply to a person who "violates subsection A while having knowingly and intentionally assumed the identity of another living individual where a reasonable person would believe that the offender is in fact the individual whose identity is assumed." The new offense would be a Class 6 felony.

Legal Analysis

One of the main concerns with any bill that criminalizes conduct involving speech is that the proposed restriction could violate the First Amendment, possibly causing the measure to be unconstitutional. Lying, which is at the heart of impersonation, has been the subject of a recent U.S. Supreme Court case.[3] Based on existing case law in Virginia and by the U.S. Supreme Court, some lies and harassing speech can clearly be made illegal, while other lies and forms of harassment are constitutionally protected.

Virginia Law

The current computer harassment statute, Va. Code § 18.2-152.7:1, has been upheld by the Supreme Court of Virginia. In Barson v. Commonwealth, the Supreme Court of Virginia held that the defendant's actions did not meet the requirements of this statute.[4] The defendant in Barson had sent a series of expletive filled emails to his ex-wife that were deemed by the Court to be harassing. The Court found, however, that the emails did not meet the narrow definition of "obscene" as defined by Va. Code § 18.2-372 and prior case law. Because the harassing emails did not contain obscene speech, the defendant's conviction was overturned. However, the statute itself was not struck down. The concurring opinion in Barson favorably referenced an earlier case by the Court of Appeals of Virginia, Perkins v. Commonwealth, which interpreted nearly identical language used in another statute, Va. Code § 18.2-427 (telephone harassment).

In Perkins, the Court of Appeals for Virginia upheld a conviction for a violation of Va. Code § 18.2-427, rejecting an overbreadth challenge.[5] The defendant in Perkins made several threatening and obscene phone calls, specifically threatening to rape and kill the victim's wife and to burn the victim's house down.[6] According to the court in Perkins, the words in the statute, "with the intent to coerce, intimidate, or harass" are an act, which is then modified by specific types of speech.[7] The speech in question in this case was deemed by the court to be either "obscene, vulgar, profane, lewd, lascivious, or indecent language," which are forms of unprotected speech.[8] Since the speech was unprotected, the court stated that this limitation "removes protected speech from within the statute's sweep," placing the statute on firm grounds against an overbreath challenge.[9]

Constitutional Issues

In 2012, the U.S. Supreme Court issued a plurality decision in the case of U.S. v. Alvarez, when it reversed a conviction and struck down the Stolen Valor Act.[10] The Stolen Valor Act made it a crime to falsely claim to have received the U.S. Congressional Medal of Honor, as well as other medals and military honors.[11] In his formal opinion, Justice Kennedy stated:

> "[w]ere this law to be sustained, there could be an endless list of subjects the National Government or the States could single out. Where false claims are made to effect a fraud or secure moneys or other valuable considerations, say offers of employment, it is well established that the

> Government may restrict speech without affronting the First Amendment."[12]

The Court noted that with the statute in question, the Stolen Valor Act, the federal government had no compelling interest at stake other than punishing a lie, which it could not do under the First Amendment.[13] There is no clear holding in this case, as Alvarez is a plurality opinion. However, all of the Justices recognized that there are some circumstances in which lies can be punished without violating the First Amendment.[14] In fact, Justice Kennedy noted specific forms of unprotected speech, including:

- Advocacy intended, and likely, to incite "imminent lawless action;"[15]
- Obscenity;[16]
- Defamation;[17]
- Speech integral to criminal conduct;[18]
- Fighting words;[19] and,
- True threats.[20]

The U.S. Supreme Court has clearly indicated that lies that fall into a category of unprotected speech can be penalized. Incidentally, Congress modified the Stolen Valor Act in 2013 to apply only to those who act "with intent to obtain money, property, or other tangible benefit."[21]

Recent Case Law

In a recent case, the U.S. District Court of Southern Ohio enforced an injunction on an Ohio statute that prohibited making false statements about the voting record of a candidate or public official, or distributing information concerning an opponent that is either known to be false or done with reckless disregard for the truth.[22] In enforcing the injunction, the court noted that the statute "applies to negative but non-defamatory statements, positive false statements that do not defame, and statements that cause no harm."[23] Essentially, the court noted that it was not the role of the courts to determine what is a political truth or lie.[24]

The highest court in New York, the New York Court of Appeals, upheld a conviction under a criminal impersonation statute, which prohibits persons from impersonating someone "in such assumed character with intent to obtain a benefit or to injure or defraud another."[25] The defendant in the Golb case impersonated a number of scholars and college professors in an effort to criticize other scholars who were critical of his father's research.[26] In some of the defendant's postings he made statements pretending that a rival scholar had admitted to charges of plagiarism.[27] The Court stated that injury to another's reputation was enough to satisfy the statute's requirement for an injury, and thus the conviction was upheld.[28] In that same case, the Court overturned the defendant's conviction on another charge involving New York's aggravated harassment statute, which penalized any communication with the intent to harass, annoy, threaten or alarm another person.[29] The Court held this statute was overbroad and struck it down.[30]

Applications to HB 707 and HB 344

When examining HB 707 in light of applicable Virginia case law and United States Supreme Court decisions, there is the possibility that if enacted, it could be held to be constitutionally overbroad. Because the phrase "intent to harass, [or] intimidate" does not specifically modify forms of unprotected speech, and because it does not necessarily involve obscene speech or threats, it could be read to include some forms of speech that are protected, such as non-obscene criticisms, or reviews. Unlike Va. Code §§ 18.2-152.7:1 (computer harassment) and 18.2-427 (telephone harassment), there is no requirement that the speech be obscene or constitute a threat. Without this limitation, consistent with the holding in Perkins, the proposed statute might be vulnerable to a constitutional challenge.

Regarding HB 344, adding the impersonation language in subsection B is not problematic. The operative language and conduct in subsection A has already been found not to be overbroad, and the statute is limited in application to unprotected speech. However, there could always be an "as applied challenge" to the language of the proposed subsection, if innocent conduct was prosecuted under the statute. An example would be a prosecution that was initiated against a person who posted what was clearly a parody on a website.

Summary

Both HB 707 and HB 344 seek to punish the impersonation of another person with the intent to harass and intimidate others. Because both of these bills seek to punish certain forms of speech, the bills must fall within the permissible constitutional standards for restrictions on speech.

Virginia and U.S. Supreme Court decisions do allow for criminal sanctions regarding speech, but such offenses must be limited to unprotected forms of speech, such as threats, obscenity, and fraud. House Bill 344 involves a narrow addition to existing Va. Code § 18.2-152.7:1 and is therefore consistent with Virginia case law that permits this type of unprotected speech to be criminalized. As for HB 707, the U.S. Supreme Court has indicated that lying by itself cannot be punished, but lying plus additional elements may place that speech outside of constitutional protection. The language in HB 707 could possibly allow protected speech to be punished and therefore would be at risk of being struck down if passed as initially written. The "defraud" portion of HB 707 can clearly be made criminal conduct. The "intimidate" portion might be made criminal, although it may be safer to tie this action to actual or implied threats to physical safety. The "harass" portion of HB 707 is the most problematic, and essentially creates a new form of criminal libel in Virginia.

The Crime Commission reviewed HB 344 and HB 707, and the relevant case law, at its October meeting. Staff was directed to draft statutory language, similar to HB 707, that would be constitutional, and would still create a penalty for impersonating another with the intent to injure them or a third party. This language, in both a limited and more expansive form, along with a modified version of the language from HB 344, was

presented at the December meeting. Three policy options were presented for consideration:

> **Policy Option 1:** Amend the computer harassment statute, Va. Code § 18.2-152.7:1, by adding a subsection B, making the current Class 1 misdemeanor of computer harassment a Class 6 felony if it is done by someone who has assumed another's identity. (This language is identical to HB 344, with the addition of the verb "defraud" added to the existing subsection A of the statute, so that a person would be guilty if he coerced, intimidated, harassed, or defrauded another person with a computer).
>
> **Policy Option 2:** Create a new statute, making it a crime to impersonate another online, even if there is no obscene speech involved, but the impersonation was done with the intent to defraud, or to communicate a direct threat.
>
> **Policy Option 3:** Create a new statute, identical to that proposed in Policy Option 2, but in place of making it a crime to communicate a direct threat, insert broader language of "maliciously injure another," with such injury including "injury to character or reputation, or credit rating or score."

After deliberation, the Crime Commission unanimously voted to endorse Policy Option 1. No motions were made for Policy Options 2 or 3. Policy Option 1 was introduced by Delegate Todd Gilbert as House Bill 1845 during the 2015 Regular Session of the Virginia General Assembly. The bill was left in the House Courts of Justice Committee.

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[1] H.B. 707, 2014 Gen. Assem., Reg. Sess. (Va. 2014).
[2] H.B. 344, 2014 Gen. Assem., Reg. Sess. (Va. 2014).
[3] United States v. Alvarez, 132 S. Ct. 2537 (U.S. 2012).
[4] Barson v. Commonwealth, 284 Va. 67 (2012).
[5] Perkins v. Commonwealth 12 Va. App. 7 (Va. Ct. App. 1991).
[6] Id.
[7] Id. at 10.
[8] Id. at 11.
[9] Id.
[10] United States v. Alvarez, 132 S. Ct. 2537 (U.S. 2012).
[11] 18 U.S.C.S. § 704(b).
[12] *Supra* note 10 at 2547.
[13] Id.
[14] Id.
[15] Brandenburg v. Ohio, 395 U.S. 444 (U.S. 1969).
[16] Miller v. California, 413 U.S. 15 (U.S. 1973).
[17] New York Times Co. v. Sullivan, 376 U.S. 254, 256 (U.S. 1964).
[18] Giboney v. Empire Storage & Ice Co., 336 U.S. 490, 492 (U.S. 1949).
[19] Chaplinsky v. N.H., 315 U.S. 568, 569 (U.S. 1942).
[20] Watts v. United States, 394 U.S. 705 (U.S. 1969).
[21] 127 Stat. 448 (2013).
[22] List v. Ohio Elections Comm'n, 2014 U.S. Dist. LEXIS 127382 (S.D. Ohio Sept. 11, 2014).
[23] Id.

[24] Id.
[25] People v Golb, 23 N.Y.3d 455 (N.Y. 2014).
[26] Id. at 461.
[27] Id. at 462-63. In the world of academia, if a professor were to admit to having committed plagiarism, it would have extremely severe repercussions on the rest of his career—possibly including his being unable to find a job at any institution of higher learning.
[28] Id. at 465-66.
[29] Id. at 467-68.
[30] Id. at 467.

DNA Notification Project Update

The Crime Commission continues to be involved in the Forensic Science Board's DNA Notification Project. The Crime Commission's Executive Director serves as a member of the Forensic Science Board as a designee and is the Chair of the DNA Notification Subcommittee, which is charged with the oversight of the notification project.

In 2004, following the discovery of over 3,000 criminal case files containing biological evidence that were found to be suitable for DNA testing, Governor Mark Warner ordered a review of all the files in an effort to determine whether there were individuals who had been wrongly convicted and could be exonerated by the saved evidence. The case files were from the years 1973-1988, when DNA testing results had not yet been ruled admissible in Virginia courts. With advancements in science, testing the DNA evidence now may provide evidence that could show whether the individuals were guilty or innocent of the crimes for which they were convicted. During the 2005 Session of the Virginia General Assembly, Delegate David Albo introduced House Bill 2216, which created the Department of Forensic Science and the Forensic Science Board. This legislation led to the creation of the DNA Notification Subcommittee which was tasked with identifying and notifying individuals whose case files were found to have biological evidence suitable for testing.

Crime Commission staff is responsible for confirming the notification of all individuals who meet the relevant criteria: a criminal conviction, and DNA evidence contained in their case file. Crime Commission staff worked closely with the Department of Forensic Science (DFS) to create databases with all the pertinent information of each case file in an effort to begin notifications. During the 2009 Session of the Virginia General Assembly, Senator Kenneth Stolle introduced Senate Bill 1391, which mandated that the Forensic Science Board ensure that everyone entitled to notification is notified, allowed certain information to be disseminated to pro bono attorneys assisting with the notification portion of the project, and expressly authorized the involvement of the Crime Commission in making notification determinations. The Mid-Atlantic Innocence Project, along with Crime Commission staff, helped prepare and train the pro bono attorneys for the notification process. Crime Commission staff, court clerks, and Commonwealth's Attorneys from around Virginia assisted in verifying convictions for named suspects in the files. In 2014, the Indigent Defense Commission hired contract employees who successfully notified over 100 individuals and identified information for numerous other cases as well.

Crime Commission staff has continued to work diligently to ensure that every measure is undertaken to notify individuals who are entitled to notification. The Crime Commission, DFS, the Mid-Atlantic Innocence Project and the Indigent Defense Commission plan to work together continuously until the project is complete.

At its September meeting, the Crime Commission was presented with several policy options for consideration:

Policy Option 1: Should all misdemeanor cases containing biological evidence be tested? If so, should only those determined to be "eliminated" be included in the testing?

Crime Commission members voted to only test misdemeanor cases, regardless of testing outcome, by request, as it is hard to distinguish circuit court cases that have been pled down to misdemeanor cases. Additionally, most evidence from misdemeanor cases is destroyed after ten years, so testing the DNA evidence now, when all other evidence in the case is destroyed or unavailable would not necessarily prove to be beneficial.

Policy Option 2: Should DFS reexamine testing in cases resulting in an inconclusive outcome?

DNA testing of biological evidence may result in the following outcomes:

- Indicated: Person was a contributor to the DNA profile.
- Eliminated: Person was not a contributor to the DNA profile.
- Need known: A reference sample is needed to reach a conclusion.
- Inconclusive: Insufficient evidence to reach a conclusion.

Crime Commission members recommended that DFS retest cases where the initial post-conviction laboratory results were deemed "inconclusive," meaning there was insufficient evidence after the initial DNA testing to determine a profile. Advancements in technology may allow profiles to be developed with additional testing. Retesting the biological evidence, when appropriate, could be probative of the defendant's guilt or innocence in these cases.

Crime Commission members decided to prioritize the testing of cases with "inconclusive" results as follows:

1. Individuals with spermatozoa present in the DNA sample who are currently incarcerated.
2. Individuals who are incarcerated.
3. Individuals with spermatozoa present in the DNA sample who are not incarcerated.
4. All remaining cases.

Policy Option 3: Should the family members of deceased convicted suspects, who were "eliminated" by testing results, be notified?

The Crime Commission decided that if an individual whose DNA testing resulted in an "eliminated" outcome was deceased, then staff would attempt to locate and notify the individual's next of kin.

Staff plans to continue work on this project in 2015.

Expungement of Juvenile Records

Executive Summary

Senate Joint Resolution 24 was introduced during the 2014 General Assembly Session by Senator Barbara Favola. The resolution directs focus upon the confidentiality and expungement of juvenile records. The resolution specifically directed the Crime Commission to:

(i) Review all laws related to confidentiality and retention of juvenile court records;
(ii) Report on at what time and by whom juvenile record information can be accessed;
(iii) Determine whether existing confidentiality and destruction of records laws are being complied with;
(iv) Examine the impact on youthful offenders of having a juvenile record; and,
(v) Make recommendations regarding improvements in the laws that would assist juvenile offenders while allowing law enforcement to maintain the safety of the citizens of the Commonwealth.

Under Virginia law, juvenile records are to remain confidential; however, there are exceptions to this general rule. The Virginia State Police, the Department of Juvenile Justice, the courts, and the Department Motor Vehicles are all statutorily permitted to share juvenile records, under limited circumstances, to assist with handling of juvenile cases and for public safety purposes. The records of juveniles who are tried as adults, or juveniles who are 14 or older and found delinquent on the basis of an act which would be a felony if committed by an adult, are open and are not treated as confidential.

In terms of expungement, juveniles who are adjudicated delinquent of misdemeanors or status offenses have their records automatically expunged by age 19, or at age 29 for some offenses that are required to be a part of a Department of Motor Vehicles record. However, juveniles who are found delinquent of an offense that would otherwise be a felony if committed by an adult, or who are tried as an adult, do not have their records expunged. They may only obtain expungement if they are found not guilty or the charge is not prosecuted. Juveniles whose delinquency cases qualify for automatic expungement are not required to answer in the affirmative on applications about criminal history if asked if they have "ever been convicted of a crime." Even those juveniles who do not receive an automatic expungement and whose records are open, may still answer that they have not been convicted of a crime. This is because, under the wording of Virginia's statutes, they have not been "found guilty;" rather, they were "adjudicated delinquent of an offense that would be a felony if committed by an adult." However, their record is still open for public inspection and the general public may not recognize the distinction between "guilty" and "adjudicated delinquent." A juvenile tried

as an adult would have to answer in the affirmative if they are asked about a conviction on an application because those juveniles have actually been found "guilty."

A conviction for a crime carries numerous collateral effects that may last indefinitely. For felony convictions and felony delinquencies, these collateral effects may include the loss of civil rights, limited employment, difficulties in obtaining insurance, staying in school and obtaining a secondary education, loss/denial of public benefits, and the possibility of not being able to serve in the military.

Based on a 2011 Crime Commission review of possible improper disclosure of juvenile records, it was discovered that the Department of Motor Vehicles had mistakenly disclosed offense information on some juvenile driving records. The Department of Motor Vehicles made these disclosures based on abstracts that had not been redacted when sent to them, or abstracts that were erroneously sent by the courts.[1] This mistake was corrected; however, it is unclear under current statutes as to what extent the Department of Motor Vehicles has the authority to include any information about offense specifics on a juvenile's driving record.

The Crime Commission reviewed study findings at its September and December meetings and presented two policy options:

> **Policy Option 1:** Amend Va. Code § 46.2-383 to make it clear that DMV can include offense specifics that relate to the operation of a motor vehicle on a juvenile's driving record, but not for any other type of crime for which a juvenile is adjudicated delinquent.
>
> **Policy Option 2:** Should the courts be required to record and report the number of cases expunged annually?

The Crime Commission unanimously endorsed Policy Option 1. No motion was made on Policy Option 2.

Delegate Jennifer McClellan introduced House Bill 1957 during the 2015 Regular Session of the Virginia General Assembly to make clear the information that DMV can provide on a juvenile driving record. After passing both the House of Delegates and the Senate, this bill was signed into law by the Governor on March 23, 2015.

Background

Senate Joint Resolution 24 (SJR 24) was introduced during the 2014 General Assembly Session by Senator Barbara Favola. The resolution directs focus upon the expungement of juvenile records. The resolution specifically directed the Crime Commission to:

(i) Review all laws related to confidentiality and retention of juvenile court records;
(ii) Report on at what time and by whom juvenile record information can be accessed;

(iii) Determine whether existing confidentiality and destruction of records laws are being complied with;
(iv) Examine the impact on youthful offenders of having a juvenile record; and,
(v) Make recommendations regarding improvements in the laws that would assist juvenile offenders while allowing law enforcement to maintain the safety of the citizens of the Commonwealth.

In general, juveniles are separated into two categories in Virginia's criminal justice system: juveniles who are tried as adults; and, juveniles who are processed through the juvenile justice system.

Juveniles Tried as Adults

In Virginia, juveniles can have their cases transferred to a circuit court and be tried as an adult in three specific ways: automatic certification, discretionary certification, and after a transfer hearing. Juveniles are "automatically" certified for transfer to circuit court if they are 14 years of age at the time of offense and there is a sufficient finding of probable cause for the following serious offenses: capital murder, murder, lynching, and aggravated malicious wounding.[2] Under prosecutorial certification, if a Commonwealth's Attorney makes a motion, and it is established at a hearing that there is probable cause that a juvenile 14 years or older committed any of the statutorily listed offenses in Va. Code § 16.1-269.1(C), then the juvenile will be tried as an adult.[3] And finally, if a Commonwealth's Attorney makes a motion, and the juvenile is 14 years or older and is charged with any crime that would be a felony if committed by an adult, the judge may consider transferring the juvenile to circuit court to be tried as an adult.[4] As with adult records, juveniles who are tried and convicted as adults have no confidentiality attached in regard to these records.[5] After a juvenile has been tried and convicted as an adult, he is considered to be an adult for all future criminal cases.[6]

Confidentiality of Juvenile Records

The general rule with juvenile adjudications and criminal records is that these records must be kept confidential and not disclosed or shared.[7] There are, however, several exceptions located in the Virginia Code which permit the disclosure of juvenile adjudications in very specific circumstances. In particular, there are exceptions for the Virginia State Police (VSP), courts, the Department of Juvenile Justice (DJJ), and the Department of Motor Vehicles (DMV) to share information on juvenile adjudications. These exceptions are aimed at allowing agencies to share information with other agencies involved with the juvenile's custody and care, and to protect the public.

The Virginia State Police, under Virginia Code § 19.2-389.1, is permitted to share juvenile criminal records in the following, limited circumstances:

- Information required for firearms purchases and permits;
- Aid in the preparation of pretrial, post-trial, and pre-sentence reports;
- Community-based probation services agencies;
- Fingerprint comparisons using AFIS;

- Va. Department of Forensic Science to determine if it can maintain a juvenile's DNA sample;
- Va. Office of the Attorney General for all criminal justice activities;
- Va. Criminal Sentencing Commission for research purposes;
- Threat assessment teams at public institutions of higher learning; and,
- Law enforcement employment screening.

Under Va. Code § 16.1-301, law enforcement agencies are required to keep juvenile criminal records separate from adult records. However, records for any violent juvenile felony offense listed under Va. Code § 16.1-269.1 (B) and (C), any arson offense, or any violation of a law involving any weapon listed in Va. Code § 18.2-308(A), may be disclosed to school principals for the safety of other students. This information may also be shared with local school division threat assessment teams.

The general rule for courts is that records of juvenile adjudications are to remain confidential, only to be shared with individuals or entities that are specifically listed in the Code of Virginia.[8] Additionally, courts are required to maintain juvenile files separately from adult files. Under Va. Code § 16.1-305, the courts are permitted to share juvenile court records with specifically enumerated individuals or agencies:

- Judges, probation officers, and professional staff assigned to JDR courts;
- Public or private agencies that have custody of the child or for furnishing treatment or evaluation;
- Commonwealth's Attorneys or attorneys for the juvenile;
- Persons, agencies, or institutions, under court order, with legitimate interests;
- Aid in the preparation of pretrial, post-trial, and presentence reports;
- Community-based probation service agencies;
- Background for Parole Board;
- Office of the Attorney General of Virginia for all criminal justice activities;
- Va. DMV for abstracts pursuant to Va. Code § 46.2-383; and,
- Va. Workers Compensation Board, to determine compensation for a victim of a crime.

The Virginia Department of Juvenile Justice must keep the records of juveniles in their custody, under supervision of court service units, or before a court, confidential.[9] The Virginia Department of Juvenile Justice may open the records to the following:

- Judges, prosecuting attorneys, probation officers and professional staff assigned to the juvenile's case;
- Agencies treating or providing services to a juvenile;
- Parents, legal guardians, or those standing in *loco parentis* to the juvenile;
- The juvenile himself upon reaching majority;
- Any person, by order of the court, having a legitimate interest in the juvenile, case, or work of the court;
- Any person, agency, or institution, having a legitimate interest in the treatment of the juvenile;

- Commonwealth's Attorneys, pretrial services, probation services for pretrial and post-trial activities;
- Persons, agencies, institutions outside of DJJ doing research for DJJ;
- Law enforcement for criminal street gang information purposes;
- Va. Office of the Attorney General for all criminal justice activities; and,
- The Commonwealth's Attorneys' Services Council and any attorney for the Commonwealth for use in identifying criminal street gang members.[10]

The Virginia Department of Motor Vehicles is statutorily permitted to obtain juvenile adjudication records in order to effectuate suspensions of juvenile drivers' licenses under three distinct sections of the Code. Virginia Code section symbol 16.1-305(D) references "papers filed in connection with an adjudication of guilty for an offense for which the clerk is required by section symbol 46.2-383 to furnish an abstract to the Department of Motor Vehicles." This implies, though does not strictly state, that those adjudication records are to be forwarded to the DMV if the offense involved is listed in Va. Code § 46.2-386. (The subsection directly concerns prosecutors being able to receive attested copies of those papers, not DMV). In turn, under Va. Code § 46.2-383, DMV is permitted to obtain abstracts of the convictions on the following offenses:

- Any traffic violation, including local ordinances;
- Motor vehicle theft;
- Operating a water craft while intoxicated;
- Driving while intoxicated;
- Failure to pay fines, costs, forfeiture, restitution or penalty, or any installment, related to traffic cases;
- Forfeiture of bail or collateral, related to charges;
- Manslaughter or any other felony in the commission of which a motor vehicle was used; and,
- Court ordered driver's education or alcohol treatment/rehabilitation program.

This section refers to convictions and not adjudications. According to DMV, the authority to include adjudication information on DMV driving records is derived from the fact that this Code section refers to "persons," and the word "persons" includes juveniles. This argument, plus the fact that Va. Code § 16.1-305 (D) references Va. Code § 46.2-383, albeit indirectly, is the justification that DMV uses to include adjudication information on the driving records that they produce. It should be noted, though, that there is no specific language in Va. Code § 46.2-383 that authorizes DMV to include juvenile offense specifics on a driving record, just that DMV can receive this information.

The second section that confers on DMV the authority to obtain otherwise confidential juvenile records is Va. Code § 16.1-278.9. Under this section, if a juvenile is adjudicated delinquent of the following offenses, the judge must deny or suspend the driver's license of a juvenile:[11]

- DUI or refusal;
- Marijuana or controlled substances possession or distribution;
- Unlawful purchase, possession or consumption of alcohol;
- Public intoxication;

- Possession of a handgun or "street sweeper;"
- Threats to bomb or damage a building; and,
- Truancy.

While judges are required to take action on the license and "shall report any order issued under this section to the Department of Motor Vehicles," there is similarly no explicit authority in this section for DMV to include specific adjudication information on the juvenile's driving record.

The last section that permits DMV to obtain records of juvenile adjudications is Va. Code § 16.1-278.8(A)(9). In this section, a judge has the discretion to order the suspension of a license for juveniles found delinquent of any offense. And, as with the other sections that allow DMV to receive information about adjudications, this section simply allows the judge to take action on the juvenile's driver's license. Again, there is no explicit authority in this statute for DMV to include specific adjudication information on the driving record they produce, nor is there a cross reference to Va. Code § 46.2-383. There is also a general grant of authority under Va. Code § 46.2-395 for DMV to suspend or revoke licenses for failure or refusal to pay fines or court costs for criminal convictions, but again there is also no explicit authority in this statute to include information about underlying juvenile convictions on the DMV driving record.

With regard to the conviction records that DMV maintains, these records may be destroyed after 3 years, and 5 years for forfeitures related to speeding or reckless driving. Convictions stay on driving records for various lengths of time, depending upon the person or entity requesting the record: 5 years for insurance companies; 7 years for employers; 11 years for personal use; and, 12 years for law enforcement.

Unauthorized Disclosures

In 2011, Crime Commission staff was asked to determine if juvenile records were being improperly disclosed, based on a 2011 Commission on Youth study on juvenile re-entry, which indicated that there were improper disclosures of juvenile records.[12] After staff made a presentation at the September 2011, Crime Commission meeting, staff obtained a copy of a letter from an attorney whose client had an adjudication for petit larceny included on his DMV driving record. Staff reviewed the juvenile's DMV record and determined that it appeared to be an improper disclosure of his record. The authorization for including the adjudication on the record was stated as "Va. Code § 46.2-390.1." It is not clear from Va. Code § 46.2-390.1 where the authority would be for including the juvenile adjudication for petit larceny on the driving record.[13]

After contacting both the Virginia Supreme Court and DMV, the problem was identified as a data entry error, due to a new computer program used to transmit abstracts from the JDR courts to DMV in accordance with Va. Code § 46.2-383. In some cases, petit larceny adjudications were included in the abstract, with DMV then adding this adjudication information onto the juvenile's driving record. It is extremely doubtful, based on the overall confidential nature of juvenile records, that DMV had the authority to list the actual offense of petit larceny on these driving records. The Virginia Supreme Court and DMV worked closely together to identify the affected records and remove

improperly disclosed delinquencies. Overall, there were nearly 7,000 cases reviewed and close to 3,500 records corrected.

Expungement

Within Virginia's juvenile criminal justice system, there are two separate categories of expungement. One is the regular method of expungement that is available to adults. The other is limited to juveniles who have been adjudicated of an offense that would be a misdemeanor if committed by an adult. This latter method occurs automatically. Each year, JDR court clerks must expunge the records for all juveniles who have reached 19 years of age, provided there has been five years since the adjudication of delinquency.[14] However, if the juvenile was found delinquent for an offense that would be a felony if committed by an adult, they are not eligible for this automatic expungement.[15] In addition, if the offense is one for which DMV receives an abstract under Va. Code § 46.2-383, the record can only be expunged when the individual reaches the age of 29.[16]

If a juvenile is not covered by automatic expungement, there is a provision under Va. Code § 19.2-392.2 to obtain an expungement of the record. This is the same statute that is applicable to adult charges and arrests. It provides a very limited remedy because an expungement may only be obtained if the individual was acquitted, or the charge was *nolle prosequied* ("nolle prossed"); and, the court finds that the continued existence and possible dissemination of the record constitutes "a manifest injustice to the petitioner."

The JDR courts expunge records each year, and are provided training on a regular basis concerning automatic expungements. However, the number of records expunged each year is not currently tracked.

Collateral Effects of a Criminal Record

There are many effects that a criminal record has on a person, beyond incarceration, which may last indefinitely, even after an incarcerated person may have been rehabilitated.[17] As one Supreme Court jurist noted, a conviction "imposes a status upon a person...which...seriously affects his reputation and economic opportunities."[18] In fact, the current modern form of these consequences has been compared to the old English practice known as the "civil death," where a criminal's civil rights were extinguished after conviction of a crime.[19] In general, a criminal record may affect a person's ability to find employment, participate in business opportunities, result in a loss of access to benefits and participation in government programs such as student loans, housing, insurance, and contracting, and may negatively impact other parts of civic life.[20]

For juveniles, in addition to the possible restrictions on future employment, there are other consequences of a criminal record that are different than for adults. One such difference is that juveniles may have their education interrupted while incarcerated. Even if there are no appreciable interruptions to a juvenile's education, some studies link unusually low high school graduation rates to juvenile convictions and delinquency adjudications, when compared to those students without a criminal record.[21] In

addition, juveniles with a criminal record also enroll at much lower rates in four-year colleges than those youth with no such records.[22]

Virginia's Collateral Effects

If a juvenile's adjudicated delinquencies are subject to automatic expungement, he does not have to answer in the affirmative if he has been "convicted" of a crime if asked by a potential employer, insurer, or school. Furthermore, provided the juvenile has not been tried as an adult, he can answer that he has never been "convicted" of a crime, even if he was adjudicated delinquent of an offense that would be a felony if committed by an adult. JDR court proceedings result in adjudications, and not convictions, which is why he would not be required to answer that he was "convicted" of a crime "nor shall any such finding operate to disqualify the child for employment by any state or local governmental agency."[23] However, the VSP and local law enforcement may consider the "nature and gravity of the offense, the time since adjudication, the time since completion of any sentence, and the nature of the job," when a juvenile applies for a job with a law enforcement agency.

The social, medical, psychiatric, psychological, predisposition and supervision records of juveniles are not open to the public.[24] With the prospective employee's written consent, an employer may file a form with the Central Criminal Records Exchange (CCRE) requesting criminal records. If the person has juvenile adjudications, but no adult convictions, the CCRE request should come back with a "clean record."[25] Educational institutions or employers are not permitted to inquire about records that have been expunged per Va. Code § 19.2-392.4. State agencies and local governments are also not permitted to request an "applicant for a license, permit, registration, or governmental service" disclose an expunged record under Va. Code § 19.2-392.4.

If a juvenile is 14 and is adjudicated delinquent of a crime that would be a felony if committed by an adult, these court records are open to public inspection, unless a judge has ordered the record to remain confidential. So, it is possible for a potential employer to search the court records for these types of juvenile adjudications. The juvenile may still answer in the negative that he was not "convicted" of a crime, but the record is open to the public.

School superintendents are notified when a juvenile is charged with a serious crime, which can result in the student's suspension, or expulsion, or required attendance at an alternative education program.[26]

There is also the potential loss of public benefits as a result of a criminal record which includes:

- Loss of driver's license for committing certain offenses, listed in Va. Code §§ 46.2-383, 16.1-278.8(A)(9), and, 16.1-278.9;
- Being unable to adopt or become a foster parent per Va. Code § 63.2-1721; and,
- Being prohibited from possessing or owning firearms if found delinquent of murder, kidnapping, robbery, or rape, Va. Code § 18.2-308.2.

Some other effects include:

- Colleges and universities require the disclosure of convictions, and the U.S. military also restricts enlistment based on an individual's criminal record;[27]
- Fingerprints and photographs submitted to the CCRE are not expunged;[28]
- If a juvenile 14 or older is convicted of a felony or adjudicated delinquent on the basis of an act which would be a felony if committed by an adult, he will have a sample of their blood, saliva or tissue taken for DNA analysis;[29] and,
- If a juvenile is found guilty or delinquent of an offense that requires registration on the Sex Offender and Crimes Against Minors Registry, he may be required to register for up to 15 years, 25 years, or for his lifetime, depending on the offense.[30]

Summary

Overall, juvenile records are to remain confidential, although there are exceptions. The VSP, DJJ, the courts, and DMV all share juvenile records to assist with handling of cases and for public safety purposes. The court records of juveniles who are tried as adults or juveniles that are 14 or older and found delinquent on the basis of an act which would be a felony if committed by an adult are open, and are not treated as confidential.

Juveniles who are adjudicated delinquent of misdemeanors and status offenses can have their records automatically expunged by age 19, or at age 29 for some offenses that appear on DMV records. However, juveniles who are found delinquent of a felony, or who are tried as an adult, do not have their records expunged. Juveniles subject to automatic expungement are not required to answer in the affirmative on applications about criminal history. Even those juveniles found delinquent of offenses that would be a felony if committed by an adult, whose records are open, may still answer that they have not been convicted of a crime. Juveniles tried as adults must disclose convictions on applications.

There are numerous collateral effects for delinquencies and convictions that cannot be expunged, which include the loss of civil rights, limited employment, denial of insurance, difficulties related to staying in school and obtaining a secondary education, denial of public benefits, and the ability to serve in the military. The DMV based on mistaken abstracts received from the courts, improperly disclosed information on certain driving records a few years ago. This mistake was corrected. However, a close reading of Virginia's statutes reveals that it is unclear if DMV has the authority to include <u>any</u> information about offense specifics on a juvenile's driving record.

The Crime Commission reviewed study findings at its September and December meetings and presented two policy options:

> **Policy Option 1:** Amend Va. Code § 46.2-383 to make it clear that DMV can include offense specifics that relate to the operation of a motor vehicle on a juvenile's driving record, but not for any other type of crime for which a juvenile is adjudicated delinquent.

Policy Option 2: Should the courts be required to record and report the number of cases expunged annually?

The Crime Commission unanimously endorsed Policy Option 1. No motion was made on Policy Option 2.

Delegate Jennifer McClellan introduced House Bill 1957 during the 2015 Regular Session of the Virginia General Assembly to make clear the information that DMV can provide on a juvenile driving record. After passing both the House of Delegates and the Senate, this bill was signed into law by the Governor on March 23, 2015.[31]

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[1] These are abstracts that contain the main details of a criminal case: the name of the defendant, the court, the offense charged, the date of the adjudication, etc. They are forwarded to the Department of Motor Vehicles.
[2] VA. CODE ANN. § 16.1-269.1(B) (2014).
[3] VA. CODE ANN. § 16.1-269.1(C) (2014).
[4] VA. CODE ANN. § 16.1-269.1(A) (2014).
[5] *See* VA. CODE ANN. 16.1-305(A) dealing with the confidentiality of just delinquency proceedings; compare to VA. CODE ANN. 16.1-271 and VA. CODE ANN. 16.1-307 which specify all of the procedures and dispositions for the convictions of juveniles tried as adults." *See also* UNC Center for Civil Rights, *Juvenile Delinquency Adjudication, Collateral Consequences, and Expungement of Juvenile Records*: *A Survey of Law and Policy in Delaware, Virginia, North Carolina and Florida* p. 12 (2011), retrieved from http://www.law.unc.edu/documents/civilrights/centerforcivilrightsexpungementreport.pdf.
[6] VA. CODE ANN. § 16.1-271 (2014).
[7] VA. CODE ANN. § 16.1-305 (2014).
[8] However, if "a juvenile 14 years of age or older at the time of the offense is adjudicated delinquent on the basis of an act which would be a felony if committed by an adult," the records are open, unless otherwise ordered by the judge.
[9] VA. CODE ANN § 16.2-300 (2014).
[10] Id. Under Va. Code § 16.1-309.1, a judge may share information on a juvenile in the "consideration of public interest." Essentially, this information may be shared in situations where the juvenile has been adjudicated of a serious offense and is a fugitive.
[11] VA. CODE ANN. § 16.1-278.9 (2014).
[12] VA. COMM'N ON YOUTH, STUDY OF JUVENILE OFFENDER REENTRY IN THE COMMNITY, September 2011. Retrieved from http://leg2.state.va.us/dls/h&sdocs.nsf/fc86c2b17a1cf388852570f9006f1299/2aa3342132c11b2f85257903005a63f6/$FILE/RD179.pdf.
[13] Under Va. Code § 46.2-390.1, a juvenile's license may be revoked for violating drug offenses, which has nothing to do with petit larceny.
[14] VA. CODE ANN. § 16.1-306(A) (2014).
[15] Id.
[16] Id., Additionally, if the juvenile commits an offense which is eligible for automatic expungement and an offense for which DMV receives an abstract, the file can only be expunged when the juvenile reaches the age of 29. VA. CODE ANN. § 16.1-306(B)(ii) (2014).
[17] Berson, S.B. (Sept. 2013). Beyond the sentence: Understanding collateral consequences, *National Institute of Justice Journal*, 272, 25-28.
[18] Parker v. Ellis, 362 U.S. 574, 593-94 (1960) (Warren, C.J., dissenting).

[19] Chin, G.J. (2012). The new civil death: Rethinking punishment in the era of mass conviction, *University of Pennsylvania Law Review*,160,1789-1833.
[20] *Supra* note 17 .
[21] See, for example, Kirk, D.S., & Sampson, R.J. (2013). Juvenile arrest and collateral educational damage in the transition to adulthood. *Sociology of Education*, 86(1), 36-62.
[22] Id. at p. 53.
[23] VA. CODE ANN. §16.1-308 (2014).
[24] VA. CODE ANN. §16.1-305(B1) (2014).
[25] VA. CODE ANN. §19.2-389 (2014).
[26] VA. CODE ANN. § 22.1-277.2:1 and VA. CODE ANN. § 16.1-260(G).
[27] *See generally*, http://usmilitary.about.com/od/joiningthemilitary/a/moralwaivers.htm.
[28] VA. CODE ANN. § 19.2-299 (2014).
[29] VA. CODE ANN. § 16.1-299.1 (2014).
[30] VA. CODE ANN. § 9.1-902(G)(2014).
[31] 2015 Va. Acts ch. 478.

Human Trafficking and Juvenile Prostitution

Executive Summary

Senate Bill 373, patroned by Senator John Edwards, and House Bill 486, patroned by Delegate Timothy Hugo, were introduced during the Regular Session of the 2015 General Assembly. Senate Bill 373 focused on creating new felonies for human trafficking, while House Bill 486 sought to require reporting of suspected cases of child human trafficking and designate child protective services as the responsible agency for these types of cases. Both bills were left in House Courts of Justice's Criminal Law Subcommittee and sent to the Crime Commission for review.

Since 2006, the Crime Commission, the General Assembly, and other state agencies, have examined the topic of human trafficking on numerous occasions. Currently, there is no version of a model "Human Trafficking Act" in the Code of Virginia, as was proposed in Senate Bill 373 in 2014. The various changes enacted by the General Assembly in recent years to correct identified statutory deficiencies applicable to human trafficking cases make many provisions of Senate Bill 373 redundant and unnecessary. Additionally, some of the new criminal offenses proposed in the bill use terms that are so broad that they would inadvertently criminalize conduct that should not be made illegal.

In general, many of the problems with prosecuting human trafficking cases in Virginia are not due to Virginia's laws, but are the result of the fact that witnesses are often uncooperative with law enforcement. In instances involving juvenile prostitution, law enforcement and many professionals believe that if there is no mechanism to keep the victims within the judicial system, they often refuse to seek and get the treatment that they need. One statutory deficiency identified by law enforcement in Virginia is that it is difficult to prosecute a pimp who is recruiting minors for purposes of prostitution, if he is arrested before any other criminal activity takes place. This deficiency could be remedied through the creation of a criminal statute, similar to Virginia's existing gang recruitment statute.

There was federal legislation passed in September 2014, similar in nature to the provisions in House Bill 486, which was introduced during the Regular Session of the 2014 General Assembly. The new federal law will presumably require the Virginia Department of Social Services to evaluate how to implement several new federal requirements, including reporting requirements and the mandate to develop plans with law enforcement and the juvenile justice system for foster children. To that extent, it may be premature to enact House Bill 486, without a more complete understanding of what state-wide policy changes will need to be made by the Virginia Department of Social Services. House Bill 486 also contains provisions requiring local Child Protective

Services agencies to conduct investigations of human trafficking. Doing this may inadvertently lead to police investigations being hindered, especially if Child Protective Services is designated as the lead agency in investigating human trafficking cases.

Based upon a review of the two bills, and information gathered from law enforcement officers, prosecutors, and advocates who have been focusing on human trafficking and prostitution in Virginia, a number of policy options related to human trafficking and juvenile prostitution were considered by the Crime Commission at their October and December meetings:

> **Policy Option 1:** Should Virginia enact a comprehensive Human Trafficking Act, with newly created felonies, similar to the Act proposed by Senate Bill 373?
>
> **Policy Option 2:** Should local CPS become involved in investigations where juveniles are believed to be victims of human trafficking, as mandated by House Bill 486?
>
> **Policy Option 3:** Should a heightened penalty for pandering or procuring prostitutes be created, when minors are involved?
>
> **Policy Option 4:** Should a new recruitment for purposes of prostitution statute be created, modeled after Virginia's gang recruitment statute (§ 18.2-46.3)?
>
> **Policy Option 5:** Should manual stimulation of the genitals be incorporated into the prostitution statute?
>
> **Policy Option 6:** Should a juvenile, charged with prostitution, be allowed to have their case dismissed, and become subject to a CHINS petition, if the juvenile expresses a willingness to participate in specialized services?

The Crime Commission made no motion and took no action on Policy Options 1, 2 and 6. In regards to Policy Option 6, it was observed that juvenile and domestic relations district courts already have the authority to do this, if the judge deems such a disposition to be appropriate in a given case. The Crime Commission unanimously voted to approve Policy Option 5; however, no legislation was subsequently introduced during the 2015 General Assembly Session.

Policy Options 3 and 4 were introduced by Delegate Rob Bell in House Bill 2040 during the 2015 Regular Session of the Virginia General Assembly. This bill was later amended in the House Courts of Justice Committee, with both the proposal to heighten the penalty for pandering or pimping juveniles (Policy Option 3) and the proposal to create a new recruitment for purposes of prostitution statute (Policy Option 4) removed from the bill. The final version of House Bill 2040, as signed into law by the Governor, amended Va. Code § 18.2-355, by increasing the penalty from a Class 4 felony to a Class 3 felony for the crime of taking a minor to a place for purposes of prostitution.

However, both Policy Options 3 and 4 were incorporated into Senate Bill 1188, introduced by Senator Mark Obenshain, when that bill was amended in the Senate Courts of Justice Committee. They were also incorporated into House Bill 1964, introduced by Delegate Timothy Hugo, when that bill was amended in the House Courts

of Justice Committee. Both bills were signed into law by the Governor. As of July 1, 2015, anyone who pimps or panders a juvenile will be guilty of a Class 3 felony, and on that date, a new criminal offense, commercial sex trafficking in violation of Va. Code § 18.2-357.1, will go into effect, making it a separate crime to encourage or solicit a person to work as a prostitute.

Background

Senate Bill 373 (SB 373), patroned by Senator John Edwards, and House Bill 486 (HB 486), patroned by Delegates Timothy Hugo and Ronald Villanueva, were introduced during the Regular Session of the 2014 General Assembly. Both bills were left in the House Courts of Justice Criminal Law Subcommittee, and a request was sent to the Crime Commission for review. The general subject matter of both bills was an attempt to improve the handling and prosecution of human trafficking cases in Virginia.

Senate Bill 373: Analysis of Proposed New Criminal Offenses

Senate Bill 373 would add several new sections to the Code of Virginia to address human trafficking, create new felonies for trafficking in persons for forced labor or sexual servitude, add the new felonies as predicate acts to racketeering activities and to the multi-jurisdictional grand jury statute, and allow forfeitures for convictions of the new felonies.[1] Almost all of the new felonies proposed by SB 373 are already covered by existing crimes in Virginia. For example, the bill makes it a crime to "use coercion to compel an individual to provide forced labor or services." Coercion is defined as including "use of force against, abduction of, or physical restraint of, an individual." However, anyone who violates the proposed new felony in this manner would of necessity be guilty of abduction, as it is an element of the new offense.[2] Depending upon the particular facts involved in a case, a defendant who abducts a victim with the intent to make him provide forced labor for the defendant's own benefit, might well be guilty of a Class 2 felony under existing law, which is a far more severe penalty than the proposed Class 4 felony proposed by SB 373.[3] As another example, the crime of extortion, as currently defined in the Code, would apply to many of the proposed new felonies. Extortion includes situations where a person "knowingly destroys, conceals, removes, confiscates, withholds or threatens to withhold, or possesses any actual or purported passport or other immigration document, or any other actual or purported government identification document."[4] This existing language is essentially identical in meaning to a portion of the proposed new definition of "coercion"—"the destruction or taking of or threatened destruction or taking of an individual's passport, immigration document, or other governmental identification, or other property."[5]

To the extent that the proposed new crimes in SB 373 are not covered by existing law, they are written so broadly as to include innocent, non-malicious conduct that should not be made criminal. For example, another portion of the proposed definition for the term "coercion" in SB 373 is "the abuse or threatened abuse of the law or legal process." This provision could have the potential to criminalize all manner of everyday business conduct, such as disputes between a contractor and subcontractor. A contractor loudly shouting his intention to sue a subcontractor into bankruptcy if his crew does not start

work immediately, is most likely a "threatened abuse of the law or legal process," and could run afoul of the new statute.

Senate Bill 373: Considerations with Enacting a Model Human Trafficking Act

There are various policy arguments that can be made both in favor of, and against, enacting a specialized Human Trafficking Act, such as the Uniform Act on Prevention of and Remedies for Human Trafficking, which was drafted by the National Conference of Commissioners on Uniform State Laws in 2013, and which served as a basis for much of the language in SB 373.[6] Arguments in favor of enacting such an Act include:

- Passing a Human Trafficking Act helps bring public attention to the very real problems of human trafficking;
- Currently, it is extremely difficult to obtain accurate figures as to the amount of human trafficking that occurs in Virginia, so having a specific Code section could lead to better tracking of this activity;
- The more statutes that punish this reprehensible criminal behavior, the better; and,
- Having a Human Trafficking Act makes it easier for law enforcement to make arrests and bring a specific charge against traffickers, instead of obtaining warrants for a number of different offenses, e.g., abduction and pandering.

Arguments against passing a Human Trafficking Act include:

- All the crimes that are included in the Act are adequately covered by existing statutes, which are clearly written, have extensive case law, and are very familiar to prosecutors;
- Whenever a new statute is enacted that is not based on existing Virginia statutory language, there is a risk that it could be struck down, or interpreted in a very narrow manner;
- Virginia generally has not favored creating duplicative statutory offenses; i.e., if an activity is already a crime, there is no need to criminalize it a second time;
- If a crime is specifically covered in a Human Trafficking Act, and carries a lower penalty than an existing statute, defense counsel will argue that the lower penalty must be applied;
- Most versions of Human Trafficking Acts employ confusing cross-references, with the definition of one term depending upon the definition of two other terms, each of which may refer back to the original definition; and,
- Almost all of the Human Trafficking Acts use new terms that have not previously been defined in Title 18.2 or in Virginia case law, and are worded overly broadly.

House Bill 486 Analysis

While HB 486 seeks to improve prosecution of human trafficking, it attempts to accomplish this through the social services system. The bill would:

- Require those individuals who are required to report suspected child abuse or neglect to also report suspected cases of child human trafficking;
- Designate local departments of Child Protective Services (CPS) to be the public agency responsible for receiving and responding to reports of suspected human trafficking of children;
- Require CPS to report annually on its activities concerning investigation of reports of suspected human trafficking of children and services provided to children; and,
- Require making CPS a lead in investigating human trafficking cases. (This requirement could interfere with law enforcement investigations).

It is important to note that the Virginia Department of Social Services (DSS) is subject to a new federal law, the "Preventing Sex Trafficking and Strengthening Families Act,"[7] which includes reporting requirements and the mandate to develop plans with law enforcement and juvenile justice systems for foster children. It is not clear at this time how these new requirements will change or expand the duties of DSS regarding human trafficking, since it was recently passed on September 29, 2014.

Legislative Efforts in Virginia

Human trafficking is often referred to as a form of modern day slavery and has been defined by Congress in the "Trafficking Victims Protection Act" of 2000 to embody sex trafficking, where commercial sex acts are induced by force, fraud, or coercion, or by minors; or the placement of persons by use of force, fraud, or coercion for the purpose of subjection into involuntary servitude, peonage, debt bondage, or slavery.[8]

Virginia has likewise recognized the seriousness of this form of criminal enterprise. On multiple occasions since 2006, both the General Assembly and various state agencies have considered the problems of human trafficking, and have taken several steps to address this criminal activity.

In 2006, the General Assembly passed the first of its more recent measures in response to an identified problem related to human trafficking that was not adequately covered by existing laws. Language was added to the extortion statute so that threatening to report a person "as being illegally present in the United States" for purposes of extorting money or pecuniary benefit was made a crime.[9]

Later in 2006, the Crime Commission studied the issue of human trafficking and reviewed the human trafficking bills that had been introduced during the 2006 Regular Session. As a result of this study, Virginia's extortion statute Va. Code § 18.2-59, was additionally modified in 2007 to include threats of confiscating or withholding passports, immigration documents, or other government identification documents.[10] The General Assembly also created the *Commission on the Prevention of Human Trafficking* in 2007.[11] However, the Human Trafficking Commission's work did not lead to the enactment of any new legislation.[12]

In 2009, the abduction statute, Va. Code § 18.2-47, was expanded to include a trafficking subsection, which applies to persons seized, taken, or transported for forced labor or services.[13]

In 2010, the Crime Commission was requested to examine several issues related to human trafficking. House Joint Resolution 97 directed the Crime Commission to examine human trafficking in the context of prostitution-related offenses and indecent liberties.[14] No recommendations were made by Crime Commission members as a result of this study.[15]

Both the Department of Criminal Justice Services (DCJS) and the Attorney General's Office were required, in 2011, to advise law enforcement on how to identify and prosecute human trafficking cases under the existing common law and criminal statutes of the Commonwealth.[16] Also in 2011, DSS was statutorily required to develop a plan which would provide services including identifying victims of human trafficking, providing assistance to obtain existing benefits, and providing medical and mental health services.[17]

Legislation passed in 2012 required the Department of Education, in collaboration with DSS, to provide awareness and training information for local school division staff concerning human trafficking, to include strategies for the prevention of the trafficking of children.[18] The General Assembly also passed a law in 2012 requiring certain business owners to post signs containing information about a human trafficking hotline.[19] Additionally in 2012, the taking and detaining of persons for purposes of prostitution, and receiving funds for prostitution, were made predicate offenses for purposes of Virginia's criminal gang statute.[20]

In 2013, several more changes were made to Virginia's laws to address human trafficking. An amendment to Va. Code § 15.2-1724 was enacted to allow law enforcement to enforce abduction violations outside of their jurisdictional limits.[21] Va. Code § 19.2-215.1 was amended to allow multi-jurisdictional grand juries to investigate receiving monies for procuring a person in violation of Va. Code § 18.2-356.[22] And, the crime of soliciting prostitution, Va. Code § 18.2-346, was amended to make it a Class 5 felony to solicit a minor, less than 16 years old, and a Class 6 felony to solicit a minor 16 or older.[23]

Also in 2013, under the direction of the Secretary of Public Safety, DCJS created a work group to review current practices for dealing with human trafficking and to develop new strategies. Recommendations included:

- Coordinate human trafficking enforcement statewide;
- Capture or track statistics about human trafficking in Virginia;
- Ensure access to services for victims; and,
- Educate professional groups and equip those groups to identify, investigate, and prosecute cases.[24]

At the same time, the Crime Commission studied the human trafficking-related issues of forced prostitution, decriminalization of juvenile prostitution and expungement of prostitution convictions and charges. No recommendations were made by Crime Commission members as a result of this study.[25]

Difficulties with Human Trafficking Cases

In most instances, human trafficking does not involve kidnapping a person off the streets through an act of violence. Usually, the victim is lured based on promises of money, affection, or a better life. In cases of sex trafficking, these victims often develop loyalty to their pimps due to fear, dependency, or an emotional attachment, roughly analogous to Stockholm syndrome.[26] Because of the intense loyalty the victims display towards their abusers/pimps, and a related fear of the pimp, law enforcement and the legal system, or both, victims do not trust law enforcement or service providers. Therefore, if not placed in some form of custody, victims are frequently reported as trying to contact their pimp after an arrest, and resuming prostitution. A number of law enforcement officials and service providers have noted it is often better to keep criminal charges "over their head" to keep prostitution victims within the judicial system, so that they have access to assessment and treatment options. Safe harbor provisions, or decriminalizing prostitution for minors, are problematic because they can function as a recruitment tool, with the pimp telling the person he is trying to recruit that "you can't even get arrested for this." In a perverse way, safe harbor provisions may also serve as a disincentive for prostitutes to obtain treatment and can impede efforts to bring pimps to justice.

At the October Crime Commission meeting, members heard a presentation on human trafficking and juvenile prostitution from a detective of the Northern Virginia Human Trafficking Task Force (NVHTTF) regarding recent data and case examples. According to the presentation, the National Human Trafficking Resource Center keeps track of all phone calls, text messages, and online tips and emails sent to them related to human trafficking. There were a total of 35,889 messages and tips received nation-wide in 2013. Of that number, 742 phone calls, 37 online tips, 26 emails, and 5 text messages originated from individuals in Virginia.

The NVHTTF reported that from October 1, 2013, to October 17, 2014, they had received 156 leads. In turn, this led to 261 victims being identified, 13% of whom were juveniles; 108 victims being recovered and offered services; and 76 suspects identified. Seventeen percent of all the leads received were gang-related. Focusing on the 53 leads received between July 1, 2014, to October 17, 2014, 23 of the cases are pending further investigation; 7 are ongoing as a federal investigation; 11 are ongoing as an investigation being carried out by a different law enforcement unit; 10 were tracked as Intel, and 1 case was unfounded.

Examining all of the known data concerning identified victims, the NVHTTF reported that the vast majority, 77% (102 out of 133) were from the United States; the second most common geographic area of origin was Central America, with 9% (12 out of 133); and China was the third most common, with 7% (9 out of 133). The vast majority of female victims were in the age range of 15 to 17, while the age range of male victims was evenly distributed across all ages. The known data on identified trafficking suspects revealed that 53% (18 out of 34) were from the United States; the second most common geographic area of origin for suspects was Central America, with 24% (8 out of 34). The remainder of the suspects were evenly distributed from a variety of countries, including Qatar, Peru, Bolivia, Bulgaria, Canada, Croatia and Germany.

A recent case that was investigated by the NVHTTF provides an illustrative example of how human trafficking rings can be effectively combated by law enforcement. The Underground Gangster Crips, a known and nationally recognized set of the Crips, operates primarily in Virginia, with approximately 15 documented members. Amongst their criminal enterprises is prostitution. In November of 2011, a proactive review of police reports, a child protective services report, and a report made by a concerned parent, led the NVHTTF to begin interviews. Victim #1 was cooperative and identified several co-conspirators. Victim #2 was uncooperative and would not provide information. The investigators began compiling historical data going back to 2009 concerning the Underground Gangster Crips. Meanwhile, Victim #2 provided some Facebook messages between herself and Victim #1, which lead to a search warrant for Victim #1's Facebook account. As the evidence was slowly gathered, a fuller picture of how the prostitution operation was organized and run. For out-calls, a gang member would escort the juvenile to the door of the "john," and inspect the apartment to ensure that it was not an undercover policeman who had made the solicitation. The money was paid in advance, and the gang member would wait outside the door while the sex act was performed. For in-calls, all arriving "johns" were screened to ensure they were not undercover policemen. They were then taken through the rear sliding glass door in the basement of a townhouse that served as a brothel. The gang members would advertise their prostitutes through various methods, including word of mouth, door to door solicitations for sexual services, and advertisements on the Internet. At the conclusion of the NVHTTF investigation, indictments were brought in federal court. Five of the gang members were convicted, with three receiving 120 months incarceration, one receiving 276 months, and the ring-leader receiving 480 months.

Discussions with law enforcement and prosecutors have revealed a number of statutory changes that could be made to help combat human trafficking in Virginia:

- While a heightened penalty was created for soliciting prostitution from a minor in 2013, there is no corresponding heightened penalty for pandering or procuring minors for purposes of prostitution. These crimes should also carry a heavier penalty if juveniles are involved.
- If a pimp is discovered to be recruiting juveniles for prostitution, but is interrupted or arrested before he can successfully recruit anyone, it is very difficult to prosecute him. A separate prostitution recruitment statute should be enacted.

Summary

The General Assembly, the Virginia State Crime Commission, and various other state agencies have examined the topic of human trafficking on a regular basis since 2006. While no version of a model "Human Trafficking Act" has been enacted by the General Assembly, various statutory changes have been made in instances where deficiencies were identified in Virginia's statutes, thus making some of the key provisions of SB 373 redundant.

Recent federal legislation, the "Prevent Sex Trafficking and Strengthening Families Act," similar in subject matter to HB 486, was enacted this past September. The Virginia Department of Social Services presumably will be evaluating how to implement any new requirements generated by the "Preventing Sex Trafficking and Strengthening Families Act." To some extent, it would be premature to enact HB 486, until there is a more complete understanding of how Virginia's responsibilities will be affected by new federal requirements. Requiring local CPS agencies to conduct investigations of human trafficking and to coordinate with local law enforcement, as is mandated by HB 486, may inadvertently lead to police investigations being hindered. In many instances, law enforcement has more training and experience in conducting investigations which have an organized criminal gang component, including the use of confidential informants. Difficulties with human trafficking cases include uncooperative witnesses, due to the misplaced loyalty many prostitutes feel towards their pimps or abusers, and the difficulties in prosecuting a person who is discovered to be recruiting minors for purposes of prostitution, but is arrested before any other criminal acts take place.

Based upon a review of the two bills, and information gathered from law enforcement officers, prosecutors, and advocates who have been focusing on human trafficking and prostitution in Virginia, a number of policy options related to human trafficking and juvenile prostitution were considered by the Crime Commission at their October and December meetings:

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> **Policy Option 6:** Should a juvenile, charged with prostitution, be allowed to have their case dismissed, and become subject to a CHINS petition, if the juvenile expresses a willingness to participate in specialized services?

The Crime Commission made no motion and took no action on Policy Options 1, 2 and 6. In regards to Policy Option 6, it was observed that juvenile and domestic relations district courts already have the authority to do this, if the judge deems such a disposition to be appropriate in a given case. The Crime Commission unanimously voted to approve Policy Option 5; however, no legislation was subsequently introduced during the 2015 General Assembly Session.

Policy Options 3 and 4 were introduced by Delegate Rob Bell in House Bill 2040 during the 2015 Regular Session of the Virginia General Assembly. This bill was later amended in the House Courts of Justice Committee, with both the proposal to heighten the penalty for pandering or pimping juveniles (Policy Option 3) and the proposal to create a new recruitment for purposes of prostitution statute (Policy Option 4) removed from the bill. The final version of House Bill 2040, as signed into law by the Governor, amended Va. Code § 18.2-355, by increasing the penalty from a Class 4 felony to a Class 3 felony for the crime of taking a minor to a place for purposes of prostitution.

However, both Policy Options 3 and 4 were incorporated into Senate Bill 1188, introduced by Senator Mark Obenshain, when that bill was amended in the Senate Courts of Justice Committee. They were also incorporated into House Bill 1964, introduced by Delegate Timothy Hugo, when that bill was amended in the House Courts of Justice Committee. Both bills were signed into law by the Governor on March 27, 2015.[27] As of July 1, 2015, anyone who pimps or panders a juvenile will be guilty of a Class 3 felony, and on that date, a new criminal offense, commercial sex trafficking in violation of Va. Code § 18.2-357.1, will go into effect, making it a separate crime to encourage or solicit a person to work as a prostitute.

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[1] S.B. 373, 2014 Gen. Assemb., Reg. Sess. (Va. 2014).
[2] The crime of abduction is found, and penalties are given, in Va. Code §§ 18.2-47 and 18.2-48. VA. CODE ANN. §§ 18.2-47, 18.2-48 (2014).
[3] Anyone who abducts a person with the intent to extort pecuniary benefit is guilty of a Class 2 felony. VA. CODE ANN. § 18.2-48 (i) (2014).
[4] VA. CODE ANN. § 18.2-59 (2014).
[5] S.B. 373, 2014 Gen. Assemb., Reg. Sess. (Va. 2014).
[6] Unif. Act on Prevention of & Remedies for Human Trafficking (2013).
[7] Public Law No. 113-183, retrieved from https://www.congress.gov/bill/113th-congress/house-bill/4980.
[8] 22 U.S.C.S. § 7102 (LexisNexis 2014).
[9] 2006 Va. Acts. ch. 313.
[10] 2007 Va. Acts. ch. 547.
[11] 2007 Va. Acts. ch. 525.
[12] The Commission's report can be accessed at: http://leg2.state.va.us/DLS/h&sdocs.nsf/5c7ff392dd0ce64d85256ec400674ecb/687970da61a7b6e28525744b005c34fd?OpenDocument.
[13] 2009 Va. Acts. ch. 662.
[14] H.J. Res. 97 Va. General Assemb. (2010).
[15] VA. STATE CRIME COMM'N, INDECENT LIBERTIES AND PROSTITUTION-RELATED OFFENSES INVOLVING CHILDREN, H. DOC. 8 (2011).
[16] 2011 Va. Acts, ch. 719.
[17] 2011 Va. Acts, ch. 258.
[18] 2012 Va. Acts, ch. 317, 370.
[19] 2012 Va. Acts, ch. 630.
[20] 2012 Va. Acts, ch. 364.
[21] 2012 Va. Acts, ch. 428.
[22] 2012 Va. Acts, ch. 8.
[23] 2012 Va. Acts, ch. 417, 467. Prior to this change, solicitation of prostitution was a misdemeanor, irrespective of the prostitute's age.

[24] Va. Dep't of Criminal Justice Servs., Laying the Foundation for Virginia's Response to Human Trafficking, 15-28 (2013).
[25] VA. STATE CRIME COMM'N, FORCED PROSTITUTION (2014), RD181, P. 44. Retrieved from http://vscc.virginia.gov/Forced%20Prost%20Report.pdf.
[26] "Similar to trafficking victims, child and adolescent victims of prostitution can develop Stockholm syndrome. Children and adolescents pressured into prostitution form an attachment to the offender despite the history of abuse and violence. Consequently, prostituted children may develop a perverse bond with their captor that is difficult to fracture, effectively reinforcing the hold perpetrators have over victims." (Citations omitted). Bang, B., Baker, P.L., Carpinteri, A., & VanHasselt, V.B. (2014). *Commercial sexual exploitation of children.* New York: Springer, at page 20; *See also*, Natalie Kitroeff, *Stockholm Syndrome in the Pimp-Victim Relationship*, N.Y. TIMES, May 3, 2012, retrieved from http://kristof.blogs.nytimes.com/2012/05/03/stockholm-syndrome-in-the-pimp-victim-relationship/.
[27] S.B. 1188, 2015 Va. Acts, ch. 691; H.B. 1964, 2015 Va. Acts, ch. 690.

Illegal Cigarette Trafficking Update

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. At the conclusion of the study, the Commission recommended a number of statutory changes, including increasing the penalties for cigarette trafficking. Concurrently, the 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.

In December of 2013, the Crime Commission reviewed the most recent data on cigarette trafficking, and learned of various difficulties certain prosecutors had encountered while trying cigarette traffickers for violations of Va. Code § 58.1-1017.1. Based upon these reported incidents, the Crime Commission made a number of recommendations to modify existing statutes, in order to help Commonwealth's Attorneys with their prosecutions. Most of these recommendations dealt with evidentiary or procedural issues; none of them involved increasing criminal penalties. The Commission also requested that the issue of cigarette trafficking continue to be studied in 2014, particularly in regards to whether the statutory changes that had been made could be seen as having an impact on cigarette trafficking in the state, and what else could be done to combat this growing crime.

As was reported last year, 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. Different law enforcement agencies in disparate parts of the state all reported that they continued to observe large, fraudulent retail operations—stores that did not exist (their business address was either fictitious or belonged to a location that was clearly not a retail establishment, such as a rental storage locker), yet were identified by industry as purchasing extremely large volumes of cigarettes. In some situations, the trafficking operation did have a valid retail store, but the quantities of cigarettes purchased were excessively high, and the persons working at the business had been observed engaging in behavior that was inconsistent with regular retail sales; e.g., helping to load dozens of cases of cigarettes into cars at night, after the store was closed. The total quantities of cigarettes sold by all stores in a few counties, as calculated by industry, were so enormous, that they equaled every resident of the county, both children and adults, purchasing a pack of cigarettes or more every day. Sales volumes this high are clear indications of out-of-state cigarette trafficking.

During the fall of 2014, the Crime Commission organized a private, invitation-only summit to select members of the legislature and state government, in collaboration with

key members of industry. At the summit, specific details of current local, state, and federal law enforcement investigations were presented. An overview of the general observations and findings provided by members of law enforcement at the summit were presented at the November and December meetings of the Crime Commission, as well as possible recommendations to help address what appears to be a continuing, if not burgeoning, criminal problem for the Commonwealth. At its December meeting, the Crime Commission endorsed the following legislative recommendations:

Recommendation 1: Require anyone who wants to sell tobacco products to the general public or at the wholesale level in Virginia to obtain a tobacco retail license. Designate the Virginia Department of Alcoholic Beverage Control to manage the tobacco retailing permit system and enforce laws prohibiting the trafficking of cigarettes.

Recommendation 2: Lower the felony threshold level for trafficking cigarettes, in violation of Va. Code § 58.1-1017.1, from 500 cartons to 200 cartons.

Recommendation 3: Create a new statute to make it a criminal offense to purchase cigarettes from a wholesaler using a forged business license, or a forged or invalid sales and use tax exemption certificate. An offense involving 25 cartons or fewer would be a Class 1 misdemeanor for a first offense and a Class 6 felony for a second or subsequent offense. An offense involving more than 25 cartons would be a Class 6 felony for a first offense, and a Class 5 felony for a second or subsequent offense.

Recommendation 4: The definition of an "authorized holder" in Va. Code § 58.1-1000 should be modified, so as to exclude anyone who has been convicted of a cigarette trafficking offense in any locality, state, or the United States, from being able to claim exemption from Virginia's cigarette trafficking statutes. Under the current definition, only convictions under Va. Code §§ 58.1-1017 and 58.1-1017.1 operate as a bar to being an "authorized holder."

Recommendation 5: A list of persons who, due to criminal convictions, are ineligible to be "authorized holders" in Virginia should be developed and maintained by the Office of the Attorney General of Virginia. This list should be easily accessible to wholesalers, to aid them in identifying persons to whom large quantities of cigarettes should not be sold.

Recommendation 6: Amend Va. Code § 58.1-1007 to allow, in addition to the Virginia Department of Taxation, the Office of the Attorney General of Virginia, local tax administrators, and the Virginia Department of Alcoholic Beverage Control access to records involving the purchases and sales of cigarettes.

Recommendation 1 was endorsed by the Crime Commission, though not unanimously. Recommendations 2 through 6 were endorsed unanimously by the Commission. All of the recommendations were introduced during the Regular Session of the 2015 General Assembly of Virginia. Recommendation 1 was introduced by Senator Bryce Reeves as

Senate Bill 1230 during the Regular Session of the 2015 Virginia General Assembly. It passed the Senate, but was left in the General Laws Committee of the House of Delegates

Recommendations 2 and 3 were patroned by Senators Bryce Reeves and Janet Howell as Senate Bill 1231, and were patroned by Delegate Charniele Herring as House Bill 1807, during the Regular Session of the 2015 Virginia General Assembly. Both bills passed the General Assembly and were signed into law by the Governor on March 17, 2015.

Recommendations 4, 5 and 6 were patroned by Senators Bryce Reeves and Janet Howell as Senate Bill 1232, and were introduced by Delegate Jennifer McClellan as House Bill 1955, during the Regular Session of the 2015 Virginia General Assembly. Both bills passed the General Assembly, and after technical amendments recommended by the Governor were accepted by the General Assembly, became law on April 15, 2015.

Background

2012 Activities

During the 2012 Regular Session of the Virginia General Assembly, Senate Joint Resolution (SJR) 21 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 Commission recommended a number of statutory changes, including increasing the penalties for cigarette trafficking.[3] At the time, the 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 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, to include:

- 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]

2013 Activities

To comply with the directive to continue the cigarette trafficking study, numerous meetings and interviews were held in 2013 with representatives from cigarette manufacturers, wholesalers, 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 Tobacco Trafficking Task Force during the year. Previous data sources, such as the Virginia Department of Taxation and the Virginia Criminal Sentencing Commission (VCSC), were contacted for updated figures. Additionally, assistance was provided to the Virginia Department of Criminal Justice Services (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.

In December of 2013, the Crime Commission reviewed the most recent data on cigarette trafficking, and learned of various difficulties certain prosecutors had encountered while trying cigarette traffickers for violations of Va. Code § 58.1-1017.1. Based upon these reported incidents, the Crime Commission made a number of recommendations to modify existing statutes, in order to help Commonwealth's Attorneys with their prosecutions. Most of these recommendations dealt with evidentiary or procedural issues; none of them involved increasing criminal penalties. The Commission also requested that the issue of cigarette trafficking continue to be studied, particularly in regards to whether the statutory changes that had been made could be seen as having an impact on the rates of cigarette trafficking in the state. Lastly, the Commission recommended that staff investigate the details of how a state-wide, centralized law enforcement unit dedicated to cigarette trafficking could be organized or created in the Commonwealth.

All of the Commission's recommended statutory changes from 2013 were enacted into law during the 2014 Regular Session of the Virginia General Assembly, becoming effective on July 1, 2014, to include:

- A statutory prima facie presumption was created 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 was done to eliminate the possible need to call an expert witness, during a criminal trial on a charge of trafficking cigarettes, to testify that a particular brand of cigarettes does, in fact, contain nicotine, and therefore satisfies the definition of a "cigarette."

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

- The forfeiture statute that applies to counterfeit and trafficked cigarettes, Va. Code § 19.2-386.21, was amended, so that law enforcement officers can now make use of forfeited cigarettes for legitimate, undercover operations, instead of simply destroying them.

- The required civil penalties which accompany a conviction for cigarette trafficking under Va. Code § 58.1-1017.1 were greatly increased:
  - 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.

- A statutory prohibition was put in place, preventing anyone convicted of trafficking cigarettes in violation of Va. Code §§ 58.1-1017 or 58.1-1017.1 from

ever again qualifying as an "authorized holder." This prevents a convicted trafficker from opening up a fraudulent retail business and continuing to traffic cigarettes under the guise of being a legitimate wholesaler or retailer.

- Cigarette trafficking was added to the list of crimes which can be investigated by a multi-jurisdictional grand jury.

2014 Activities

Staff continued to meet with representatives from cigarette manufacturers, cigarette wholesalers, retailers, local and state law enforcement, the NVCTB, the Tobacco Enforcement Unit of the Office of the Attorney General of Virginia, the Virginia Department of Taxation, ABC, ATF, the IRS, and Commonwealth's Attorneys. Particular focus was paid to the observations and trends noted by local law enforcement. In addition, staff provided a number of trainings to law enforcement, Commonwealth's Attorneys, the Virginia Wholesalers and Distributors Association, and to circuit court and district court judges at each of their respective Judicial Conferences. Staff was also invited to participate on a national conference panel to discuss strategies to combat cigarette trafficking. After continuing to hear from law enforcement that large criminal operations were being discovered in Virginia, but specific details could not be released publically, due to ongoing, active investigations, it was decided that a closed, invitation-only summit should be held for members of the General Assembly and invited representatives from Virginia wholesalers and retailers, manufacturers, legislative staff, and various state agencies. At this summit, candid descriptions of the current methods used by traffickers in Virginia were presented to attendees.

Update: Trends in Cigarette Trafficking

The fact that Virginia has the second lowest cigarette excise tax rate in the country, while the mid-Atlantic and New England states directly north of Virginia have some of the highest tax rates in the country, continues to provide a powerful incentive for cigarette traffickers to obtain cigarettes cheaply in Virginia, and then sell them illegally up north. Table 1 illustrates the different cigarette excise taxes throughout the United States:

Table 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	2.90	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	2.75
Massachusetts	**3.51**	**Virginia**	**0.30**
Michigan	2.00	Washington	3.025
Minnesota	3.426	West Virginia	0.55
Mississippi	0.68	Wisconsin	2.52
Missouri	**0.17**	Wyoming	0.60

Source: The Tax Burden on Tobacco: Historical Compilation Volume 49, 2014, Table 6 on pages 10 and 11. All rates current as of January 1, 2015.[15]

Although a comparison of the actual costs of the excise tax in Virginia versus other states, such as New York or Rhode Island, appears small at a "per pack" level, the differences become considerable when cartons or cases of cigarettes are involved.

- The state excise tax rate for a carton of cigarettes (10 packs):
  - **Virginia: $3.00**
  - Pennsylvania: $16.00
  - New Jersey: $27.00
  - Rhode Island: $35.00
  - 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: $2,100.00
  - Massachusetts: $2,106.00
  - New York: $2,610.00
  - **New York City: $3,510.00**

As quickly becomes apparent, with an excise tax difference of $3,330 per case, the amount of illegal profit that can be made by trafficking cigarettes from Virginia to New York City runs into the tens of thousands, even when small quantities of six or seven cases are taken in a mid-sized automobile. 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 having to offer his cigarettes at a reduced price from the legal wholesale price in the area, staggeringly large amounts of money can be made illegally in a short period of time.

It was noted in 2013 that the recent trend for trafficking groups was to create false storefronts in Virginia. These fraudulent retail establishments, which frequently exist only on paper and have an actual physical address that is either non-existent or is a storage unit, provide a cover to purchase bulk quantities of cigarettes. They further allow the trafficker to minimize his costs by avoiding sales tax, as he claims to be purchasing them as a "retailer." Ultimately, no sales tax is ever collected or paid on these cigarettes, as they are not sold in Virginia, but are instead transported out-of-state.[16] Police intelligence reports indicate that this trend is continuing and becoming more wide-spread. A non-comprehensive review of known fraudulent retail businesses in the greater Richmond-metro area alone identified 61 separate businesses, of which 23 were started in 2014.[17] Additional fraudulent businesses, throughout the state, have been uncovered in the first few months of 2015.[18]

Ancillary crimes connected with cigarette trafficking continue as well. Burglaries and robberies of convenience stores, where the primary items stolen are cigarettes, have been reported. Credit card fraud, money laundering, and armed robberies of known traffickers by competing criminal gangs, are also persistent trends. If cigarette traffickers continue to establish a more permanent presence in the state, as they are doing with the creation of so many fraudulent retail establishments, it is expected that these crime patterns will also continue, putting Virginians at risk.

Virginia Cigarette Data

The Crime Commission has gathered data from a number of enforcement agencies in previous years to ascertain the extent of criminal cigarette trafficking in the Commonwealth. These figures provide a different, though complimentary, perspective from the charge and conviction data obtained from Virginia's court system. Each of

these agency sources was contacted for updated figures for 2014. The data, in general, indicates that cigarette trafficking is a continuing problem for Virginia. Comparing identically sourced data, the more recent figures generally indicate either an increase, or no change, from the figures received in earlier years.

The Virginia State Police was 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 2014 through to October 2014, they reported seizing 2,195 cartons of cigarettes, along with $105,129 in cash.[19] By way of comparison, from January 2013 to October of 2013, the Virginia State Police seized approximately 6,775 cartons of cigarettes, along with $45,749 in cash. And, from January 2012 to October of 2012, approximately 1,941 cartons of cigarettes were seized, along with $226,360 in cash, during the course of normal drug interdiction efforts.[20] While the 2014 figures show a decrease in the number of cartons seized compared with the previous year, the increase in money seized is significant—indicating that more traffickers are being stopped before they have had a chance to purchase cigarettes.

The NVCTB was contacted regarding their continuing enforcement efforts against cigarette trafficking. In 2014, more precise figures were available than from earlier years. They conducted 2,141 inspections of retail establishments, and seized 41,009 packs of cigarettes for not being in compliance with local tax ordinances. Using their authority to sell seized packs, they earned $327,000 in revenue. Based upon a review of their records, they reported having seized approximately 55,000 packs of cigarettes in 2012 and 2013 combined, and noted that from 2007 through to 2013, they had seized a combined estimate of 140,000 packs. These numbers illustrate that in 2014 alone, the NVCTB seized as many packs of cigarettes as in the previous two years, combined.

The Tobacco Enforcement Unit in the Office of the Attorney General of Virginia reported that in 2014, their enforcement efforts increased from previous years. They conducted 1,813 retail inspections and seized 20,736 packs of cigarettes. They also assisted the Virginia Department of Taxation with seven background investigations. This compares with the period of time of January 1, 2013, through November 6, 2013, when they conducted 159 inspections and seized 2,923 packs of cigarettes, and with 2012, when they reported conducting 145 retail inspections and seizing 14,569 packs of cigarettes for not being in compliance with Virginia law. Beginning in 2011, the Tobacco Enforcement Unit began to keep track of fictitious businesses involved with cigarette trafficking, and the rate of these identifications has been increasing. In 2011, the Unit identified five fictitious businesses; in 2012 they identified six such businesses; and as of November of 2013, they had identified 25 fictitious businesses. In 2014, they identified an additional 23 fictitious businesses operating in Virginia. At this point in time, the problem seems to be increasing exponentially. The Unit has already identified an additional 43 businesses through May 29, 2015.

The Virginia Department of Taxation reported that in 2014, there were 189 cases in which civil penalties were assessed to retailers for compliance issues involving cigarettes, and an additional 23 cases involving other tobacco products. The total amount collected by the Department was $220,004. This compares with 2012 and

2013, when the Department reported 177 assessments for non-compliance were issued, with $142,374 in civil penalties being collected.

The Virginia Department of Alcoholic Beverage Control does have some involvement with cigarettes. A large majority of the establishments that have a license to sell alcohol also sell cigarettes, and technically, ABC enforcement agents may enforce all of the laws of the Commonwealth, not just those that involve alcohol. In addition, ABC agents conduct periodic underage buyer tobacco checks, as well as check advertising and labeling compliance for tobacco products pursuant to a federal FDA program. In FY14, ABC conducted 1,491 checks for advertising and labeling compliance, and 1,835 underage buyer checks. They also conducted an additional 1,258 underage buyer checks pursuant to the federal Synar program. They reported making 74 total arrests for various tobacco related offenses, including two arrests for cigarette trafficking. This compares with FY13, when they conducted 586 checks for compliance with advertising and label compliance, and 1,884 underage buyer checks for tobacco products, with an additional 1,206 underage buyer checks for tobacco products pursuant to the Synar program. In FY13, ABC reported making 71 arrests for various tobacco related offenses, including one arrest for the possession of untaxed cigarettes.

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,[21] the Office of the Sheriff of New York City was contacted for updated figures on their cigarette seizures. From April 1, 2014, to April 1, 2015, they reported seizing 2,410 cartons of cigarettes, of which 1,509 cartons (62%) involved Virginia cigarettes. During that time frame, they reported that out of the 216 retail inspections in which unlawful cigarettes were seized, 131 of those inspections (61%) involved Virginia cigarettes.[22] This roughly compares with the time period of April 1, 2013, to April 1, 2014, in which they seized 3,971 cartons, of which 1,536 cartons (39%) were identified as coming from Virginia. During that time frame, they reported that out of the 401 retail inspections in which unlawful cigarettes were seized, 206 of those inspections (51%) involved Virginia cigarettes.[23] 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.[24] And, 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.[25] Looking at the collected data, it becomes apparent that Virginia is the largest single source of illicit cigarettes that the New York City Sheriff's Office identifies, year after year, since the latter half of 2011, when this data first became available. Additionally, the number of seized cartons coming from Virginia does not appear to be decreasing.

Other information has confirmed that Virginia is the largest single source for black market cigarettes in New York City. A recent internal study conducted by Altria indicates that this trend continues. An analysis of discarded cigarette packs in New York City found that 71% of all recovered packs did not have a proper New York City tax stamp, and 41% of all recovered packs had a tax stamp from another state. A total of 23% of all packs analyzed had a Virginia tax stamp, indicating that Virginia is the supply

state for over 55% of all black market cigarettes that are clearly known to have been obtained from other states.[26] Separate findings by the Mackinac Center for Public Policy confirm these large numbers. Their recent statistical analysis, using data from 2013, indicated that 22.6% of all cigarettes sold in Virginia end up trafficked or transported to other states.[27]

Recent Press Articles

The complex nature of large cigarette trafficking conspiracies, especially those which involve numerous participants and inter-state coordination between affiliated criminal groups, frequently means that a thorough law enforcement investigation takes time. Surveillance must be carried out, cooperation sought from law enforcement departments in other states, and financial records must be examined. Virginia's law enforcement efforts are continuing to uncover various trafficking rings, a number of which have been reported in recent press articles.[28] Details of collateral crimes, such as armed robberies, are also gaining attention in the press.[29]

In September of 2014, Mohamed Seid Ahmed Mohamed of Chesterfield, Virginia, pled guilty in federal court to conspiring to traffic contraband cigarettes. Mohammed used his role as owner of the City Cigarettes store in Richmond to purchase 440,000 cartons of cigarettes between 2011 and 2014, and then sold them to traffickers. The U.S. Attorney involved with the case estimated that $1,009,046 of sales tax was lost to Virginia.[30]

On November 5, 2014, Michael Zekry was arrested in Staten Island, with more than 2,000 cartons of cigarettes found in his van. An additional 551 cartons of cigarettes was recovered from his home, along with $40,000 in cash and an electronic money counter.[31] Zekry pled guilty and paid restitution and forfeiture totaling $215,471, prior to his sentencing on July 14, 2015, when it is expected he will receive 60 days in jail and five years' probation.[32]

On February 23, 2015, Min Jie Zhu and two co-defendants pled guilty to trafficking cigarettes in Chesterfield Circuit Court. Over a nine month period, they purchased between $3.6 million to $5 million worth of cigarettes, using "Chinatown" commercial buses to send them to New York. The cigarettes were purchased from wholesalers, and no sales tax was remitted to Virginia. When police raided Zhu's home, they seized $100,000 in cash, hundreds of cartons of cigarettes and a collection of empty cigarette cases. Zhu had been previously convicted of cigarette trafficking in April of 2014.[33]

A news article dated March 14, 2015, mentions fax machine orders being received at the Sam's Club store near Potomac Mills for cigarettes, coming from "10 Northern Virginia stores that exist only on paper." The same story reveals that a series of 17 surprise inspections of Brooklyn stores carried out on November 21, 2014, by a tobacco team task force from the New York City's Sheriff's Office, netted almost 200 cartons of contraband cigarettes, most of them from Virginia.[34]

On April 26, 2015, Karon Grant pled guilty in federal court to charges stemming from a series of recent robberies and carjackings of cigarette distributors carried out by a gang

of four individuals. "The robberies began Nov. 11, when a van carrying $31,000 worth of cigarettes was hijacked in Richmond. On Nov. 25, a man had just bought $100,000 worth of cigarettes from a store in Chesterfield when his van was hijacked at gunpoint from the store's loading dock. On Jan. 7, two men transferring cigarettes to a van from a Glen Allen rental storage unit were interrupted by robbers who stole the van, $90,000 worth of cigarettes and $25,000 in cash. The final robbery was Feb. 9 at a storage facility in Henrico County."[35] Ultimately, all four men would plead guilty.[36] In a final twist, one of the victims of the November 25 robbery, Maher Mustafa, was later charged in federal court with failing to report cash transactions of $10,000 or more; in a six month period of time, he made over 90 such deposits, totaling over $14 million, money he made from trafficking cigarettes.[37] It is believed that Mustafa once did business with one of the robbery teams.[38] When Mustafa was formally indicted on May 6, the amount of the cash transactions made in violation of federal reporting laws was given as $23,412,844.[39]

An undercover review carried out by the News-4 I-Team in March and April of 2014, with the assistance of the NVCTB, found a number of suspicious purchases of large quantities of cigarettes from big box stores. "One northern Virginia man, who has purchased $10 million in cigarettes over six months, listed at least four business addresses when registering with Virginia's tax agency. The I-Team found those addresses included an empty lot, a family home in a Fredericksburg subdivision and a small, unmarked office in a remote business park."[40]

Fattoh Ghaleb was charged in April of 2015, in Henrico County, Virginia, with two felony cigarette trafficking offenses. Sales records indicate that he had purchased $1 million worth of cigarettes in the five months prior to mid-March of 2015.[41] The same news article reveals that five of Virginia's ten largest cigarette buyers are in the Richmond area. All five buyers claim addresses that do not correspond to a legitimate business address. Together these five buyers purchased more than 322,000 cartons of cigarettes, worth $15 million to $17 million, in the thirteen weeks that ended on February 28, 2015.[42]

On January 2, 2015, Hatim Mohamed of Richmond, Virginia, was arrested in New Jersey near the New York border. He was transporting 250 cartons of cigarettes at the time of his arrest. He was formally indicted by a New Jersey grand jury on April 30, 2015.[43] Also arrested in New Jersey, in an unrelated case, was Gamal Alkatteeb, also of Richmond, Virginia. At the time of his arrest on March 18, 2015, he was in possession of more than 450 cartons of cigarettes in his vehicle.[44]

And, on May 10, 2015, three men were arrested in Loudon County, Virginia, on charges related to credit card fraud. Numerous credit cards and gift cards were discovered in their vehicle. Two of the men, Jason H. Alexander and Koye R. Wilson, are from New York; the third man, Sean D. Butler, is from Virginia. Also discovered in their vehicle was a large number of cigarette cartons.[45]

All of these examples illustrate what had been previously predicted—the illegal profits from cigarette trafficking would almost certainly result in a continuing growth of this

type of criminal activity in Virginia, and the large amounts of profits to be made would then result in collateral crimes following shortly thereafter.[46]

Virginia Criminal Sentencing Commission Data

The Virginia Criminal Sentencing Commission 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.[47] Table 2 illustrates the number of charges filed in general district courts for misdemeanor cigarette-related offenses. It appears that the number of misdemeanor charges relating to possession of stamped cigarettes for purposes of trafficking has remained steady. Conviction data for these offenses in the general district courts for FY13-FY14 is provided in Table 3. Tables 4 and 5 illustrate circuit court charges and convictions for cigarette-related offenses. Similar to previous years, the data from the circuit courts indicates that few charges are filed, and few convictions are obtained, for these types of cigarette offenses.

Table 2: General District Court Charges for Cigarette-related Offenses, FY13-FY14*

Code Section	Description	FY13	FY14
§ 58.1-1007	Fail to keep records on purchase, sale of cigarettes (Excise Tax)	0	0
§ 58.1-1009	Cigarettes, unlawful sale of revenue stamps	1	0
§ 58.1-1009	Revenue stamps not purchased from Tax Dept.	0	0
§ 58.1-1017(B)	Cigarettes without stamp, sale, purchase, possess, <3000 pks (FY13); < 500 pkgs (FY14)	8	3
§ 58.1-1017(C)	Cigarettes without stamp, sale, purchase, possess, >3000 pks (FY13); > 500 pkgs (FY14)	12	12
§ 58.1-1021	Fail to keep records on purchase, sale of cigarettes (Use Tax)	1	0
§ 58.1-1033	Violation of restrictions	0	0
Local Cigarette Tax Ordinance	Local Cigarette Tax Ordinance Violation	7	14
§ 58.1-1017.1	Possession with intent to distribute tax-paid, contraband cig.	102	106
§ 58.1-1017.1	Possession with intent to distribute tax-paid, contraband cig., subseq.	2	8
§ 58.1-1017.1	Intent/distribute >=100,000 tax-paid cigarettes	---	14
§ 58.1-1017.1	Intent/distribute >=100,000 tax-paid cigarettes, subseq.	---	0

Source: Supreme Court of Virginia - General District Court Case Management System. *Fiscal year in which the charge was filed.

Table 3: General District Court Convictions for Cigarette-related Offenses, FY13-FY14*

Code	Description	FY13	FY14
§ 58.1-1007	Fail to keep records on purchase, sale of cigarettes (Excise Tax)	0	1
§ 58.1-1010	Illegal sale of unstamped cigarettes by wholesale dealers	1	0
§ 58.1-1017(B)	Cigarettes without stamp, sale, purchase, possess, <3000 pks (FY13); < 500 pkgs (FY14)	7	4
§ 58.1-1017(C)	Cigarettes without stamp, sale, purchase, possess, >3000 pks (FY13); > 500 pkgs (FY14)	0	0
§ 58.1-1021	Fail to keep records on purchase, sale of cigarettes (Use Tax)	1	0
Local Cigarette Tax Ordinance	Local Cigarette Tax Ordinance Violation	3	4
§ 58.1-1017.1	Possession with intent to distribute tax-paid, contraband cig.	68	69
§ 58.1-1017.1	Possession with intent to distribute tax-paid, contraband cig., subseq.	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.).

Table 4: Circuit Court Charges for Cigarette-related Offenses, FY13-FY14*

Code	Description	FY13	FY14
§ 58.1-1009	Cigarettes, unlawful sale of revenue stamps	0	0
§ 58.1-1009	Revenue stamps not purchased from Tax Dept.	2	0
§ 58.1-1017(B)	Cigarettes without stamp, sale, purchase, possess, <3000 pks (FY13); < 500 pkgs (FY14)	0	0
§ 58.1-1017(C)	Cigarettes without stamp, sale, purchase, possess, >3000 pks (FY13); > 500 pkgs (FY14)	9	0
§ 58.1-1017(C)	Cigarettes without stamp, sale, purchase, possess, > 500 pkgs., subseq.	0	5
§ 58.1-1033	Violation of restrictions	0	0
§ 58.1-1017.1	Possession with intent to distribute tax-paid, contraband cig.	4†	7†
§ 58.1-1017.1	Possession with intent to distribute tax-paid, contraband cig., subseq.	0	3
§ 58.1-1017.1	Intent/distribute >= 100,000 tax paid cigarettes	---	4

Source: Supreme Court of Virginia – Circuit Court Case Management System. *Fiscal year in which the charge was filed or concluded. † These charges were the result of appeals from General District Court. The Circuit Court Case Management System does not include cases from Alexandria, Fairfax, or Virginia Beach for these FYs.

Figure 5: Circuit Court Convictions for Cigarette-related Offenses, FY13-FY14*

Code	Description	FY13	FY14
§ 58.1-1009	Cigarettes, unlawful sale of revenue stamps	0	0
§ 58.1-1009	Revenue stamps not purchased from Tax Dept.	1	0
§ 58.1-1017(B)	Cigarettes without stamp, sale, purchase, possess, <3000 pks (FY13); < 500 pkgs (FY14)	5	3
§ 58.1-1017(C)	Cigarettes without stamp, sale, purchase, possess, >3000 pks (FY13); > 500 pkgs (FY14)	4	2
§ 58.1-1017.1	Possession with intent to distribute tax-paid, contraband cig.	2†	3
§ 58.1-1017.1	Possession with intent to distribute tax-paid, contraband cig., subseq.	0	2
§ 58.1-1017.1	Intent/distribute >= 100,000 tax paid cigarettes	---	1

Source: Supreme Court of Virginia – Circuit Court Case Management System. *Fiscal year in which the charge was filed or concluded. † These convictions were the result of appeals from General District Court. The Circuit Court Case Management System does not include cases from Alexandria, Fairfax, or Virginia Beach for these FYs.

Continuing Vulnerabilities in Virginia

Numerous meetings with law enforcement and prosecutors revealed that while the changes to the law effective in 2014 have assisted in enforcement efforts against cigarette trafficking in Virginia, there remain a number of areas where improvements could be made. Law enforcement officers in particular commented on the difficulties they have in investigating and bringing cases against large scale, fraudulent retail operations. To be successful, not only is extensive surveillance required, but forensic accounting and a detailed review of financial forms and tax filings (if any) are also needed. This requires extensive work hours, and for the accounting portion of the investigation, specialized skills and training. From a larger perspective, there continue to be 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.

Systemic Weaknesses in Combatting Cigarette Trafficking

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.

As has been pointed out in previous years, there are many valuable sources of information that can help combat cigarette trafficking in Virginia that are not collated. The Virginia Department of Taxation, the State Corporation Commission, the Virginia State Police, 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 may begin an investigation of a suspected cigarette trafficking operation, based upon observation 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.

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.

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. Not only does that lack of criminal intelligence limit the scope of an investigation that a local law enforcement agency might be able to carry out, but even worse, it can lead to situations where two local agencies, independently of one another, investigate the same trafficking ring, and inadvertently interfere with each other's work.

Lastly, in terms of the systemic difficulties that Virginia currently faces, there is no comprehensive list of all locations that sell cigarettes or tobacco products to the public. This makes the jobs of both law enforcement and the Department of Taxation much more difficult, as they simply are not aware of all retail locations, or purported retail locations, where cigarettes are sold. Auditing and enforcement efforts are made more difficult, and identification of trafficking rings becomes haphazard, when there are unknown numbers of retailers who sell tobacco products. It should be noted that Virginia is in the minority of states on this issue; 36 states require either a license or a permit to sell cigarettes to the general public.

The most direct way to address these systemic weaknesses, comprehensively, would be to designate an existing state-wide agency as one which would be responsible for focusing on cigarette trafficking. The responsibility would be in terms of agency focus; all law enforcement agencies, state and local, would still have the authority to investigate and make arrests in cigarette trafficking cases that occurred within their jurisdiction. To address the issue of the unknown numbers of retailers who sell cigarettes and other tobacco products to the public, Virginia could require that all such retailers be licensed. Not only would a licensure system help identify all locations where cigarettes are sold, but it would provide an incentive for retailers to follow applicable laws and regulations when it comes to the sale of tobacco products. Failure to do so, by selling tobacco products to minors, knowingly selling to traffickers, or misreporting sales or tax figures, would then carry the possible additional penalty of suspension or loss of license. By way of analogy, retailers and restaurants with ABC licenses have an incentive, beyond possible misdemeanor criminal charges, to follow the law. Violations usually result in a suspension of the holder's license, which often has a direct and negative impact on a location's revenues—something which business owners always seek to avoid.

Combining these two policy considerations—need for a centralized state agency that has a primary mission-focus of investigating cigarette trafficking, and the benefits of requiring a license in order to sell tobacco products in Virginia—results in a logical choice of having ABC assume both roles. As the state agency that is responsible for vetting, approving, and monitoring the licenses of businesses that sell alcohol, they have extensive experience with administering a state-wide retail licensure system. They are very familiar with the work that is necessary to thoroughly vet an individual's or business' license application. Their agents visit the physical location of all restaurants and other retail establishments for verification purposes—something which would, in the context of cigarette sales, help prevent the creation of fictitious "retail establishments" that are nothing more than the address of a storage unit or parking lot. The ABC estimates that there is an overlap of approximately 40% of businesses that sell both alcohol and tobacco products. They currently have the explicit authority, under Va. Code § 4.1-103.01(C), to enforce laws governing the sale of tobacco products to minors. Lastly, ABC has law enforcement authority and extensive experience with reviewing financial records to determine if criminal fraud, unlawful purchases of alcohol products, or tax evasion has been committed. A practical knowledge of forensic auditing in the context of criminal investigations is exactly what is required in many tobacco trafficking cases.

Having ABC provide a centralized state unit generally dedicated to tobacco enforcement could provide many benefits to other law enforcement agencies, both local and state-wide. Deconfliction assistance could be extremely useful when multiple jurisdictions begin investigations that turn out to involve the same trafficking gang, or affiliated criminal groups. Forensic accounting assistance is often needed by local law enforcement agencies, as they do not typically have any trained auditors on their staffs. Serving as a well-known point of contact for "cigarette cases" would allow ABC to receive useful information from a variety of sources, and to communicate that information to the appropriate agencies. It would also allow them to better coordinate investigations that involve out-of-state locales and police departments, and investigations that require the help of federal agencies. The administrative hearings that ABC would conduct whenever licensees were believed to have broken state or local tobacco laws would also provide yet another avenue to stop the operations of those cigarette traffickers that have established themselves as either "wholesalers" or "retailers."

If ABC were to assume a more prominent role in combating cigarette trafficking, the fees from licensure could offset the costs of hiring more enforcement agents, as well as licensing staff. Further consolidation could be achieved if the issuance of cigarette stamping agent permits and tobacco distributor licenses were transferred from the Virginia Department of Taxation to ABC.

Statutory Changes to Assist in Combatting Cigarette Trafficking

Law enforcement and prosecutors identified a number of specific areas in which Virginia's laws could be strengthened to help combat cigarette trafficking more effectively, both in terms of heightening criminal penalties, and in making it more difficult for traffickers to purchase their cigarettes.

The current felony threshold for cigarette trafficking is 500 cartons or more.[48] Law enforcement has reported that fraudulent retail business owners will frequently purchase around 230 cartons of cigarettes at one time from box store wholesalers. The wholesale cost of this amount is just under $10,000, and is chosen by traffickers in an attempt to circumvent the federal reporting requirements that exist for commercial transactions of $10,000 or more.[49] Lowering the felony threshold to an amount lower than 230 cartons would allow for stronger criminal penalties against cigarette traffickers who do not have a prior criminal conviction in Virginia.

Similarly, in response to the rapid growth of fraudulent retail stores established by traffickers solely for the purpose of purchasing large quantities of cigarettes at wholesale prices, a new criminal offense could be enacted. By statute, a separate and distinct offense of purchasing cigarettes using a forged business license, or one obtained by false pretenses, or using a forged or invalid sales and use tax exemption certificate, or one obtained by false pretenses, could be created. A violation involving 25 cartons or fewer would be a Class 1 misdemeanor, and a second or subsequent offense would be a Class 6 felony; a violation involving more than 25 cartons would be a Class 6 felony, and a second or subsequent offense involving this amount would be a Class 5 felony. This new criminal offense would provide an additional tool which police and prosecutors could use against cigarette traffickers.

In 2014, the definition of an "authorized holder" under Va. Code § 58.1-1000 was changed, to specifically exclude anyone who had been "convicted of a violation of § 58.1-1017 or 58.1-1017.1 [cigarette trafficking]."[50] With this change in the law, it became illegal for any person who had previously been convicted of a violation of Virginia's cigarette trafficking statutes from going into business as a cigarette "retailer" or "wholesaler." Law enforcement and prosecutors reported that although they frequently encountered defendants who had a lengthy history of cigarette trafficking, oftentimes their previous convictions were in other states. Therefore, they were not prohibited from establishing a "retail business" in Virginia and using such guise to purchase large quantities of cigarettes from wholesalers. To remedy this situation, the prohibition against becoming an "authorized holder" of cigarettes in Virginia should be expanded to include anyone who has been convicted of a cigarette trafficking offense in another state or the United States, or anyone who has been convicted of an offense involving tax fraud in connection with the sale of tobacco products.

To assist wholesalers in identifying cigarette traffickers, and those who are not permitted in Virginia to act as "authorized holders," a list of persons known to have been convicted of cigarette trafficking should be developed and maintained. The Office of the Attorney General of Virginia could be given this responsibility, and could publish this list on their website. (Their Office already is responsible for publishing on their website a list of all approved tobacco manufacturers and brands that are authorized for sale in Virginia, per Va. Code § 3.2-4206). Having an easily accessible list of known traffickers would be yet another helpful tool that could assist wholesalers in knowing the identities of at least some individuals to whom it is illegal to sell large quantities of cigarettes at wholesale prices.

Lastly, in order to help with the forensic accounting side of cigarette trafficking investigations, Va. Code § 58.1-1007 could be amended to permit, not only the Virginia Department of Taxation, but also the Office of the Attorney General of Virginia, ABC, and local tax administrators, to have access to all records "relating to the purchase, sale, exchange, receipt or transportation of all cigarettes." These state and local entities have specific responsibilities to ensure that Virginia's laws and regulations regarding cigarettes and cigarette taxes are followed. Allowing them the same access to the types of business records that the Virginia Department of Taxation currently is authorized to review would assist them in identifying suspicious patterns of cigarette purchases or sales.

Summary and Recommendations

The Crime Commission reviewed the information on Virginia's continuing problems with cigarette trafficking, as well as the vulnerabilities that were identified, at its November and December meetings. Staff provided several recommendations as a result of the study effort at the December meeting. All recommendations were endorsed by the Crime Commission; Recommendations 2 through 6 were endorsed unanimously.

Recommendation 1: Require anyone who wants to sell tobacco products to the general public or at the wholesale level in Virginia to obtain a tobacco retail license. Designate the Virginia Department of Alcoholic Beverage Control to manage the tobacco retailing permit system and enforce laws prohibiting the trafficking of cigarettes.

Recommendation 2: Lower the felony threshold level for trafficking cigarettes, in violation of Va. Code § 58.1-1017.1, from 500 cartons to 200 cartons.

Recommendation 3: Create a new statute to make it a criminal offense to purchase cigarettes from a wholesaler using a forged business license, or a forged or invalid sales and use tax exemption certificate. An offense involving 25 cartons or fewer would be a Class 1 misdemeanor for a first offense and a Class 6 felony for a second or subsequent offense. An offense involving more than 25 cartons would be a Class 6 felony for a first offense, and a Class 5 felony for a second or subsequent offense.

Recommendation 4: The definition of an "authorized holder" in Va. Code § 58.1-1000 should be modified, so as to exclude anyone who has been convicted of a cigarette trafficking offense in any locality, state, or the United States, from being able to claim exemption from Virginia's cigarette trafficking statutes. Under the current definition, only convictions under Va. Code §§ 58.1-1017 and 58.1-1017.1 operate as a bar to being an "authorized holder."

Recommendation 5: A list of persons who, due to criminal convictions, are ineligible to be "authorized holders" in Virginia should be developed and maintained by the Office of the Attorney General of Virginia. This list should be easily accessible to wholesalers, to aid them in identifying persons to whom large quantities of cigarettes should not be sold.

Recommendation 6: Amend Va. Code § 58.1-1007 to allow, in addition to the Virginia Department of Taxation, the Office of the Attorney General of Virginia, local tax administrators, and the Virginia Department of Alcoholic Beverage Control access to records involving the purchases and sales of cigarettes.

Senator Bryce Reeves introduced Recommendation 1 as Senate Bill 1230 during the Regular Session of the 2015 Virginia General Assembly. It passed the Senate, but was then left in the General Laws Committee of the House of Delegates.

Recommendation 2 and Recommendation 3 were introduced as Senate Bill 1231 by Senators Bryce Reeves and Janet Howell, and were introduced by Delegate Charniele Herring as House Bill 1807, during the Regular Session of the 2015 Virginia General Assembly. Both bills passed the General Assembly and were signed into law by the Governor on March 17, 2015.[51]

Recommendations 4, 5, and 6 were introduced as Senate Bill 1232 by Senators Bryce Reeves and Janet Howell, and were introduced by Delegate Jennifer McClellan as House Bill 1955, during the Regular Session of the 2015 Virginia General Assembly. Both bills passed the General Assembly, and after technical amendments recommended by the Governor were accepted by the General Assembly, became law on April 15, 2015.[52]

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RAI/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

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[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 § 58.1-1017.1 (2012).
[5] 2013 Va. Acts chs. 567, 623.
[6] Va. Code § 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 § 18.2-246.14 (2012).
[11] 2013 Va. Acts ch. 625.
[12] Id.
[13] 2013 Va. Acts ch. 381.
[14] Id.
[15] Report retrieved from http://www.taxadmin.org/fta/tobacco/papers/tax_burden_2014.pdf. 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 Guam, Puerto Rico, and the Northern Marianas Islands comes from Campaign for Tobacco-Free Kids, updated and rates current as of January 1, 2015, retrieved from http://www.tobaccofreekids.org/research/factsheets/pdf/0222.pdf (last visited on May 5, 2015).
[16] Informal estimates indicate that Virginia is losing several million dollars per year on sales tax that is not being paid on trafficked cigarettes that are illegally purchased at the wholesale level.

[17] Some of the identified fraudulent businesses have since closed, for a variety of reasons; some of them are under current active investigation by law enforcement. Of course, what is unknown is the number of businesses that have not yet been identified, both in the Richmond area and elsewhere in the state.
[18] In order to avoid compromising on-going investigations, specific details of cases are not discussed in this report, unless they have been reported by the press.
[19] As noted in previous studies, the Criminal Interdiction and Counter-terrorism Unit of the Virginia State Police is not specifically tasked with investigating or interdicting cigarette traffickers. The amounts of cash and cigarettes seized were discovered by the Unit in the course of other operational duties. The time frame of January through October was specifically requested to ensure consistency, as this was the time frame provided in previous years. The reported cash seized was specifically in connection with cigarette trafficking, and does not represent cash seized in drug enforcement cases where there was no nexus with cigarettes.
[20] *Supra* note 2, at 8-9.
[21] Va. State Crime Comm'n, Illegal Cigarette Trafficking, S. Doc. 5, 2013 Gen. Assemb., Reg. Sess. at 8-9 (2013).
[22] Id.
[23] Information provided by the New York City Sheriff's Office, e-mail correspondence, May 29, 2015.
[24] Information provided by the New York City Sheriff's Office, e-mail correspondence, Oct. 16, 2013.
[25] Id. at 9.
[26] A number of packs did not have any tax stamp on them, or had counterfeit stamps, or were non-domestic; therefore, it is unknown where they were originally obtained. Information provided by the Brand and Trade Channel Integrity department of Altria Client Services, Inc., e-mail correspondence, Nov. 7, 2014.
[27] Michael LaFaive, Todd Nesbit & Scott Drenkard, *Cigarette Smugglers Still Love New York and Michigan, but Illinois Closing In*, Mackinac Center for Public Policy, Feb. 2015, retrieved from http://www.mackinac.org/20900. Their study from the year before, using data from 2012, indicated that 21.1% of all cigarettes sold in Virginia were leaving the state; Michael LaFaive, Todd Newbit & Scott Drenkard, *Cigarette Smuggling Still Rampant in Michigan, Nation*, Mackinac Center for Public Policy, Feb. 2014, retrieved from http://www.mackinac.org/19725.
[28] At the end of 2014, and in the first few months of 2015, the existence of several large smuggling rings was revealed in newspaper articles. While the Crime Commission had been aware of a number of these, all mention of them was avoided during public meetings in 2014 and in previous reports, unless they had already received attention in the press. Details now provided are limited to those found in the news articles.
[29] The large Marcelino, Ramadan and Khalil trafficking cases were reported in the press in 2013 and 2014, and were included in the review of press articles on cigarette trafficking in the Crime Commission Annual Report for 2013. All press articles included here involve trafficking rings not previously mentioned in Crime Commission reports.
[30] *Chesterfield man faces prison time for crimes involving $19.8 million worth of cigarettes*, WTVR.COM, Sep. 3, 2014, retrieved from http://wtvr.com/2014/09/03/cigarette-conspiracy-crime/.
[31] Zak Koeske, *Big-time cigarette smuggler busted on Staten Island with half-million illegal smokes, DA says*, SILIVE.COM, Nov. 7, 2014, retrieved from http://www.silive.com/news/index.ssf/2014/11/staten_island_cigarette_smuggl.html.
[32] Frank Donnelly, *Up in smoke: 'Big-time' cigarette smuggler admits guilt, faces jail*, SILIVE.COM, Apr. 23, 2015, retrieved from http://www.silive.com/westshore/index.ssf/2015/04/up_in_smoke_big-time_cigarettt.html.
[33] Mark Bowes, *Trio pleads guilty to trafficking Va. cigarettes to NY on "Chinatown" buses*, RICHMOND TIMES-DISPATCH, Feb. 23, 2015, retrieved from http://www.richmond.com/news/local/central-virginia/article_7c57020a-87a6-525d-bd4d-e8996519e95b.html.

[34] Frank Green, *Efforts to curb illicit cigarettes sold widely in New York City*, RICHMOND TIMES-DISPATCH, Mar. 14, 2015, retrieved from http://www.richmond.com/news/article_1e46495b-1be8-54d4-b726-b93ad8886ce3.html.
[41] Frank Green, *Second man pleads guilty in cigarette dealer robberies*, RICHMOND TIMES-DISPATCH, Apr. 6, 2015, retrieved from http://www.richmond.com/news/local/city-of-richmond/article_2b2b2148-2e0f-573e-9953-0464f52d933a.html. The other conspirators were Mickel Marzouk, Derrell Walker, and Mohamed El Shamy. Frank Green, *Cigarette trafficking spawning other crimes*, RICHMOND TIMES-DISPATCH, Mar. 28, 2015, retrieved from http://www.richmond.com/news/local/crime/article_e101477f-1c3d-5117-bcce-f8839f52485c.html.
[36] Frank Green, *Fourth man convicted in series of robberies of area cigarette distributors*, RICHMOND TIMES-DISPATCH, Apr. 16, 2015, retrieved from http://www.richmond.com/news/local/crime/article_e2f46bf6-919a-50e3-bd86-5e7d8f8031a7.html. A fifth man, Dquan Lamar Thomas, has been charged with conspiracy in the case.
[37] Frank Green, *Robbery victim arrested, charged in cigarette trafficking*, RICHMOND TIMES-DISPATCH, Apr. 20, 2015, retrieved from http://www.richmond.com/news/local/crime/article_d0b7c28c-b7d7-513b-b55a-5bace65a6b3a.html.
[38] Id. *See also*, Frank Green, *Alleged cigarette trafficker had millions in sales each month, authorities say*, RICHMOND TIMES-DISPATCH, Apr. 22, 2015, retrieved from http://www.richmond.com/news/article_a315415d-36e6-5097-8b37-e4fdaa85d9df.html.
[39] Frank Green, *Henrico businessman accused of selling cigarettes to traffickers is indicted*, RICHMOND TIMES-DISPATCH, May 7, 2015, retrieved from http://www.richmond.com/news/local/henrico/article_72a82d05-4098-518b-b3f3-b8390ecfb0e6.html.
[40] Scott MacFarlane and Rick Yarborough, *Some Tobacco Shoppers at Va. Warehouse Stores Suspected of Cigarette Smuggling*, NBCWASHINGTON.COM, Apr. 10, 2015, retrieved from http://www.nbcwashington.com/investigations/Tobacco-Shoppers-at-Va-Warehouse-Stores-Suspected-of-Cigarette-Smuggling-299278881.html.
[41] Frank Green, *Cigarette trafficking thriving in Richmond area*, RICHMOND TIMES-DISPATCH, May 2, 2015, retrieved from http://www.richmond.com/news/local/central-virginia/article_c1b62eb1-1c70-5753-826f-89d051340830.html.
[42] Id.
[43] Jerry DeMarco, *Bergen authorities charge six in separate cases of shipping untaxed cigarettes north, payments south*, CLIFFVIEWPILOT.COM, May 1, 2015, retrieved from http://cliffviewpilot.com/bergen-authorities-charge-six-in-separate-cases-of-shipping-untaxed-cigarettes-north-payments-south/.
[44] Id.
[45] Chris Gaudet, *Trio Charged with Fraud, Larceny Involving Credit Cards*, ASHBURN PATCH, May 11, 2015, retrieved from http://patch.com/virginia/ashburn/trio-charged-fraud-larceny-involving-credit-cards-0.
[46] *See, generally*, *supra* note 2 at 56-73.
[47] 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.
[48] VA. CODE § 58.1-1017.1 (2014). Less than 500 cartons, but more than 25 cartons is a Class 1 misdemeanor.
[49] *See, generally*,31 U.S.C. 1051 *et seq*. (2014) ("The Bank Secrecy Act").
[50] 2014 Va. Acts chs. 422, 457.
[51] 2015 Va. Acts chs. 273, 290.
[52] 2015 Va. Acts chs. 738, 754.

Law Enforcement Lineups

Executive Summary

Over the last decade, the Crime Commission has reviewed the issue of eyewitness misidentification and law enforcement lineups, including lineup policies and procedures. As a result of these studies and recommendations, a number of changes have been made in Virginia, including a statutory requirement for law enforcement agencies to have a written lineup policy, the development of training for persons conducting lineups, the creation and revision of the DCJS model lineup policy, and the inclusion of specific lineup procedures as part of lineup policy accreditation standards. DNA exonerations have indicated that mistaken eyewitness identification has been a factor in almost 75% of wrongful convictions.

Based on this year's recent survey and analysis of collected policies conducted by Crime Commission staff, it appears almost every single law enforcement agency with primary law enforcement duties has a written policy as required by Virginia law. Furthermore, over half of the responding law enforcement agencies have adopted a lineup policy that is nearly identical or substantially similar to the DCJS model policy. An additional number of remaining responding agencies have adopted many of the features and procedures of the revised DCJS model policy, which includes blind administration, showups, folder shuffle method, witness instructions, and confidence statements.

As a result of this study, detailed findings and survey results were presented to the Crime Commission at the October meeting. At the December Crime Commission meeting, members considered the following policy options:

> **Policy Option 1:** Should Virginia law enforcement agencies be required by statute to adopt:
>
> - "Evidence-based practices" in their written lineup policy?
> - A policy that references certain procedures, such as blind administration?
> - A policy that has detailed prescriptions on how procedures are to be carried out, such as Connecticut enacted?
> - The DCJS model policy?
>
> **Policy Option 2:** Should Virginia law enforcement agencies be mandated by Code to follow specific procedures for conducting lineups?

There was no motion made on either of these policy options at the December Crime Commission meeting.

Background

The Crime Commission has studied the issue of eyewitness misidentification and law enforcement lineups on two separate occasions, in 2004 and 2010. The reason for concern regarding lineup procedures is that out of the 330 DNA exonerations nationwide, over 70% involved an eyewitness misidentification.[1] At least 16 of these DNA exonerations occurred in Virginia, with 81% (13 of 16) of the cases involving an eyewitness misidentification as a contributing factor.[2]

2004 Crime Commission Mistaken Identity Study

In 2004, the Crime Commission studied mistaken identification as a result of House Joint Resolution 79 (HJR 79).[3] The study resolution specifically requested the Crime Commission to review DNA exoneration cases, examine traditional lineup procedures, and review the sequential method for conducting lineups.[4] As a result of the 2004 study recommendations, the following was accomplished:

1. Va. Code § 19.2-390.02 was enacted, which requires a written lineup policy for the Department of State Police and each local police department and sheriff's office;
2. The Department of Criminal Justice Services (DCJS) created a model policy (Order 2-39) for lineups; and,
3. The Virginia State Police was required to maintain, in the CCRE, a photo of each individual arrested, per Va. Code § 19.2-390, to be used for photographic lineups.

2010 Crime Commission Lineup Study

In 2010, Crime Commission staff conducted a survey and reviewed the status of lineup policies based upon House Bill 207.[5] As part of the lineup survey policy analysis, staff reviewed specific criteria, such as the use of blind administration, sequential method, and other best practices. Blind administration is a procedure where the person administering the lineup is not working on the investigation or is otherwise unaware of the suspect's identity.[6] This procedure reduces the chance of accidental or inadvertent influence on the eyewitness.[7] Crime Commission staff also reviewed the sequential method, which is the process of showing suspects to eyewitnesses one at a time, rather than simultaneously.[8] The sequential method, when used in conducting a lineup procedure, helps eyewitnesses avoid using relative judgment, as it relies more on the witnesses' own memory of the perpetrator.[9]

Staff received survey responses from 95% (127 of 134) of primary law enforcement agencies, with 25% (32 of 127) of those agencies responding that they did <u>not</u> have a written lineup policy as required by Va. Code § 19.2-390.02. Staff also reviewed and analyzed 82 lineup policies that were submitted as a result of the survey. As Table 1 illustrates, only 21% (17 of 82) of responding law enforcement agencies had lineup policies that were identical or substantially similar to the DCJS model policy in 2010.

Table 1: 2010 Lineup Policy Analysis Findings

Type of Requirement or Preference	Total Number of Agencies (n=82)
Require that fillers similar to the suspect be used	77
Use the sequential method	54
Require the use of a current picture of the suspect	51
Require administrators to refrain from influencing the witness	48
Provide formal instructions for witnesses	47
Mandate only one suspect per lineup	45
Require documented results of the lineup	45
Separate the witnesses if there are more than one	38
Preference for a video or audio recording of the lineup	17
Have policies that are substantially similar to DCJS model policy (Order 2-39)	17
Require independent administrators	5

Source: Virginia State Crime Commission Lineup Survey, 2010.

As a result of the 2010 study, the Crime Commission endorsed three recommendations:

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

   Status: DCJS conducted five training sessions in 2012 and made the course available online for training academies to use as part of their training programs.[10] Additionally, DCJS developed an updated model policy in November 2011.[11] This policy revision incorporated a number of best practices that were not in the previous version of the policy. The new policy revision recommended use of blind administration and/or a "blinded" administrator, or use of the folder shuffle method.[12] The revision also added requirements for documenting witness confidence statements at the time of identification and included instructions on show-up procedures.[13] Since 2011, the policy has been updated three times - July 2012, September 2013, and March 2014.[14]

2. Request DCJS to conduct a policy compliance audit and report findings to the Crime Commission.

   Status: DCJS made a presentation to the Crime Commission at the November 2011 meeting and published its findings in spring 2012.[15]

3. Request the Virginia Law Enforcement Professional Standards Commission (VLEPSC) to consider revising the accreditation standard for lineups.

   Status: Crime Commission staff made a presentation to the VLEPSC board in 2011, informing members about the results of the study and about the Commission's request for VLEPSC to consider adopting an updated standard concerning lineups. In January 2013, VLESPC adopted a revised accreditation standard, which incorporated elements of the revised DCJS model policy.[16]

Crime Commission staff also made a presentation to both the Virginia Sheriffs' Association and the Virginia Association of Chiefs of Police on results of the 2010 study.

Update on Other States

A review of other states indicates that at least 14 states specify lineup procedures in their statutes. At the time of the 2010 study, there were only nine states that had addressed lineups by statute or statewide regulation.[17] Since that time, at least five more states have added statutory requirements for lineup procedures, as discussed in detail below.

Connecticut: In 2012, Connecticut passed a requirement for all law enforcement agencies to adopt a model policy that was to be developed by the state police. These policies would need to include blind administration, sequential presentation, instructions, proper filler selection, and certainty statements.[18]

Nevada: In 2011, the legislature passed a bill that requires all law enforcement agencies to adopt written polices for "live lineups, photo lineups, and show-ups."[19]

Rhode Island: A legislative task force recommended that a statewide lineup policy be adopted with best practices, including blind administration, in 2011.[20]

Texas: The legislature enacted a statutory mandate, in 2011, which requires specific and detailed procedures that must be contained in agency lineup policies, including blind administration, sequential method, and witness instructions.[21]

Vermont: In 2014, the legislature passed a bill, which requires all state law enforcement agencies to adopt a policy that includes blind administration, sequential method, and recording the witness confidence statement.[22]

Recent Studies

In 2013, Professor Brandon Garrett of the University of Virginia School of Law conducted a study on law enforcement lineups in Virginia.[23] Professor Garrett sent out a survey and requested lineup policies from over 350 Virginia law enforcement agencies.[24] Professor Garrett's study included all law enforcement agencies, including

those that are not responsible for primary law enforcement duties. He received 201 responses, with an approximate 57% response rate.[25] Of the 201 agencies that responded, 144 provided a copy of their lineup policy.[26] Some of the findings from his report included:

- The revised DCJS model policy is excellent;[27]
- 40% (58 of 144) of law enforcement agencies included blind administration procedures available as an option;[28]
- Very few agencies required the use of blind administration; [29]
- Only nine agencies included the folder shuffle method;[30]
- 63% (91 of 144) of respondents offered sequential lineups;[31]
- 43 agencies did not address avoiding suggestiveness in their lineup procedure;[32]
- 61% (88 of 144) had standard instructions to witnesses;[33] and,
- 71 of 144 agencies required taking a witness confidence statement.[34]

Professor Garrett's conclusion was that the "majority of Virginia law enforcement agencies still followed earlier and outdated model policies" and more should be done to disseminate best practices to law enforcement agencies.[35] Due to the confidentiality of responses in Professor Garrett's study and the fact that results were not specific for law enforcement agencies with primary responsibilities, it is impossible to make any comparisons to the past and current Crime Commission surveys and policy analyses.

2014 Lineup Policy Status

In 2014, Crime Commission staff requested copies of lineup policies from law enforcement agencies with primary law enforcement duties. By October 2014, when the presentation was made to Crime Commission members, there was a 90% (122 of 135) response rate.[36] Staff completed an analysis of the lineup policies to see how congruent they were with the current DCJS model policy. A number of elements from the DCJS model policy were evaluated in the analysis to include:

- Similarity to the DCJS model policy;
- Training;
- Show-up procedures;
- Blind administration;
- Folder shuffle method;
- Requirement for current photograph of suspect;
- Similar fillers;
- Sequential method;
- Administrators refraining from influencing witnesses;
- One suspect per lineup;
- Witnesses separated -if more than one;
- Witness instructions;
- Document procedure;

- Record confidence/certainty statements; and
- Video recording of identification process.

Overall, staff found that 46% (56 of 122) of agencies submitted a policy nearly identical to the DCJS model policy. An additional 9% (11 of 122) of the submitted policies are substantially similar to the DCJS model policy. In terms of the use of a blind lineup administrator, staff found that 10% (12 of 122) of agencies require this method, 69% (83 of 122) use a blind administrator whenever practicable/optional, and 22% (27 of 122) do not include this method in their policies. Table 2 provides a detailed breakdown of findings from the 2014 policy analysis:

Table 2: 2014 Lineup Policy Analysis Findings

Type of Requirement or Preference	Total Number of Agencies (n=122)
Require that fillers similar to the suspect be used	122
Use the sequential method	117
Require the use of a current picture of the suspect	109
Require administrators to refrain from influencing the witness	106
Provide formal instructions for witnesses	115
Mandate only one suspect per lineup	114
Require documented results of the lineup	116
Separate the witnesses if there are more than one	102
Require training for persons conducting lineups	89
Include the folder shuffle method as an option	77
Include a section on show-ups	103
Record confidence/certainty statements	106

Source: Virginia State Crime Commission Lineup Survey, 2014.

Crime Commission members requested that staff continue to follow-up with the non-responding agencies in an effort to determine statutory compliance for a written lineup policy. By December 2014, staff confirmed that 99% (133 of 135) of law enforcement agencies with primary law enforcement duties have a written lineup policy. The remaining two offices did not respond to multiple requests; therefore staff is unable to determine if they have a written policy or not.

Sheriff Brian Roberts, Brunswick County, recently requested an informal opinion from the Attorney General's Office regarding whether a MOU between a jurisdiction's sheriff's office and its primary law enforcement agency satisfies the requirements of Va. Code

§ 19.2-390.02. The informal opinion stated that a MOU with a primary agency is an acceptable way to comply with the statute, as the statute does not specify what the terms of the policy must be, only that the policy must be written. Therefore, a sheriff's office's policy can consist of an agreement that "whenever a lineup needs to be carried out, the local police agency will do this for us."

Summary

The Crime Commission has studied the issue of eyewitness misidentification and law enforcement lineups three times in the past ten years. As a result of the past decade of work, the Crime Commission has recommended: a statutory requirement for agencies to have a written lineup policy; the development of training; creation of the DCJS model policy; and, the inclusion of lineup policy specifics as part of accreditation standards. All of these recommendations have been implemented.

Based on this year's recent survey and analysis of lineup policies conducted by Crime Commission staff, it appears that almost every single law enforcement agency with primary law enforcement duties has a written policy as required by Virginia law. Furthermore, over half of the responding law enforcement agencies have adopted a lineup policy that is nearly identical or substantially similar to the DCJS model policy. It also appears that a significant number of responding agencies have adopted several facets of the revised DCJS model policy, including blind administration, show ups, folder shuffle method, witness instructions, and confidence statements.

As a result of this study, detailed study findings and survey results were presented to the Crime Commission at the October meeting. At the December Crime Commission meeting, members considered the following policy options:

Policy Option 1: Should Virginia law enforcement agencies be required by statute to adopt:

- "Evidence-based practices" in their written lineup policy?
- A policy that references certain procedures, such as blind administration?
- A policy that has detailed prescriptions on how procedures are to be carried out, such as Connecticut enacted?
- The DCJS model policy?

Policy Option 2: Should Virginia law enforcement agencies be mandated by Code to follow specific procedures for conducting lineups?

There was no motion made on either of these policy options at the December Commission meeting.

[1] *See*, http://www.innocenceproject.org/ (last visited June 30, 2015).
[2] Id.
[3] H.J.Res. 79, Gen. Assemb., Reg. Sess. (Va. 2004).
[4] Id.
[5] H.B. 207 Va. General Assemb. (2010).
[6] *See, generally*, Gary L. Wells, *The Double-Blind Lineup. General Comments and Observations*, GARY WELLS, retrieved from http://www.psychology.iastate.edu/~glwells/Meet_the_Double-Blind_Lineup.doc (last visited December 8, 2014).
[7] Id.
[8] H.D. 40, REPORT ON MISTAKEN EYEWITNESS IDENTIFICATION, Virginia State Crime Commission, 9-10 (2005), retrieved from http://leg2.state.va.us/DLS/H&SDocs.NSF/4d54200d7e28716385256ec1004f3130/cece4e476d79218985256ec500553c3b?OpenDocument.
[9] Id.
[10] Information provided by DCJS.
[11] General Order 2-39, http://www.dcjs.virginia.gov/cple/sampleDirectives.
[12] Id. The folder shuffle method is a procedure that allows a photographic lineup to be performed by an administrator who is aware of the suspect. This is accomplished by inserting pictures into marked folders, and allowing the witness to self-administer the procedure.
[13] Id.
[14] Id.
[15] *See* http://www.dcjs.virginia.gov/research/documents/12LawEnforceLineup.pdf.
[16] Virginia Law Enforcement Program Manual, OPR.03.07, 03.08, retrieved from http://www.dcjs.virginia.gov/accred/documents/6th-EditionProgramManual-V7.pdf
[17] VA. STATE CRIME COMM'N, LAW ENFORCEMENT LINEUPS (2010), retrieved from http://vscc.virginia.gov/documents/Law%20Enforcement%20Lineups.pdf.
[18] CONN. GEN. STAT. § 54-1p (2014).
[19] NEV. REV. STAT. ANN. § 171.1237 (Lexis-Nexis 2014).
[20] R.I. GEN. LAWS § 12-1-16 (2014).
[21] TEX. CODE CRIM. PROC. art. 38.20 (West 2014).
[22] VT. STAT. ANN. tit. 13 § 5581 (2014).
[23] Brandon Garrett, *Eyewitness Identifications and Police Practices: A Virginia Case Study*, 2 VA. J. CRIM. L., 1 (2014), retrieved from http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2313908.
[24] Id.
[25] Id.
[26] Id.
[27] Id. at 10.
[28] Id. at 13
[29] Id.
[30] Id. at 14.
[31] Id. There is an ongoing debate over whether sequential photo lineups or simultaneous photo lineups are more valid or reliable. A study by the National Academy of Sciences (Oct. 2014) has recommended that lineup procedures should include: blind administration, contemporaneous confidence statements, witness instructions, and videotaping of the procedure. However, the study did not take a position on sequential versus simultaneous presentation of photos, indicating the need for further research on the issue. *See* Identifying the culprit: Assessing eyewitness identification. Washington, D.C.: The National Academies Press. Retrieved from http://www.nap.edu/download.php?record_id=18891#.
[32] Id. at 15.
[33] Id. at 16.
[34] Id. at 17.
[35] Id. at 17-20.

[36] The total number of policies received at this time of report was 133, with only two agencies failing to comply with the survey request. Only 122 policies were analyzed for the October 21, 2014, presentation, as the other 11 were received after this meeting.

Missing Persons/Search and Rescue

Executive Summary

Senate Joint Resolution 64, patroned by Senator Ryan McDougle, and House Joint Resolution 62, patroned by Delegate David Albo, were introduced during the Regular Session of the 2014 General Assembly. Both resolutions, which are identical, focused upon the current state of readiness of Virginia's law enforcement and search and rescue efforts for rapid and well-coordinated deployment in all missing, endangered, and abducted person cases. The resolution specifically mandated the Crime Commission to:

(i) Examine cases where a well-coordinated, large-scale, rapid search and rescue effort was not deployed… and each endangered or abducted child/person case that did not result in the rescue or recovery of the missing person;
(ii) Examine cases in which an endangered or abducted person/child did result in the rescue or recovery of the missing person and how the response of the law enforcement agency with jurisdiction was different;
(iii) Determine how often the search strategies from the Washington Study have been immediately deployed (within hours of the report) in Virginia on endangered and abducted person cases and why those strategies were not deployed immediately in other cases;
(iv) Consider the time delays in Virginia for engaging the national media and reasons for those delays; and,
(v) Consider reasons for lack of support from the National Center for Missing and Exploited Children, including situations in which there have been long delays in deployment of missing child information, activation of amber alerts, and provision of support services for families.

The Crime Commission was also directed to examine what needs to be done in order to get improved, large-scale rapid search and rescue coordination efforts; immediate notification to the Virginia Department of Emergency Management (VDEM) when a person is determined to be endangered or abducted; additional resources and staffing needs for VDEM and law enforcement; cross-training between command staff and VDEM's Search and Rescue Program; support services for the families of missing persons; and, to implement other recommendations the Crime Commission deems necessary.

In order to address the study mandate, Crime Commission staff examined relevant literature, collected available data from state and federal agencies, completed a 50-state statutory review, disseminated surveys to all Virginia law enforcement agencies, reviewed Virginia law enforcement agencies' general orders/policies pertaining to missing children and adults, and participated in a three-day Land Search and Rescue

training hosted by the Virginia State Police (VSP). Additionally, staff met with the families of missing persons and numerous federal, state, and local representatives. The resolutions specifically mentioned the cases of Alicia Showalter Reynolds, Morgan Harrington, and Alexis Murphy; however, other on-going cases, including Hannah Graham, were also examined.

Each missing person case is unique. Individuals go missing for a number of reasons, some even voluntarily. Not all cases of missing persons involve a criminal investigation or an actual search and rescue effort. However, it is important to note that any search and rescue mission is an emergency and time is of the essence. Search and rescue missions are built upon a well-established methodology based on both empirical evidence and years of field experience. While search and rescue missions are distinct from any on-going criminal investigation, search efforts are not random and are based on leads developed from the criminal investigation.

Data pertaining to missing persons is available at both the federal and state levels. Crime Commission staff retrieved national data from the FBI's National Crime Information Center (NCIC) and state data from the VSP. In Virginia, all missing person records are entered into the NCIC, as well as the Virginia Criminal Information Network (VCIN). In 2013, 10,946 missing person records were entered into NCIC/VCIN. The vast majority of records, 84%, were for missing children and the remaining 16% of records were for missing adults. Of the missing children records, 94% were classified as runaways between the ages of 12 to 17, consistent with national trends. The classification for abductions and kidnapping was the smallest category for both children and adults, also consistent with national trends. While many records are entered into NCIC/VCIN each year, many more are also cleared or cancelled within the same time period when a subject is located or returns home. As of October 21, 2014, there were 600 *active* missing person cases in Virginia going back to as early as 1973; 367 children and 228 adults, respectively.

The Code of Virginia is silent on missing persons 21 to 60 years of age, as well as those over the age of 60 who do not meet the definition of a "missing senior adult." A legal analysis revealed that the Code of Virginia does provide some guidance on missing persons by defining a "missing child" and a "missing senior adult" under Virginia Code §§ 52-32 and 52-34.4, respectively. Reports for these missing individuals must be submitted to the VSP's Missing Children Clearinghouse within two hours. There is no waiting period for law enforcement to accept missing child and missing senior adult reports. Crime Commission staff recommended that a mechanism be established for the receipt of "critically missing adult" reports similar to the mechanisms for missing children and senior adults. Staff also recommended that the VDEM's Search and Rescue Program be notified of all critically missing adult and children cases. Immediate notification of these reports that could potentially result in a search and rescue effort is vital for awareness and preparedness.

Virginia has several specialized statewide alert systems for certain missing persons, such as the AMBER Alert (for abducted children under the age of 18 or those enrolled in a secondary school, regardless of age) and the Senior Alert (for seniors over the age of 60 who have specific cognitive impairments). However, there are no such alert systems

available for missing persons 18 years of age or older who do not meet the definition of either an "abducted child" or a "missing senior adult."

Based upon existing research, survey results, and numerous discussions with subject matter experts, staff made additional recommendations to include: additional resources/equipment for search and rescue missions, creation of model policies and practices, development of training, education/awareness, and additional resources for the families of missing persons. Overall, it was clear that the issue of missing persons/search and rescue needed to be elevated statewide and within both VDEM and the VSP.

The Search and Rescue Program at VDEM has a dual role of 1) providing specialized search and rescue training, at no cost, to all types of first responders; and, 2) carrying out actual search and rescue operations upon request from local jurisdictions. In 2014, VDEM was requested to assist in over 100 search missions and provided training to more than 600 personnel. The Search and Rescue Program is currently staffed by only two individuals, which makes it extremely difficult to provide needed services in both areas of responsibility. For example, if staff members are requested to assist in a search and rescue mission when a training was scheduled, the training may have to be rescheduled or cancelled. In order for VDEM to provide effective training, resources, and assistance to the field, Crime Commission staff recommended that a Search and Rescue Coordinator position be created at VDEM to oversee all search and rescue missions and training between civilian and state agencies, as well as two regional coordinator positions to provide a regional response to missions and training needs. The Code is silent on the search and rescue of missing persons. A designated point of contact at the state level, by Code, could provide law enforcement with a much needed resource to request assistance when needed. Nothing in this Crime Commission recommendation is to be construed as authorizing VDEM to undertake direct operational responsibilities away from local or state law enforcement in the course of search and rescue or missing person cases. Nor does it preclude VDEM from acting as the Search Mission Coordinator when requested to do so by local or state law enforcement.

Similarly, Crime Commission staff recommended that a full-time Search and Rescue Coordinator position be created at the VSP. It should be noted that the role of this Coordinator is distinct from any of the roles or responsibilities of the proposed VDEM Search and Rescue Coordinator. Currently, search and rescue responsibilities are handled by an Area Commander, in addition to routine patrol assignments and other duties. This creates difficulties when the Area Commander is pulled off the road for search and rescue missions/trainings. A full-time Search and Rescue Coordinator would be able to devote full attention to this issue and oversee the currently existing VSP Search and Recovery Team (over 20 highly trained search and rescue personnel), coordinate the Tactical Field Force for search and rescue response (approximately 300 sworn personnel), supervise VSP search and rescue responses, and maintain all training requirements and requests for training. Crime Commission staff also recommended that available resources be increased at the VSP for search and rescue equipment, as responders are responsible for purchasing most of their equipment out-of-pocket, such as safety gear, GPS units, and backpacks. Additional resources are also needed at the

VSP's Missing Children Clearinghouse. They currently operate under very limited resources even though their caseload has increased enormously since they were established in the mid-1980s. An additional non-sworn staff position was recommended to effectively meet the Clearinghouse's overall mission, to upload missing adult information to the website consistently, to provide training to law enforcement on missing children, and to provide already-developed prevention programs on child safety and internet safety to children and parents.

Virginia law enforcement needs better guidance and training on how to respond to search and rescue emergencies. There appears to be no comprehensive, up-to-date model policies on missing persons or search and rescue. While accreditation standards require a policy on missing persons, agencies need assistance in creating thorough general orders for adoption. In light of this, Crime Commission staff recommended that the Department of Criminal Justice Services (DCJS) be required to establish and publish model policies for missing children, missing adults, and search and rescue. Additionally, staff recommended that they, themselves, convene key stakeholders to develop a detailed checklist for first responders who respond to these types of cases in the field. Training standards for law enforcement and dispatchers also need to be reviewed, revised and developed as necessary. Staff recommended that DCJS be required to establish training standards for missing persons, as well as search and rescue. Well-established training curricula for search and rescue exist and can easily be modified and adopted for Virginia's law enforcement and dispatchers. To promote general education and awareness of the topic, it was also recommended that Crime Commission staff coordinate with the Virginia Association of Chiefs of Police and the Virginia Sheriffs' Association. Finally, it was abundantly evident from discussions in the field that families of missing persons do not often have adequate resources or information available to them in these cases. Staff recommended that DCJS be requested to create a family resource guide for missing persons, which should be available online as a reference.

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 unanimously endorsed all of the following twelve recommendations at its December meeting:

Recommendation 1: Statutorily require the creation of a Search and Rescue Coordinator position at the Va. Department of Emergency Management under Va. Code § 44-146.18.

Recommendation 2: Create a Search and Rescue Coordinator position at the Va. State Police.

Recommendation 3: Create an additional FTE position at the Va. State Police's Missing Children Clearinghouse to assist with responsibilities of training, record keeping, compliance, and technical assistance to law enforcement agencies in reporting missing persons.

Recommendation 4: Increase available resources for search and rescue missions at the Va. State Police.

Recommendation 5: Create two regional Search and Rescue Coordinator positions at the Va. Department of Emergency Management to provide a regional response for missions and training needs.

Recommendation 6: Statutorily require the creation of a mechanism for receipt of reports for critically missing adults under proposed new statute, Va. Code § 15.2-1718.2.

Recommendation 7: Amend Va. Code § 9.1-102 to require the Va. Department of Criminal Justice Services to establish and publish model policies for missing children, missing adults, and search and rescue efforts.

Recommendation 8: Amend Va. Code § 9.1-102 to require the Va. Department of Criminal Justice Services to develop training standards for missing persons and search and rescue.

Recommendation 9: Request the Va. State Police to examine programmatic efforts to provide immediate notification to the Va. Department of Emergency Management when a critically missing child or adult is entered into VCIN.

Recommendation 10: Request Crime Commission staff to facilitate convening the Va. Department of Criminal Justice Services, the Va. Department of Emergency Management, Va. State Police, Va. Sheriffs' Association, the Va. Association of Chiefs of Police, and others to create a detailed checklist for Virginia's first responders.

Recommendation 11: Request the Va. Department of Criminal Justice Services to create a family resource guide for missing persons and make available online.

Recommendation 12: Coordinate with the Va. Sheriffs' Association and the Va. Association of Chiefs of Police to promote law enforcement awareness.

Recommendations 1, 6, 7 and 8 were combined into an omnibus bill. The omnibus bill was introduced in both the Virginia Senate and House of Delegates: Senator Ryan McDougle patroned Senate Bill 1184 and Delegate Charniele Herring patroned House Bill 1808 during the 2015 Regular Session of the Virginia General Assembly. Both bills were signed into law by the Governor on March 16, 1015 and are effective as of July 1, 2015.[1] Two budget amendments relating to Recommendations 1 through 5 to provide additional positions and funding to VDEM and VSP were introduced by Senator McDougle during the 2015 Session. Both of the budget amendments were partially funded to support the creation of search and rescue coordinators for each agency and one-time vehicle and equipment costs, as well as recurring costs for training, travel and materials.[2]

Background

Senate Joint Resolution 64, patroned by Senator Ryan McDougle, and House Joint Resolution 62, patroned by Delegate David Albo, were introduced during the Regular Session of the 2014 General Assembly. Both resolutions, which are identical, focused upon the current state of readiness of Virginia's law enforcement and search and rescue efforts for rapid and well-coordinated deployment in all missing, endangered, and abducted person cases. The resolution specifically mandated the Crime Commission to:

(i) Examine cases where a well-coordinated, large-scale, rapid search and rescue effort was not deployed… and each endangered or abducted child/person case that did not result in the rescue or recovery of the missing person;
(ii) Examine cases in which an endangered or abducted person/child did result in the rescue or recovery of the missing person and how the response of the law enforcement agency with jurisdiction was different;
(iii) Determine how often the search strategies from the Washington Study have been immediately deployed (within hours of the report) in Virginia on endangered and abducted person cases and why those strategies were not deployed immediately in other cases;
(iv) Consider the time delays in Virginia for engaging the national media and reasons for those delays; and,
(v) Consider reasons for lack of support from the National Center for Missing and Exploited Children, including situations in which there have been long delays in deployment of missing child information, activation of amber alerts, and provision of support services for families.

The Crime Commission was also directed to examine what needs to be done in order to get improved, large-scale rapid search and rescue coordination efforts; immediate notification to the Virginia Department of Emergency Management (VDEM) when a person is determined to be endangered or abducted; additional resources and staffing needs for VDEM and law enforcement; cross-training between command staff and VDEM's Search and Rescue Program; support services for the families of missing persons; and, to implement other recommendations the Crime Commission deems necessary.

In order to address the study mandate, Crime Commission staff examined relevant literature, collected available data from state and federal agencies, completed a 50-state statutory review, disseminated surveys to all Virginia law enforcement agencies, reviewed Virginia law enforcement agencies' general orders and policies pertaining to missing children and adults, and participated in a three-day Land Search and Rescue training hosted by the Virginia State Police (VSP). Additionally, staff met with the families of missing persons and numerous federal, state, and local representatives.

Recent cases have once again brought attention to the issue of missing persons in Virginia. Both resolutions specifically mentioned the cases of Alicia Showalter Reynolds,[3] Morgan Harrington,[4] and Alexis Murphy.[5] And, although occurring after the resolutions' passage, three additional cases in Virginia brought increased media attention: the abduction and murder of Hannah Graham,[6] the kidnapping and murder of Kevin Quick,[7] and the accused abductor Delvin Barnes.[8] All of these cases are currently on-going investigations. As will be discussed later, there are hundreds of other cases involving missing persons in Virginia.

Introductory Overview[9]

Missing person cases vary widely. Individuals can go missing for a variety of reasons; some go missing intentionally while others go missing unintentionally or are taken by force or coercion (i.e., abduction). In general, a "missing person" is when an individual's whereabouts are unknown and knowledgeable persons regard the disappearance as unusual or uncharacteristic. Critical risk factors include when the person is:

- Possibly the subject of foul play or suspicious circumstances;
- Under the age of 13;
- Beyond the "zone of safety" for age and developmental stage;
- Has a disability or mental condition that is potentially life threatening if left unattended;
- In danger to himself or to others;
- In the company of individuals who could endanger the person's welfare;
- Involved in a boating, swimming, or other sporting accident or natural disaster; or,
- Absent in a way that is inconsistent with established patterns of behavior.[10]

Some missing person cases involve a criminal investigation; some entail an actual, physical search for the person, while others do not. Many situations can lead to individuals becoming missing and require searches, including natural disasters (tornadoes, earthquakes, tsunamis, hurricanes, flooding, etc.), unnatural disasters (aircraft crashes, building or other structural collapses, terrorism, acts of war, etc.), and other criminal acts (abduction/kidnapping, etc.). The most important point to take away from any search and rescue (SAR) effort is that it is an emergency and time matters. Search and rescue efforts have a clearly established methodology based on empirical evidence and experience in the field.[11] It must be noted that SAR missions are distinct from the criminal investigation; however, SAR missions are based on intelligence and leads received from the criminal investigation and should not be random.

While anyone can go missing, the vast majority of the literature focuses its attention on missing children, primarily in the context of investigating such cases. Many guides and reports exist that focus on investigating missing children in general,[12] while others focus more specifically upon family/international abductions,[13] infant abductions,[14] or children missing from care,[15] for example. A study specifically mentioned in the resolutions (referred to as the "Washington Study"), although somewhat dated, provides one of the few attempts to capture aggregate trends in missing children homicides.[16] Some of the study's important findings include:

- Most missing children are found shortly after being reported missing with no evidence of foul play;[17]
- Even for children who are taken against their will, the majority return home alive;
- It is a very rare event for a child to be abducted and killed by a stranger;[18] and,
- The first three hours are the most critical in abducted children cases– 74% of abducted children who are murdered are dead within three hours of the abduction.

The report notes the following lessons for law enforcement and parents/guardians:

- Any report of a missing child must be taken seriously;
- The importance of responding quickly with a neighborhood canvass;[19]
- Parents must ensure that children are appropriately supervised; and,
- Parents must call the police immediately, without delay, if their child goes missing.[20]

There is far less literature relating to adults who go missing. Some of the difficulty with adults is that there is no authority for law enforcement to detain an adult who is safe and of sound mind, has not committed a crime, and presents no danger to themselves; i.e., has decided to voluntarily "go missing." There are, however, response options for certain populations of adults who go missing that will be discussed later. The remainder of this report focuses upon a number of additional issues, with specific attention to relevant data, legal considerations, and available resources in Virginia.

Relevant Data

Data related to missing persons is available at both the national and state levels. Staff retrieved publicly available information from the FBI for national data and made a request to the VSP for state-level data.

National Data

The FBI's National Crime Information Center (NCIC) has collected information on missing persons since 1975. The NCIC's missing person file requires missing persons to be classified into one of the following categories: disability, endangered, involuntary, juvenile, catastrophe, or other. Many records are entered and/or removed from NCIC each year. For example, in 2013, a total of 627,911 missing person records were entered into NCIC, but an additional 630,990 were cleared or cancelled within the same timeframe.[21] Clearances and cancellations are due to the subject being located by law enforcement, returning home, or when a record is deemed invalid. While the total number of active missing person records varies each day, on December 31, 2013, there were 84,136 active missing person records in NCIC:

- 48% (40,581 of 84,136) were for adults 21 years of age and older;
- 40% (33,849 of 84,136) were for juveniles 17 years of age and under; and,

- 12% (9,706 of 84,136) were for children between the ages of 18 to 20.[22]

It should be noted that in 2003, federal law extended the age of mandatory missing children record entry to include individuals between the ages of 18-20 years old.[23]

An "Unidentified Person File," which came online in 1985, is also maintained by NCIC. The NCIC's Unidentified Person File contains records of: unidentified deceased persons; persons of any age who are living and unable to determine their identity (i.e., amnesia victim, infant, etc.); and, unidentified catastrophe victims. There were 866 unidentified persons entered into the File in 2013: 73% (632 of 866) were deceased unidentified bodies, 25% (216 of 866) were living but unable to ascertain identity, and 2% (18 of 866) were catastrophe victims.[24] When looking at the total number of active cases, as of December 31, 2013, there were a total of 8,045 active unidentified person records in NCIC.[25]

Virginia Data

In Virginia, all missing person records are entered into the FBI's NCIC and the Virginia Criminal Information Network (VCIN). In Calendar Year 2013 (CY13), 10,946 missing person records were entered into NCIC. The vast majority, 84% (9,192 of 10,946) were for missing children and another 16% (1,754 of 10,946) were for missing adults in Virginia. The NCIC requires a classification for each missing person. The vast majority of children, 94% (8,677 of 9,192) were classified as "juvenile," which is the designation for runaways between the ages of 12-17. This is consistent with national data indicating that 96% of all missing children are classified in this category.[26] The "involuntary" classification for both children and adults represents situations involving abduction or kidnapping and is the smallest category--less than 1% for each. These percentages are also consistent with national trends, which show that less than 1% of cases involve abduction by a non-custodial parent and less than half a percent involve abduction by a stranger.[27] Table 1 illustrates the total number of missing persons reported in Virginia by NCIC category in CY13.

Table 1: Total Missing Persons Reported in Virginia by NCIC Category, CY13

NCIC Category	Children	Adults
Disability	61	534
Endangered	160	511
Involuntary	46	15
Juvenile	8,677	n/a
Other	248	694
TOTAL	**9,192**	**1,754**

Source: Va. State Police.

Similar to national NCIC data, there are far fewer missing person records that are active in Virginia. As of October 21, 2014, there were just under 600 active missing person

records: 367 children (ages 0 to 20) and 228 adults, respectively. Active cases go back as early as 1973.

Virginia Law

The Code of Virginia does provide some guidance on missing persons and provides definitions for missing children and missing senior adults. Table 2 summarizes some of the information that will be discussed in greater detail in the following pages.

Table 2: Virginia Definitional Statutes Related to Missing Persons

Definition	Va. Code	Applies to	Note
Missing Child	§ 52-32	20 years of age and younger.	Federal law mandated that the definition of a missing child, for purposes of missing reports, be extended from 17 years of age to 20 years of age per 42 USC 5779(c).
Missing Senior Adult	§ 52-34.4	Certain persons over the age of 60.	Is limited to those who suffer a cognitive impairment to the extent that the person is unable to care for oneself without assistance from a caregiver, to include a diagnosis of Alzheimer's Disease or dementia.
Abducted Child	§ 52-34.1	17 years of age or younger; or, is currently enrolled in secondary school, regardless of age.	Virginia goes above the requirements of the federal AMBER Alert by extending the coverage to any person enrolled in Virginia secondary school, regardless of age.
AMBER Alert	§§ 52-34.1 and 52-34.3	Those meeting the definition of an "abducted child" and all other specified criteria.	An Alert will only be activated if all criteria are met.
Endangered Missing Child Media Alert	Not defined by Code	Typically limited only to those meeting nearly all of the requirements for an AMBER Alert.	May be issued, at the discretion of the VSP, for cases that meet all of the AMBER Alert criteria except for one.
Senior Alert	§§ 52-34.4 thru 52-34.6	Those meeting the definition of a "missing senior adult."	An Alert will only be activated if all criteria are met.

Source: Va. State Crime Commission.

Per Va. Code § 52-32, a “missing child” is defined as “any person who is under the age of 21 years, whose temporary or permanent residence is in Virginia, or is believed to be in Virginia, whose whereabouts are unknown to any parent, guardian, legal custodian or

other person standing in loco parentis of the child, and who has been reported as missing to a law enforcement agency within the Commonwealth." A "missing senior adult" is defined under Va. Code § 52.34.4 as "an adult whose whereabouts are unknown and who is over 60 years of age and suffers a cognitive impairment to the extent that he is unable to provide care to himself without assistance from a caregiver, including a diagnosis of Alzheimer's Disease or dementia, and whose disappearance poses a credible threat as determined by a law enforcement agency to the health and safety of the adult and under such other circumstances as deemed appropriate by the Virginia State Police." Unlike what is often depicted in television, the Virginia Code does specify that there is to be no waiting period for law enforcement to accept a report for a missing child or senior adult.[28] However, Virginia law is silent on missing person reports and waiting periods for those 21 years of age or older that do not meet the definition of either a "missing child" or "missing senior adult."

All 50 states have a designated Missing Child/Person Clearinghouse. These act as state-based extensions of the national effort to provide training, education, and public information relating to missing and exploited children. Virginia's Missing Children Information Clearinghouse (Clearinghouse) was established in 1983 and is situated within the VSP. Its powers and duties are outlined under Va. Code § 52-33. The Clearinghouse has many responsibilities such as maintaining a centralized file for missing persons, liaison between NCIC and NCMEC for the exchange of information, disseminating monthly bulletins and emergency flyers of missing children, and providing training to law enforcement and others on reporting missing children and other persons.

When a missing child or senior adult report is made to law enforcement, the report must be submitted within two hours to the Clearinghouse.[29] Similarly, law enforcement must immediately notify the Clearinghouse when the child is located.[30] If the missing person is a child enrolled in school, law enforcement must notify the principal of the school where the missing child is or was most recently enrolled within 24 hours or the next business day.[31] The principal, in turn, must indicate (by mark) in the child's cumulative record that the child has been reported as missing.[32] The mark must be removed from the record when law enforcement notifies that the child has been located.[33] If during the time that the child's record is marked, a request is received from any school or person for copies of the cumulative records and birth certificate of any child, the school being requested to transfer the records shall immediately notify the reporting law enforcement agency of the location of the school or person requesting the information, without alerting the requestor of such report.[34] The Superintendent of the State Police must then "immediately initiate an investigation into the circumstances surrounding the request, including a search for any record that may exist showing who has legal custody of the child and for any record that may disclose an allegation of child abuse perpetrated against a member of the child's family."[35]

Alert Systems for Missing Persons

Media is an imperative tool in missing person cases. The media has the ability to deliver information to a large audience quickly. As such, Virginia has implemented several specialized statewide alert systems for missing persons, including the:

- AMBER Alert;
- Endangered Missing Child Media Alert;
- Senior Alert; and,
- Blue Alert.

Each system has very specific criteria that must be met in order for an alert to be broadcasted. The key to these alerts is utilizing the media as a tool in getting information to a large area quickly and to assist law enforcement in their investigations. There are, however, no specific alert systems available for missing persons 18 years of age and older who do not meet the definition of an "abducted child" or a "missing senior adult."

The AMBER Alert system, which is an acronym for America's Missing: Broadcast Emergency Response, began as a local effort and quickly became a national initiative in 1996.[36] According to NCMEC, 679 children have been safely recovered specifically as a result of an AMBER Alert being issued.[37] Virginia established the Virginia AMBER Alert Program in 2003 and required the VSP to develop policies for the creation of uniform standards.[38] There is a common misperception that AMBER Alerts are issued for every child that goes missing. This is not the case, as the AMBER Alert is reserved for the most serious of child abduction cases that meet very specific criteria. Under Va. Code § 52-34.1, an "abducted child" is defined as a child "(i) whose whereabouts are unknown, (ii) who is believed to have been abducted, (iii) who is 17 years of age or younger or is currently enrolled in a secondary school in the Commonwealth, regardless of age, and (iv) whose disappearance poses a credible threat as determined by law enforcement to the safety and health of the child and under such other circumstances as deemed appropriate by the Virginia State Police." In order for an AMBER Alert to be activated, the following criteria must also be met:

- Law enforcement believes that the child has been abducted;
- Abducted child must be 17 years of age or younger, or is currently enrolled in a secondary school;
- Law enforcement investigation has taken place that verifies abduction or eliminates alternative explanations;
- Sufficient information is available to disseminate to the public that could assist in locating the child, suspect, and/or the suspect's vehicle; and,
- The Virginia AMBER Alert form authorizing release of information must be signed.

If all of the criteria are not met, a Virginia AMBER Alert will not be issued. However, an Endangered Missing Child Media Alert *may* be issued instead. The Endangered Missing Child Media Alert is not defined by statute, but may be an option for cases that meet all of the AMBER Alert criteria except for one. For instance, if a child was not abducted, but was severely autistic, this Alert could be an option, as seen in the case of Robert Wood, Jr. in Hanover County, Virginia.[39] The Alert may also be extended to include 18-20 year olds, but only in certain cases at the discretion of the VSP.

The Virginia Senior Alert Program was established in 2007 by statute and requires the VSP to develop policies for the creation of uniform standards.[40] In order for a Senior Alert to be activated, the following criteria must be met:

- The missing senior is over 60 years of age;
- Suffers a cognitive impairment to the extent that he is unable to provide care for himself without assistance from a caregiver;
- Whose disappearance poses a credible threat as determined by law enforcement to the health and safety of the adult;
- Sufficient information is available to disseminate to the public that could assist in locating the missing senior or their vehicle;
- A report must be entered into VCIN and NCIC, and the information reported to the Clearinghouse in the prescribed format; and,
- A photograph must be provided on the prescribed forms or the equivalent.

If all the criteria are not met, a Senior Alert will not be issued; however, information can still be provided to the media.

The Virginia Blue Alert Program was established in 2011 by statute and requires the VSP to develop policies for its implementation.[41] In order for a Blue Alert to be activated, the following criteria must be met:

- A law enforcement officer was killed or seriously injured and the suspect has not been apprehended and there may be a serious threat to the public; or,
- A law enforcement officer is missing while in the line of duty under circumstances warranting concern for his safety.

The Virginia State Police will confirm either of the above and determine if sufficient evidence is available to disseminate to the public that could assist in the location of the suspect or the missing officer prior to activation. As an example, a Virginia Blue Alert was activated in 2012 for Laurence Stewart, the suspect accused of targeting a woman and two law enforcement officials in a series of pipe bomb incidents in Stafford County and Fredericksburg, Virginia.[42]

As seen in Table 3, with such strict criteria, very few cases meet the standards for *any* Alert activation even when specifically requested by a law enforcement agency:

Table 3: Total Number of Alerts Requested vs. Activated, CY11-CY14

Type of Alert	CY11		CY12		CY13		CY14	
	Requested	Activated	Requested	Activated	Requested	Activated	Requested	Activated
AMBER Alert	11	2	6	2	5	0	8	5
Endangered Alert	4	2	4	0	3	2	0	0
Senior Alert	10	2	14	9	13	6	11	7
Blue Alert	0	0	1	1	0	0	0	0
TOTAL	**25**	**6**	**25**	**12**	**21**	**8**	**19**	**12**

Source: Va. State Police.

Regardless of whether or not an alert is issued, media is still a vital tool in missing person cases. In general, law enforcement agencies reported having a good, cooperative working relationship with the media. Further, the role of social media has proven beneficial to law enforcement agencies, with several reporting the integral role of intelligence gleaned from comments on their agency's Facebook or other social media sites.

Resources and Collaboration

Much of the study mandate dealt with examining the current state of readiness of law enforcement and other first responders to incidents requiring a SAR response. Staff spent a great deal of time to better understand the resources available in Virginia, as well as the level of collaboration amongst relevant agencies.

There are many resources that Virginia law enforcement may request assistance from in these types of cases. For example:

- Va. Department of Emergency Management's Search and Rescue Program;
- Va. State Police's Search and Recovery Team and/or Tactical Field Force;
- Va. Search and Rescue Council;
- Va. Divisional Technical Rescue Teams;
- Va. Department of Game and Inland Fisheries;
- Neighboring or Other Virginia Law Enforcement Agencies;
- Local/Neighboring Fire and Rescue;
- Schools/School Resource Officers;
- Other States' Law Enforcement;
- Local/Regional Child Abduction Recovery Team (CART);
- FBI and other Federal Agencies;
- FEMA Urban Search & Rescue Teams;
- National Center for Missing and Exploited Children (NCMEC);

- Volunteer Search and Rescue Organizations; and,
- Citizen Volunteers.

Additional details on several of these resources are provided below.

Virginia Department of Emergency Management (VDEM)

VDEM's Search and Rescue Program has a dual role of providing specialized search and rescue training, at no cost, to all types of first responders, as well as carrying out actual search and rescue operations upon request from local jurisdictions. VDEM's Search and Rescue Program serves as the liaison between local jurisdictions and assistance from state or federal resources. Currently, only two full-time employees administer this program.

VDEM's Search and Rescue Program completed 101 missions in CY14. Fifty-five of these missions involved a lost or missing person; however, the Program also had other missions involving overdue aircraft and crashes, evidence searches, and responses to distress beacons (aircraft, vessel, vehicle or personal locator). Table 4 illustrates the total number and type of SAR responses by VDEM from CY10-CY14.

Table 4: Total VDEM SAR Missions, CY10-CY14

Search and Rescue Response	2010	2011	2012	2013	2014
Lost/Missing Persons	55	59	59	60	55
Found Alive	*42*	*47*	*45*	*43*	*34*
Found Deceased	*9*	*4*	*10*	*13*	*14*
Remains Missing	*4*	*8*	*4*	*4*	*7*
Cadaver/Evidence	22	20	19	14	21
Distress Beacons	7	2	5	3	1
Missing/Overdue Aircraft	1	1	0	1	2
Known Aircraft Crashes	24	28	24	23	22
TOTAL SEARCH MISSIONS:	**109**	**110**	**107**	**101**	**101**

Source: VDEM's Search and Rescue Program.

Additionally, VDEM's Search and Rescue Program classifies their missing person missions by type. Table 5 illustrates the classification of the 50 missing persons included in VDEM's SAR missions as of October 31, 2014. Just over 25% of the missions involved subjects with dementia.

Table 5: VDEM SAR Missions, Missing Persons by Type, 2014*

Subject Type	2014*
Abduction	5
Autism	1
Cave	1
Child	3
Dementia	14
Despondent	7
Hiker	6
Hunter	2
Mental Illness	4
Missing NOS	4
Substance Abuse	1
Water	2
TOTAL	**50**

Source: VDEM's Search and Rescue Program.*Figures as of October 31, 2014.
Note: These figures only apply to the subjects involved in SAR missions coordinated through VDEM.

Finally, VDEM provides specialized SAR training to law enforcement, fire/rescue personnel, EMS, emergency managers, volunteer SAR responders and other first responders who may have a duty to respond to a SAR emergency. The trainings are offered at no cost. The demand for SAR training has increased significantly each year, with classes often reaching full capacity nine months or more in advance. VDEM relies heavily on adjunct instructors who are typically limited to teaching only on the weekends, which can make it difficult for some to attend. Unfortunately, due to these limitations, many potential trainees routinely have to be turned away. Table 6 shows the total number of personnel trained in SAR by VDEM over the past 5 years.

Table 6: Search and Rescue Training Provided by VDEM, CY10-CY14

Number of Personnel Trained in Search and Rescue by VDEM	2010	2011	2012	2013	2014
Total Personnel	479	374	668	785	601

Source: VDEM's Search and Rescue Program.

It should be noted that Virginia law is essentially silent on SAR responsibilities. Other states statutorily designate SAR coordinators or provide language specifying who is responsible for certain SAR services or state-wide plans, including Arizona,[43] Hawaii,[44] Idaho,[45] Kentucky,[46] Louisiana,[47] Maine,[48] Massachusetts,[49] Missouri,[50] Nevada,[51] New

Mexico,[52] New York,[53] North Dakota,[54] Oregon,[55] Pennsylvania,[56] Utah,[57] and Washington.[58]

In particular, a director with clearly designated powers and duties would add clarity to SAR responsibilities and would provide law enforcement with a much needed point of contact. Four other states, including Nevada,[59] New Mexico,[60] Oregon,[61] and Washington,[62] specifically establish a statewide SAR coordinator by statute.

Virginia State Police

The Virginia State Police also has resources that may be requested in a SAR emergency. In addition to the Clearinghouse resources discussed earlier, the VSP has a specialized Search and Recovery Team with over 20 highly trained members, as well as a Tactical Field Force, which consists of around 300 members. Currently, search and rescue responsibilities are handled by an Area Commander, who also has routine patrol assignments and other duties. This creates difficulties when the Area Commander is pulled off the road for SAR missions and trainings. An additional concern is that VSP's SAR personnel are responsible for purchasing most of their equipment out-of-pocket, such as their safety gear, GPS, and backpacks.

In CY13, the Search and Recovery Team completed 89 recovery operations and assisted 27 other agencies.[63] The Tactical Field Force, although originally created for a different purpose, has proven to be very beneficial in SAR missions by providing localities with the needed field personnel to assist in SAR operations and by having the ability to remain on-scene for an extended period of time. This large pool of sworn law enforcement adds incredible manpower to a SAR emergency response. Search and rescue volunteers are often limited to providing services on weekends or on a part-time basis. Similarly, local law enforcement is also constrained in that they must continue to respond to all the other calls for service in their jurisdiction.

Search and rescue training is also provided by the VSP. In CY13, 96 SAR-related training assignments were conducted. Additionally, the VSP has an Aviation Unit, bloodhound canine teams and swift water/rope rescue capabilities. In CY13, the Aviation Unit responded to 134 requests for searches, which included searches for missing persons and lost children.[64] Their bloodhound teams also handled nearly 300 missing person/missing child/suspect tracking requests.[65]

Virginia Search and Rescue Council

The Virginia Department of Emergency Management's Search and Rescue Program works very closely with the Virginia Search and Rescue Council (SAR Council) to coordinate responses to SAR missions. The SAR Council is a non-profit organization consisting of members of state and local government and SAR organizations. The SAR Council helps to coordinate the SAR system in Virginia by providing communication between organizations and helping to arrange personnel, facilities, equipment and training for the effective and coordinated delivery of SAR services.[66] The SAR Council's resources are initiated upon the direct request of a "responsible agent," such as VDEM's Search and Rescue Program staff or a law enforcement agency. They cannot participate

in an incident without this direct request. There are 22 volunteer SAR associations that operate under a MOU with VDEM. Combined, they have 500 active volunteers who must meet or exceed state standards of training. The benefit of having groups meet specific requirements to qualify for a MOU is that it reduces liability, ensures a basic level of performance and expectations, and facilitates cooperation between the multiple organizations. They donate an estimated $1.2 million worth of services each year. Virginia relies heavily on the efforts of these trained SAR volunteers. However, since they are volunteers, it can be problematic during prolonged search efforts, especially during weekdays when they must report back to their full-time jobs.

National Center for Missing and Exploited Children (NCMEC)

Numerous services are provided to law enforcement and families across the nation by NCMEC, including:

- Team ADAM and Project ALERT;
- Secondary distribution of AMBER Alerts;
- Team HOPE/Family Advocacy Division Services;
- Classroom and online training;
- Reunification assistance;
- Forensic imaging; and,
- Extensive resources made available online.[67]

Team ADAM provides rapid, on-site assistance to law enforcement agencies and families in serious cases of missing children.[68] Consultants are retired law enforcement professionals with years of experience at the federal, state, and local levels. They will aid in SAR efforts, training, technical support, investigative recommendations and analysis, as well as equipment and resources. The consultants will also coordinate NCMEC's various resources, forensic capabilities, and referrals. According to NCMEC, Team ADAM has deployed 33 times in Virginia since 2003.[69] Most of the deployments, 73% (24 of 33), were on-site. For instance, Team ADAM consultants were deployed in the Morgan Harrington, Alexis Murphy, and Hannah Graham cases.

Project ALERT is a team consisting of approximately 170 retired law enforcement professionals who volunteer their time and expertise to law enforcement in missing person cases. They can provide technical assistance in long-term investigations, collect biometric information, and provide outreach to law enforcement and communities via training and awareness initiatives.[70]

As soon as NCMEC receives an AMBER Alert from the VSP, they will immediately issue a secondary distribution.[71] According to NCMEC, 20 AMBER Alerts have been issued for 22 children in Virginia between CY05-CY14. All of these AMBER Alerts have been resolved with the children being found or recovered.

Team HOPE provides services to families through referrals.[72] Services include telephone support for crisis intervention services, reunification assistance, long-term counseling referrals, and peer-to-peer support. All Team HOPE counselors have been directly impacted by a missing child case. Since 2010, Team HOPE has provided support for 133

new cases involving Virginia families. This figure does not include continuing support to families in long-term or continuing cases (i.e., cases older than 5 years).

Law Enforcement Survey Findings

Crime Commission staff surveyed all Virginia law enforcement agencies and received an excellent response rate of 95% (128 of 135) from all city and county police departments and primary sheriff's offices. Staff received an additional 86 surveys from town, campus and other law enforcement agencies.

According to survey results, 99% (122 of 123) of responding law enforcement agencies indicated they would typically take the lead in investigating missing persons reported within their jurisdiction. They noted that exceptions to taking the lead could include when a person went missing from a different jurisdiction, when a person resides or was last seen in a different jurisdiction, when a report was initially directed to the VSP, or when the VSP or the FBI take over the lead. Other examples would include if the person went missing while on federal property within a jurisdiction, if a case became overwhelming and the resources available to the local jurisdiction were inadequate, when an investigation went beyond state lines or became international, when there was a conflict of interest (e.g, family member of department employee), or if the search was non-criminal in nature and another department, such as Fire and Rescue, had the lead per jurisdictional agreements.

The vast majority, 93% (115 of 123) of responding law enforcement agencies indicated that they handled at least *one* missing person report in the past 5 years. Some departments may only deal with a handful of reports each year, while others will handle hundreds. According to CY13 VCIN/NCIC data, the number of missing person reports each Virginia law enforcement agency handled varied tremendously, from 0 to 1,094 reports per agency. Some agencies reported that they or their locality had specialized teams or units dedicated to investigating missing persons or completing SAR missions.

The amount of time dedicated to *investigating* each missing person case can vary tremendously. Some cases are resolved within minutes when, for example, a child is immediately found hiding in a closet or playing down the street at a friend's house. Other cases remain active indefinitely and require follow-up until case closure. Likewise, the amount of time dedicated to *searching* for each missing person can vary enormously. The key issue in SAR efforts is sustainability, which is the degree to which an agency can sustain efforts in searching for someone while at the same time meeting the demands of all other responsibilities within their jurisdiction. For instance, some report that "…investigations can burden law enforcement agencies, quickly depleting resources, and emotionally exhausting personnel."[73] The "fatigue factor" is also a concern for all first responders involved in a long-term search effort, which can be exacerbated without a lack of appropriate training as discussed later.

To illustrate the many resources that can be involved in a search effort, preliminary figures for the resources dedicated to the Hannah Graham case include a minimum of 4,000 individuals dispatched on more than 875 search tasks, 21,000 search hours, more than 94,000 miles driven to and from the search site, 35 days to locate her, and evidence

searches conducted for an additional 6 days.[74] Needless to say, a long-term SAR mission can strain available resources. In response to fiscal concerns, some states, such as Montana[75] and Wyoming,[76] have created state-level accounts for funding search and rescue operations. The purpose of these accounts is to help defray the costs of SAR missions and equipment.

Agencies reported varying levels of collaboration with other agencies specifically in regards to missing persons and SAR, as seen in Table 7. Many of the responding local law enforcement agencies reported collaborating with other local and state law enforcement agencies, volunteer SAR organizations, and VDEM's Search and Rescue Program for SAR-related activities in the past five years. Far fewer agencies reported having a memorandum of understanding (MOU) with other agencies for SAR-related activities in their locality. For MOUs with neighboring law enforcement (n=30), many were not detailed or focused upon SAR, but rather mentioned or implied it within the scope of the MOU agreement.

Table 7: Total Number of Law Enforcement Agencies Indicating Collaboration and MOUs with Other Agencies

Agency	Collaborated with in the past 5 years for SAR-related activity	MOU for SAR-related activities in locality
Neighboring Law Enforcement	94	30
Va. State Police	76	4
Volunteer SAR Organizations	74	6
Other Virginia Law Enforcement	66	12
VDEM SAR Program	58	3
NCMEC	55	2
Citizen Volunteers	44	3
Other States' Law Enforcement	42	2
FBI	37	2
Va. Search and Rescue Council	14	0
Local/Regional CART	2	0

Source: Va. State Crime Commission, *Law Enforcement Response to Missing Persons Survey*, 2014.

Model Policies, Training, and Awareness

Some states, including Florida,[77] Minnesota,[78] New Hampshire,[79] New Jersey,[80] Ohio,[81] Oregon,[82] and South Dakota,[83] have statutorily addressed written policies, guidelines, or best practice protocol requirements for the investigation of missing persons and/or SAR. No such statutory requirement currently exists in Virginia. Crime Commission staff sought to determine the availability of missing person and SAR model policies and training, as well as levels of awareness on the availability of resources.

Model Policies

Before examining the actual policies/general orders of Virginia law enforcement agencies, staff looked at accreditation standards. In Virginia, law enforcement agencies can choose to be nationally accredited by the Commission on Accreditation for Law Enforcement Agencies (CALEA) and can also be state-accredited by the Virginia Law Enforcement Professional Standards Commission (VLEPSC). Both law enforcement accreditation bodies, CALEA and VLEPSC, require that the law enforcement agency have a policy for missing persons, though they are silent on what the policy must say.[84] It should be mentioned that accreditation seeks to establish the best professional practices by prescribing *what* should be included but not *how* agencies should meet or carry out those practices. The "how" is left to the discretion of the individual law enforcement agency. Therefore, accreditation standards, while important, do not provide enough guidance for how law enforcement should respond to missing persons and SAR efforts.

Staff examined the actual policies/general orders of over 100 law enforcement agencies across the state. Some of the general findings from the analysis of submitted policies/general orders include:

- Over half of the policies indicated that no waiting period exists before taking <u>any</u> type of missing person report;
- In addition to Amber and Senior Alerts, some policies mentioned the implementation of other programs, such as *Project Lifesaver* and *A Child is Missing*;[85]
- Only three policies mentioned that officers should determine missing persons' access to records of social media, chat rooms, e-mails, phone records, etc.;
- Only seven policies mentioned providing any type of family liaison or support;
- Only 25 policies even mentioned search and rescue. Of these 25 policies, only 8 entailed a fairly comprehensive general order or plan; and,
- Less than 15 policies mentioned VDEM or the VSP in the context of missing persons and/or SAR.

Finally, staff sought out any available model policies that could give law enforcement better guidance on missing persons and SAR. There were two relevant policies available for purchase from the International Association of Chiefs of Police (IACP)'s National Law Enforcement Policy Center located in Alexandria, VA. Their missing person model policy was created in 1994 and their missing children model policy was created in 2000. Staff obtained a copy of each model policy and it was determined that nearly one-third of the policies/general orders submitted by Virginia law enforcement were modeled after the IACP missing person model policy created 20 years ago in 1994.

NCMEC also provides a very detailed, up-to-date, investigative model policy and checklist; however, it is limited to children only.[86] There does appear to be guidance and best practices relating to search and rescue offered by the National Association for Search and Rescue that may be of benefit to first responders.[87]

As mentioned earlier, dispatchers/communications officers also play a key role in these cases. Similarly, staff sought out any existing guidance or model policies available. The Association of Public-Safety Communications Officials-International (APCO) and NCMEC recognized that telecommunications personnel needed procedures and best practices to act quickly and decisively when handling calls relating to missing, abducted, runaway and sexually exploited children. In 2015, APCO released an updated standard for public safety telecommunicators to provide guidance in these types of cases.[88] In addition, a reference guide for telecommunications personnel has been developed for guidance on proper usage of the NCIC to document incidents of missing children.[89] Again, the resources available appear to be limited to only children.

In 2012, the Virginia Department of Criminal Justice Services (DCJS) published a detailed model policy for missing persons with Alzheimer's and other related dementias.[90] However, they have not published a model policy for any other types of missing children or adults. No model policies appear to exist for search and rescue. Staff consulted with Virginia agencies that had a detailed SAR-related policy/general order to see if they had structured theirs after an existing model. Based upon discussions with representatives from these agencies, most had instead developed their own policies and would sometimes share or borrow ideas from other Virginia law enforcement agencies.

It was clear that most of the current policies/general orders and model policies fail to address technology and other best practices. This is problematic as technology plays a key role in these cases and there may be limited opportunities to collect pertinent information from surveillance videos, social media, and phone records, for example. Law enforcement may not be aware of the specific procedures needed to request this information or the time constraints on the availability of such information. Additional guidance for law enforcement agencies would be helpful.[91]

Training

Several states, such as Alabama,[92] Minnesota,[93] New Jersey,[94] New Mexico,[95] Ohio,[96] South Dakota,[97] and Vermont,[98] have statutorily addressed the issue of training for law enforcement in missing persons and SAR in various ways. In Virginia, there is no specific statutory requirement for training related to missing persons or SAR. Instead, per Va. Code § 9.1-102, DCJS is required to establish compulsory minimum training standards and has listed the topic of missing persons and SAR as performance objectives for law enforcement and dispatcher training.[99]

As mentioned earlier, SAR training for law enforcement recruits, command staff, investigators, and other first responders is limited due to the lack of resources to host numerous trainings. Training is essential to help searchers recognize and avoid some of the more common accidents or injuries which can occur due to factors such as hazardous terrain, low/night-time visibility, weather conditions, or wildlife. Also, responders must avoid becoming separated from the team and becoming lost themselves. Responders must also be able to handle other scenarios including the dangers posed by a dangerous or armed subject. First responders who are not properly trained or who do not have the appropriate equipment to respond can lead to an

unnecessarily prolonged search mission, injuries, and a lower probability of success. First responders need to have a minimum set of skills to reduce their risks and increase the probability of success.

Survey results emphasized that Virginia law enforcement desired more training in responding to missing persons and SAR. In fact, 87% (100 of 115) of responding agencies indicated that there is a need for all law enforcement officers (recruits, in-service, command staff) to receive additional training. In addition to VDEM and VSP, training for SAR is also made available by the Virginia Association of Volunteer Rescue Squads, Inc. It is promising that all of the available SAR training courses in Virginia are based on the same curriculum, so all first responders are trained uniformly across the state.

In regards to law enforcement response to missing children, NCMEC has developed a comprehensive guide to investigation and case management,[100] as well as specialized checklists addressing abducted children,[101] runaway/unsupervised children,[102] and children with special needs.[103]

Families of Missing Persons

There is a profound impact on family, friends and the overall community when a child or adult goes missing. It is critical that families of missing persons are made aware of the resources available to them. For instance, detailed guidelines and checklists have been developed that address exactly what families should expect or do in the event their child goes missing, including their role in any search effort, their partnership with law enforcement and the media, and other personal considerations.[104] Additional guidance has also been published to support the siblings of children that go missing.[105]

One concern that Crime Commission staff kept hearing in the field continuously was that the families of missing persons in Virginia are not provided with adequate resources and information. Based on survey findings, responding law enforcement agencies reported making various types of resources available to the families of missing persons:

- 89 agencies reported referring families to local Victim/Witness Assistance;
- 60 agencies reported referring families to NCMEC/Team HOPE; and,
- 29 agencies reported referring families to local non-profit organizations.

Law enforcement agencies also reported referring families to local departments of social services, local churches or ministries, juvenile intake, and stress management teams. While all of these agencies can provide help, guidance, and comfort to families, it would be helpful if existing guidelines and/or checklists were modified and adopted specifically for the needs of Virginia families and made readily available.

Summary and Recommendations

Senate Joint Resolution 64, patroned by Senator Ryan McDougle, and House Joint Resolution 62, introduced by Delegate David Albo, were patroned during the Regular Session of the 2014 General Assembly. Both resolutions, which are identical, focused upon the current state of readiness of Virginia's law enforcement and Search and Rescue efforts for rapid and well-coordinated deployment in all missing, endangered, and abducted person cases.

In order to address the study mandate, Crime Commission staff examined relevant literature, collected available data from relevant agencies, completed a 50 state statutory review, disseminated surveys to all law enforcement agencies, reviewed law enforcement's general orders/policies pertaining to missing children and adults, and participated in a three-day Land Search and Rescue training. Additionally, staff met with the families of missing persons and numerous federal, state, and local representatives.

Each missing person case is unique. Individuals go missing for a number of reasons, some even voluntarily. Not all cases of missing persons involve a criminal investigation or an actual search and rescue effort. However, it is important to note that any search and rescue mission is an emergency and time is of the essence. Search and rescue missions are built upon a well-established methodology based on both empirical evidence and years of field experience. While search and rescue missions are distinct from any on-going criminal investigation, search efforts are not random and are based on leads developed from the criminal investigation.

Based on the findings, staff made a number of recommendations related to reporting and notification. It was abundantly clear that some action needed to be taken to address missing persons that do not meet the definitions of a "missing child," "abducted child," or, "missing senior adult." As such, staff recommended that a mechanism be established in the Code of Virginia for receipt of critically missing adult reports. A new Code section could define what a critically missing adult is and the report to be submitted.[106] Specifically, a "critically missing adult" would be defined as "any missing adult 21 years of age or older whose disappearance indicates a credible threat to the health and safety of the adult as determined by a law enforcement agency and under such other circumstances as deemed appropriate after consideration of all known circumstances." The proposed Code section would also make clear that there would be no waiting period for accepting a critically missing adult report by law enforcement and that the report would need to be immediately entered into NCIC and VCIN and forwarded to the VSP's Clearinghouse within two hours, similar to what is mandated for missing children and senior adults.

Staff also recommended that VDEM's Search and Rescue Program be notified of all critically missing adult and children cases. Currently, VDEM only receives a monthly aggregate report of missing children. Immediate notification of reports that could potentially result in a search and rescue mission is vital for awareness and preparedness. There are a few ways such notification could be accomplished. Kentucky, for instance, requires that the local SAR coordinator of each political subdivision notify their Division of Emergency Management of all SAR missions.[107] In Virginia, however,

since all missing person reports from local law enforcement are eventually entered into VCIN, the VSP could readily provide this type of notification to VDEM. Consequently, the VSP was requested, by letter, to examine programmatic efforts to provide immediate notification to VDEM when a critically missing child or adult is entered into VCIN.[108] The Crime Commission was advised that this action was completed by the VSP as of April 17, 2015.

Finally, additional resources are needed at the VSP's Clearinghouse. Their caseload has increased enormously since they were established in the mid-1980s, and they have been provided with little-to-no additional resources or staffing. An additional non-sworn staff position, at a minimum, is recommended to effectively meet the Clearinghouse's overall mission, to upload missing adult information to the website consistently, to provide training to law enforcement on missing children, and to provide already developed prevention programs such as the *Prevent 25 Campaign* for child safety and *NetSMARTZ* training for internet safety to school-aged children and parents.

It was clear that the issue of SAR and missing persons needed to be elevated statewide and within both VDEM and the VSP. In order for VDEM to provide effective training, resources and assistance to the field, it was recommended that a Search and Rescue Coordinator position be created at VDEM. A director with clearly designated powers and duties would add clarity to SAR responsibilities and provide law enforcement with a much needed point of contact.

Further, VDEM's Search and Rescue Program is currently staffed by only two persons, each of whom has dual responsibilities of SAR training and response to SAR missions. It can be very difficult for them to provide needed services in both areas. For instance, it is difficult for the staff to be involved in a prolonged or multiple search efforts without impacting scheduled trainings. As such, it was recommended that two regional coordinator positions be established in VDEM's Search and Rescue Program to provide a regional response to missions and training needs.

Similarly, it was recommended that a full-time Search and Rescue Coordinator position be created at the VSP. It should be noted that the role of this Coordinator will be distinct from any of the roles or responsibilities of the proposed VDEM Search and Rescue Coordinator. Currently, search and rescue responsibilities are handled by an Area Commander, in addition to routine patrol assignments and other duties. This creates difficulties when the Area Commander is pulled off the road for search and rescue missions or trainings. A full-time Search and Rescue Coordinator would be able to devote full attention to this issue and oversee the currently existing VSP Search and Recovery Team, coordinate the Tactical Field Force for search and rescue response, supervise VSP search and rescue responses, and maintain all training requirements and requests for training. It was also recommended that available resources be increased at the VSP for search and rescue equipment as responders are responsible for purchasing almost all of their own SAR gear, including back packs, radios, GPS devices, mapping technology, rain gear, compasses, safety gear, command tents, chainsaws, and generators, for example. SAR responders need to have better resources provided to them before going into the field.

Virginia law enforcement needs better guidance and training on how to respond to search and rescue emergencies. There appears to be no comprehensive, up-to-date model policies on missing persons or search and rescue. While accreditation standards require a policy on missing persons, agencies need assistance in creating thorough general orders for adoption. In light of this, staff recommended that DCJS establish and publish model policies for missing children, missing adults, and search and rescue. Recognizing that a model policy is something that needs to be general enough to apply to all types of law enforcement agencies across the state, staff felt it was important that a more detailed checklist be developed and made available to Virginia's first responders, including dispatchers, responding officers, supervisors and investigators, to provide additional guidance in these types of cases. Training standards for law enforcement and dispatchers also need to be reviewed, revised and developed as necessary. Staff recommended that DCJS be statutorily required to establish training standards for missing persons, as well as search and rescue. Well-established training curricula for search and rescue exist and can easily be modified and adopted for Virginia's law enforcement and dispatchers. To promote general education and awareness of the topic, it was also recommended that Crime Commission staff coordinate with the Virginia Association of Chiefs of Police and the Virginia Sheriffs' Association. Finally, it was abundantly evident from discussions in the field that families of missing persons do not often have adequate resources or information available to them. Staff recommended that DCJS be requested to create a family resource guide for missing persons, which should be available online as a reference.

Crime Commission staff recommendations, which were based upon the key findings of their study, focused upon reporting and notification, model policies and practices, training, resources, and education. 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 unanimously endorsed all of the following twelve recommendations at its December meeting:

Recommendation 1: Statutorily require the creation of a Search and Rescue Coordinator position at the Va. Department of Emergency Management under Va. Code § 44-146.18.

Recommendation 2: Create a Search and Rescue Coordinator position at the Va. State Police.

Recommendation 3: Create an additional FTE position at the Va. State Police's Missing Children Clearinghouse to assist with responsibilities of training, record keeping, compliance, and technical assistance to law enforcement agencies in reporting missing persons.

Recommendation 4: Increase available resources for search and rescue missions at the Va. State Police.

Recommendation 5: Create two regional Search and Rescue Coordinator positions at the Va. Department of Emergency Management to provide a regional response for missions and training needs.

Recommendation 6: Statutorily require the creation of a mechanism for receipt of reports for critically missing adults under proposed new statute, Va. Code § 15.2-1718.2.

Recommendation 7: Amend Va. Code § 9.1-102 to require the Va. Department of Criminal Justice Services to establish and publish model policies for missing children, missing adults, and search and rescue efforts.

Recommendation 8: Amend Va. Code § 9.1-102 to require the Va. Department of Criminal Justice Services to develop training standards for missing persons and search and rescue.

Recommendation 9: Request the Va. State Police to examine programmatic efforts to provide immediate notification to the Va. Department of Emergency Management when a critically missing child or adult is entered into VCIN.

Recommendation 10: Request Crime Commission staff to facilitate convening the Va. Department of Criminal Justice Services, the Va. Department of Emergency Management, Va. State Police, Va. Sheriffs' Association, the Va. Association of Chiefs of Police, and others to create a detailed checklist for Virginia's first responders.

Recommendation 11: Request the Va. Department of Criminal Justice Services to create a family resource guide for missing persons and make available online.

Recommendation 12: Coordinate with the Va. Sheriffs' Association and the Va. Association of Chiefs of Police to promote law enforcement awareness.

Recommendations 1, 6, 7 and 8 were combined into an omnibus bill. The omnibus bill was introduced in both the Virginia Senate and House of Delegates: Senator Ryan McDougle patroned Senate Bill 1184 and Delegate Charniele Herring patroned House Bill 1808 during the 2015 Regular Session of the Virginia General Assembly. Both bills were signed into law by the Governor on March 16, 1015 and are effective as of July 1, 2015.[109] Two budget amendments relating to Recommendations 1 through 5 to provide additional positions and funding to VDEM and VSP were introduced by Senator McDougle during the 2015 Session. Both of the budget amendments were partially funded to support the creation of search and rescue coordinators for each agency and one-time vehicle and equipment costs, as well as recurring costs for training, travel and materials.

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Families of Missing Children and Adults

National Center for Missing and Exploited Children

Virginia Association of Chiefs of Police

Virginia Association of Volunteer Rescue Squads, Inc.

Virginia Department of Criminal Justice Services

Virginia Department of Education

Virginia Department of Emergency Management

Virginia Department of Emergency Management's Search and Rescue Program Unit

Virginia Law Enforcement Agencies

Virginia Search and Rescue Council

Virginia Sheriffs' Association

Virginia State Police

Virginia State Police's Missing Children Information Clearinghouse

Virginia State Police's Search and Recovery Team

[1] 2015 Va. Acts. ch. 223, 205.
[2] Budget amendment item 394 (#1c) and item 414 (#3c).
[3] Alicia Showalter Reynolds was a 25 year old graduate student from Baltimore, MD, who disappeared on March 2, 1996, while traveling to meet her mother in Charlottesville, VA. Her vehicle was found later that day in Culpeper, VA. Her remains were discovered May 7, 1996, approximately 15 miles from where she disappeared.
[4] Morgan Harrington was a 20 year old Virginia Tech student who disappeared while attending a concert at the University of Virginia on October 17, 2009. Her remains were later discovered on January 26, 2010, approximately 10 miles from the John Paul Jones Arena.
[5] Alexis Murphy was a 17 year old Nelson County, VA, resident who disappeared on August 3, 2013. Her body has not yet been found; however, physical evidence led to the arrest and conviction of Randy Taylor for her murder.
[6] Hannah Graham was an 18 year old University of Virginia student who was last seen at the Downtown Mall in Charlottesville, VA, on September 13, 2014. Her body was later discovered on

October 18, 2014, at an abandoned property in Albemarle County, VA. Jesse Matthew has been charged with her murder and is awaiting trial.

[7] Kevin Quick was a 45 year old Nelson County, VA, resident and Waynesboro Police Reserve Unit captain who was kidnapped and murdered on or around January 31, 2014. His body was later discovered in Goochland County, VA. Daniel Mathis, Shantai Shelton, Mersadies Shelton, and Travis Bell have been charged in connection with the murder. A mistrial was declared on May 12, 2015 and a new trial date will be set for 2016.

[8] Delvin Barnes was accused of kidnapping a 16 year old Richmond City, VA, girl in October 2014, who was later found in Charles City County, VA, after she escaped. He was also accused of kidnapping 22 year old, Carlesha Freeland-Gaither in Philadelphia on November 2, 2014, who was later found alive by law enforcement on November 5, 2014, in Maryland.

[9] While this section does not serve as an exhaustive discussion, it acts as a starting point to guide the reader in the direction of additional information that may be of interest.

[10] *See, for example,* NCMEC. (2011). *Missing and abducted children: A law-enforcement guide to case investigation and program management, 4th ed*. U.S. Dept. of Justice, Office of Juvenile Justice and Delinquency Prevention retrieved from http://www.missingkids.com/en_US/publications/NC74.pdf.

[11] Numerous guides exist that attempt to outline the best approaches and strategies in various types of SAR missions. *See,* for example, Koester, R.J. (2008). *Lost person behavior: A search and rescue guide on where to look-for land, air, and water*. Charlottesville, VA: dbS Productions, LLC.

[12] *Supra* note 10. Also, see for example, Sprague, D.F. (2013). *Investigating missing children cases: A guide for first responders and investigators*. Boca Raton, FL: Taylor & Francis Group, LLC/CRC Press.

[13] NCMEC. (2009). *Family abduction: Prevention and response, 6th ed*. Washington, D.C.: U.S. Dept. of Justice, Office of Juvenile Justice and Delinquency Prevention. Retrieved from http://www.missingkids.com/en_US/publications/NC75.pdf; For additional information on the response to the problem of international child abduction, refer to the *Hague Convention on the Civil Aspects of International Child Abduction.*

[14] NCMEC. (2014). *For healthcare professionals: Guidelines on prevention of and response to infant abductions*, 10th ed. Washington, D.C.: U.S. Dept. of Justice, Office of Juvenile Justice and Delinquency Prevention. Retrieved from http://www.missingkids.com/en_US/publications/NC05.pdf.

[15] NCMEC. (2005). *Children missing from care: The law-enforcement response*. Washington, D.C.: U.S. Dept. of Justice, Office of Juvenile Justice and Delinquency Prevention. Retrieved from http://isp.idaho.gov/BCI/documents/ChildMissingFromCareLawEnforcementresponse.pdf.

[16] Gregoire, C.O., & U.S. Dept. of Justice. (May 1997). *Case management for missing children homicide investigation*. Washington, D.C.: U.S. Dept. of Justice, Office of Juvenile Justice and Delinquency Prevention. Note: This study only looked at abducted children under the age of 18, who were subsequently murdered by a non-familial member.

[17] This finding is supported by the current body of literature, as well as the observations of law enforcement and other first responders.

[18] This finding is also supported by additional literature and data. See, for example, Finkelhor, D., Hammer, H., & Sedlak, A.J. (2002). *Nonfamily abducted children: National estimates and characteristics*. Washington, D.C.: U.S. Dept. of Justice, Office of Juvenile Justice and Delinquency Prevention who note that, "During the study year, there were an estimated 115 stereotypical kidnappings, defined as abductions perpetrated by a stranger or slight acquaintance and involving a child who was transported 50 or more miles, detained overnight, held for ransom or with the intent to keep the child permanently, or killed." Retrieved from https://www.ncjrs.gov/pdffiles1/ojjdp/196467.pdf.

[19] This finding is also supported by additional literature. See, for example, Douglas, A. (2012). The neighborhood canvass and child abduction investigations. *FBI Law Enforcement Bulletin*, Washington, D.C.: U.S. Dept. of Justice, Federal Bureau of Investigation who notes that, "A prompt, thorough, and well-executed neighborhood canvass can make all the difference in an abduction case and, thus, between life and death for a child."

[20] The report found that most parents wait two hours before contacting law enforcement, which is problematic since in the most serious cases, the child is murdered within three hours. A follow-up to the *Washington Study* also underscores that it is clear that parents must call the police immediately whenever their child is unaccounted for- *See*, Brown, K.M., Keppel, R.D., Weis, J.G., & Skeen, M.E. (2006). *Investigative case management for missing children homicides: Report II.* Washington, D.C.: Washington Office of the Attorney General & the U.S. Departments of Justice, Office of Juvenile Justice and Delinquency Prevention.
[21] NCIC Missing Person and Unidentified Person Statistics for 2013. Retrieved from http://www.fbi.gov/about-us/cjis/ncic/ncic-missing-person-and-unidentified-person-statistics-for-2013.
[22] Id. Note: Active records are retained indefinitely until they have been cleared or otherwise removed from the NCIC.
[23] 42 USC 5779(c).
[24] *Supra* note 21.
[25] Id.
[26] Id.
[27] Id.
[28] Va. Code § 15.2-1718 for missing children and Va. Code § 15.2-1718.1 for missing senior adults.
[29] Id.
[30] Va. Code § 52-34.
[31] Va. Code § 52-31.1.
[32] Va. Code § 22.1-288.1; A "mark" shall mean an electronic or other indicator that (i) is readily apparent on the student's record and (ii) will immediately alert any school personnel that the record is that of a missing child.
[33] Id.
[34] Id.
[35] Va. Code § 52-31.1.
[36] The AMBER Alert plan was named after Amber Hagerman, a 9 year old who was abducted while riding her bike and later murdered in 1996. At that point in time, there was no system in place to disseminate any information to the local area even though a witness to the abduction was able to provide a description. The Dallas/Fort Worth Association of Radio Managers and law enforcement decided to jointly develop a warning system that eventually evolved into what is currently known as an AMBER Alert.
[37] NCMEC (2014). *2013 AMBER Alert report: Analysis of AMBER Alert cases in 2013*. Retrieved from http://www.missingkids.com/en_US/documents/2013AMBERAlertReport.pdf.
[38] Va. Code §§ 52-34.2 and 52-34.3; For standards see, *Virginia Amber Alert Plan.* Retrieved from http://www.vaamberalert.com/VA_Amber_Alert_Plan.pdf.
[39] *See, for example*, http://www.huffingtonpost.com/2011/10/28/robert-wood-jr-missing-au_n_1064811.html; For standards see, *Virginia Amber Alert Plan.* Retrieved from http://www.vaamberalert.com/VA_Amber_Alert_Plan.pdf.
[40] Va. Code §§ 52-34.5 and 52-34.6; For standards see, *Virginia's "Senior Alert" Plan.* Retrieved from http://www.vaseniorалert.com/UserGuide/VA_Senior_Alert_LawEnforcement_User_Guide_7-1-2007.pdf.
[41] Va. Code §§ 52-34.8 and 52-34.9.
[42] *See, for example*, http://www.huffingtonpost.com/2012/11/05/laurence-stewart-ii-suspe_n_2076278.html.
[43] A.R.S. § 11-441(C) (2014).
[44] HRS § 28-121 (c3) (2013).
[45] Idaho Code § 46-1006(6g-i) (2014).
[46] KRS § 39F.090 (2013).
[47] La. R.S. 29:650 (2013).
[48] 37-B M.R.S §§183 and 850 (2013).
[49] ALM GL ch. 40, § 4J(b) (2014).
[50] §§ 41.960 and 41.962 R.S.Mo. (2014).

[51] Nev. Rev. Stat. Ann. § 414.210 (2014).
[52] N.M. Stat. Ann. § 24-15A-4-6 (2013).
[53] NY CLS Exec § 156-g (2014).
[54] N.D. Cent. Code, § 37-17.1-28 (2014).
[55] ORS § 404.100 (2013).
[56] 35 P.S. § 2140.204 (2014).
[57] Utah Code Ann. § 17-22-2 (2014).
[58] Rev. Code Wash. (ARCW) § 38.52.030(8) (2013).
[59] Nev. Rev. Stat. Ann. § 414.210 (2014).
[60] N.M. Stat. Ann. § 24-15A-4-6 (2013).
[61] ORS § 404.100 (2013).
[62] Rev. Code Wash. (ARCW) § 38.52.030(8) (2013).
[63] Virginia State Police, *Facts and Figures Report, 2013*. Retrieved from http://www.vsp.state.va.us/downloads/Annual_Report_Facts_Figures/Update-%202013%20Facts%20and%20Figures1.pdf.
[64] Id.
[65] Id.
[66] *See* the Virginia Search and Rescue Council website at: http://vasar.bdsarco.org/.
[67] *See* the NCMEC website at http://www.missingkids.com/homefor additional information.
[68] *See* http://www.missingkids.com/TeamAdam.
[69] Overall, according to NCMEC, Team Adam has been deployed more than 800 times across the nation since 2003.
[70] *See* http://www.missingkids.com/ProjectALERT.
[71] The secondary distribution is subject to the federal AMBER alert definition. As such, NCMEC will only issue the alert if the child is 17 years of age or younger even though Virginia extends its definition to include any person enrolled in secondary school, regardless of age.
[72] *See* http://www.missingkids.com/TeamHOPE.
[73] Lord, W.D., Boudraux, M.C., & Lanning, K.V. (2001). Investigating potential child abduction cases. *FBI Law Enforcement Bulletin*, p.10.
[74] Preliminary figures provided by VDEM's Search and Rescue Program.
[75] 10-3-801, MCA (2013).
[76] Wyo. Stat. § 19-13-301 (2014).
[77] Fla. Stat. § 937.021(1) (2014).
[78] Minn. Stat. § 299C.5655 (2014).
[79] RSA 7:6-a (2014).
[80] N.J. Stat. § 52:17B-221 (2014).
[81] ORC Ann. 2901.41 (2014).
[82] ORS § 146.177 (2013).
[83] S.D. Codified Laws § 23-3-18.1 (2014).
[84] Relevant CALEA accreditation standards include 41.2.5, 41.2.6, and 6.2.5. Relevant VLEPSC standards include ADM.25.10 and OPR.05.01.
[85] *Project Lifesaver* is a program used to assist those who care for persons with diseases such as Alzheimer's, dementia or autism. Those at risk wear a transmitter bracelet that emits a constant pulsing radio signal. Local emergency teams are trained in how to communicate with the persons once they are found. The average rescue time is 30 minutes. *A Child is Missing* is a non-profit alert and recovery center that assists law enforcement in the initial hours of a search. One of the resources they can provide is placing calls with recorded messages to residents in the area, as well as the utilization of detailed satellite imaging.
[86] NCMEC, *Law-enforcement policy and procedures for reports of missing and abducted children- A model.* (Last revised October 2011). Retrieved from http://www.missingkids.com/en_US/documents/Model_Policy_Child.pdf.
[87] *See*, http://www.nasar.org/.

[88] APCO. (2010). *Standard for public safety telecommunicators when responding to calls of missing, abducted, and sexually exploited children.* Note: The standard was authored by NCMEC's Missing Kids & 9-1-1 Readiness Project Executive Committee. Retrieved from http://www.missingkids.com/en_US/documents/911standards.pdf.
[89] NCMEC (2012). *Effective use of the National Crime Information Center Database with missing-child incidents: A reference guide for public-safety telecommunications personnel.* Retrieved from http://www.missingkids.com/en_US/archive/documents/NCICGuide.pdf.
[90] DCJS Model Policy 2-42. Retrieved from http://www.dcjs.virginia.gov/cple/sampleDirectives/index.cfm.
[91] *See*, Collins, J.J., Powers, L.L., McCalla, M.E., Ringwalt, C.L., & Lucas, R.M. (1993). *Law enforcement policies and practices regarding missing children and homeless youth*. Washington, D.C.: U.S. Dept. of Justice, Office of Juvenile Justice and Delinquency Prevention. This was a significant study that found detailed, written law enforcement agency policies for responding to missing child cases were associated with more proactive investigations. They noted the need for clearly defined roles and responsibilities to avoid duplicative efforts or missing critical information. Retrieved from https://www.ncjrs.gov/pdffiles1/Digitization/145644NCJRS.pdf.
[92] Code of Ala. § 26-19-4 (2014).
[93] Minn. Stat. § 299C.55 (2014).
[94] N.J. Stat. § 52:17B-9.8 (2014).
[95] N.M. Stat. Ann. § 24-15A-5 (2013).
[96] ORC Ann. 109.741 (2014).
[97] S.D. Codified Laws § 23-3-18.1 (2014).
[98] 20 V.S.A. § 2365a (2013).
[99] Virginia DCJS, *Virginia Criminal Justice Training Reference Manual*, Retrieved from http://www.dcjs.virginia.gov/standardsTraining/compulsoryMinimumTraining/cjsmanual-LAW.pdf.
[100] NCMEC (2011). *Missing and abducted children: A law-enforcement guide to case investigation and program management*, 4th ed. Retrieved from https://secure.missingkids.com/en_US/publications/NC74.pdf.
[101] NCMEC (2011). *Investigative checklist for first responders*. Retrieved from http://www.missingkids.com/en_US/publications/NC88.pdf.
[102] NCMEC (2011). *Investigative checklist for law enforcement when helping unsupervised and runaway children.* Retrieved from http://www.missingkids.com/en_US/publications/NC03.pdf.
[103] NCMEC (2012). *Investigative checklist for law enforcement when responding to missing children with special needs.* Retrieved from http://www.missingkids.com/en_US/publications/SpecialNeeds_Checklist.pdf; *See* also, NCMEC (2012). *Missing children with special needs lost-person questionnaire*. Retrieved from http://mecptraining.org/wp-content/uploads/SpecialNeeds_Questionnaire.pdf.
[104] See, for example, U.S. Dept. of Justice (2010). *When your child goes missing: A family survival guide*, 4th ed. Office of Justice Programs, Office of Juvenile Justice and Delinquency Prevention. Retrieved from http://www.missingkids.com/en_US/publications/PDF6A.pdf; *See also, Missing-child, Emergency response, Quick reference guide for families.* Retrieved from http://www.missingkids.com/en_US/publications/NC198.pdf.
[105] U.S. Dep't of Justice (2005). *What about me? Coping with the abduction of a brother or sister*. Washington, D.C.: Office of Justice Programs, Office of Juvenile Justice and Delinquency Prevention.
[106] The form would be the SP-67, the Va. State Police form that is already used for any missing adult.
[107] KRS § 39F.090 (2013).
[108] Critically missing would be defined as including the NCIC categories of "endangered," "involuntary," and "disability."
[109] 2015 Va. Acts. ch. 223, 205.

Reproduction of Child Pornography

Executive Summary

In February 2014, Delegate Benjamin Cline requested the Crime Commission to conduct a study regarding the reproduction of child pornography and, in particular, a clarification of Va. Code § 18.2-374.1:1(C). Specifically, the clarification involved whether all of the acts constituting child pornography in this Code section require lascivious intent, or whether lascivious intent is only required for the display of child pornography. Crime Commission staff completed a legal analysis to address the letter request.

The Virginia statute that criminalizes the production, transmission, or display of child pornography is Va. Code § 18.2-374.1:1, which reads in relevant part:

> Any person who (i) reproduces by any means, including by computer, sells, gives away, distributes, electronically transmits, displays with lascivious intent, purchases, or possesses with intent to sell, give away, distribute, transmit, or display child pornography with lascivious intent or (ii)…

Recently, questions were raised on how this particular subdivision should be interpreted in regards to mens rea and "lascivious intent." Additionally, a contradiction between statutes as to what the penalty for this offense is, was identified.

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

Recommendation 1: Amend subsection C of Va. Code § 18.2-374.1:1 to include a "knowingly" mens rea.

Recommendation 2: Amend subsection C of Va. Code § 18.2-374.1:1 to remove the term "lascivious intent."

Recommendation 3: Amend Va. Code § 18.2-381 to eliminate the conflicts it creates relating to penalties in the Code.

Senator Janet Howell introduced Senate Bill 1056 during the 2015 Regular Session of the Virginia General Assembly, which incorporated all three Crime Commission recommendations. The bill makes clear that a person must "know" they are handling child pornography in order to be guilty of the offense, which will prevent an innocent person from being convicted if he is unaware that his computer was transmitting child pornography. The bill also removes the words "lascivious intent" from subsection C of

Va. Code § 18.2-374.1:1 to make clear that such intent is not required to be guilty of the offense. Finally, the bill eliminates the conflicts created by Va. Code § 18.2-381 relating to penalties by having the higher penalties apply for the child pornography crimes.

Legal Analysis

The Virginia statute that criminalizes the production, transmission, or display of child pornography is Va. Code § 18.2-374.1:1, which reads in relevant part:

> Any person who (i) reproduces by any means, including by computer, sells, gives away, distributes, electronically transmits, displays with lascivious intent, purchases, or possesses with intent to sell, give away, distribute, transmit, or display child pornography with lascivious intent or (ii)…

Recently, questions were raised on how this particular subdivision should be interpreted in regards to mens rea and "lascivious intent." Additionally, a contradiction between statutes as to what the penalty for this offense is, was identified.

Mens Rea Issue

The first issue raised deals with mens rea. Subsection A of Va. Code § 18.2-374.1:1, which criminalizes simple possession of child pornography, requires a mens rea of "knowingly." However, the word "knowingly" is not found in Subsection C. It is unclear whether this should be interpreted to mean that Subsection C is strict liability crime. For example, a person receives a computer file that contains within it an encrypted child pornography image; if the person does not know of the image's existence, and forwards the file to others, is he guilty of the reproduction or electronic transmission of child pornography? It should be made clear whether a person must "know" they are handling child pornography in order to be guilty of the offense.

Lascivious Intent Issue

Subsection C of Va. Code § 18.2-374.1:1 first uses the words "displays with lascivious intent," but later uses the words "display child pornography with lascivious intent." Clearly, lascivious intent is required if one displays pornography. However, an argument can be made that a strict statutory reading of all of the language in this subdivision requires a lascivious intent mens rea for all of the listed actions. Subsection C begins with the subject of "Any person," and follows this with a series of verbs. The object of all of these verbs, "child pornography," is then given, but *before* the words "lascivious intent" are used for a second time. To illustrate:

Figure 1: Visual Breakdown of Subsection C of Va. Code § 18.2-374.1:1

Any person who:

- Reproduces, sells gives away, distributes, electronically transmits, displays with *lascivious intent*, purchases,

OR

- Possesses with the intent to sell, give away, distribute, transmit or display

Child pornography,
With *lascivious intent*,
Shall be punished…

It is unclear whether the General Assembly intended for the second prepositional phrase, "with lascivious intent," to be applied to all of the verbs. If so, the first use of "lascivious intent" is a redundancy. However, statutory language is customarily strictly construed against the Commonwealth. Some judges and prosecutors have worried that the way this subsection is written, a defense attorney could argue that if someone sold child pornography, but only to make money and not with lascivious intent, they would not be guilty of this crime. Removing the words "lascivious intent" from this subsection would settle any confusion.

Penalty Inconsistency Issue in § 18.2-381

Currently, Va. Code § 18.2-381 makes a second or subsequent offense a Class 6 felony for all crimes under §§ 18.2-374 to 18.2-379. This language, which pertains to obscenity offenses, comes from Title 18.1, and was carried over to Title 18.2. The obscenity offenses that this language applied to at the time of its enactment were all misdemeanors. The purpose of the statute was to make second offenses a Class 6 felony. Since that time, Virginia has passed a number of child pornography statutes, that numerically occur between § 18.2-374 and § 18.2-379.

As all of the child pornography offenses (except for a first offense simple possession) are Class 5 felonies or more severe, the language of Va. Code § 18.2-381 is in conflict with these heightened penalties. To resolve these inconsistencies, punishments for general obscenity crimes, second and subsequent offenses, should remain a Class 6 felony, per existing law. However, for the child pornography crimes, which currently have higher penalties, the higher penalties should apply rather than the Class 6 felony.

Summary and Recommendations

Crime Commission staff completed a legal analysis in order to clarify interpretive concerns relating to Va. Code § 18.2-374.1:1(C). Staff identified two areas of concern in the subsection: Is there, or should there be, a "knowingly" mens rea for these offenses,

and does the element of "lascivious intent" apply to all of the offenses listed? Additionally, a contradiction between statutes as to what the penalty for this offense is, was identified.

The Crime Commission reviewed study findings at its September meeting and directed staff to draft legislation for these issues. As a result of the study effort, the Crime Commission unanimously endorsed all of the following legislative recommendations at its December meeting:

> **Recommendation 1:** Amend subsection C of Va. Code § 18.2-374.1:1 to include a "knowingly" mens rea.
>
> **Recommendation 2:** Amend subsection C of Va. Code § 18.2-374.1:1 to remove the term "lascivious intent."
>
> **Recommendation 3:** Amend Va. Code § 18.2-381 to eliminate the conflicts it creates relating to penalties in the Code.

Senator Janet Howell introduced Senate Bill 1056 during the 2015 Regular Session of the Virginia General Assembly, which incorporated all three Crime Commission recommendations. The bill makes clear that a person must "know" they are handling child pornography in order to be guilty of the offense, which will prevent an innocent person from being convicted if he is unaware that his computer was transmitting child pornography. The bill also removes the words "lascivious intent" from subsection C of Va. Code § 18.2-374.1:1 to make clear that such intent is not required to be guilty of the offense. Finally, the bill eliminates the conflicts created by Va. Code § 18.2-381 relating to penalties by having the higher penalties apply for the child pornography crimes. After passing both the Senate and the House of Delegates, this bill was signed into law by the Governor on March 23, 2015.[1]

[1] 2015 Va. Acts ch. 428.

Sexting

Executive Summary

Sexting, the act of taking a sexually explicit picture and then transmitting it via a picture message from one cell phone to another, is a subject that has attracted increased media attention throughout the past decade. Whenever juveniles engage in sexting, whether through taking a photo of themselves, or receiving such a photo, they are technically in violation of child pornography laws. These criminal statutes were originally intended to punish predatory adults who victimize children and teenagers, and were not intended to be used against teenagers who take photos of themselves, and then send them to others as a form of misguided flirting. Much national debate has taken place as to the appropriate response when incidents of juvenile sexting are discovered.

In the past three years, a number of studies have indicated that sexting among adolescents is prevalent, and does not seem to be decreasing. In 2014, a number of sexting incidents occurred in Virginia which made national news. Concurrently, the Virginia Criminal Justice Conference, which had been considering the topic of sexting in Virginia since 2012, issued some recommended legislation, to treat certain, limited forms of non-malicious sexting as a Class 1 misdemeanor, rather than the usual felony that applies to child pornography cases. The Virginia Criminal Justice Conference gave their recommended legislation to the Crime Commission for review.

At the October meeting the Crime Commission reviewed the proposal that had been put forward by the VCJC. At the December meeting the Crime Commission considered the proposal, as well as the possibility of modifying it by placing further limitations on the proposed new misdemeanor crimes related to sexting. The possible limitations considered were:

- The Class 1 misdemeanor for possession of sexting images would be limited to cases where the defendant only possessed a limited number of such images; e.g., no more than 10.

- The Class 1 misdemeanor for transmission of sexting images would be limited to cases where the images were sent to a particular individual. If the images were sent to a public website, or to more than a certain number of people, the offense would not qualify for the reduced penalty.

- The Class 1 misdemeanor for possession of sexting images would not apply if the defendant paid for the images or their production.

At the conclusion of reviewing all of the proposals, the Crime Commission made no motions on the VCJC's proposed recommended legislation, and made no recommendations on the subject.

Background and Applicable Virginia Laws

Sexting, a recently invented word derived from the word "texting," is the act of taking a sexually suggestive photo, usually of oneself, and sending it via a picture message from one cell phone to another.[1] Over the past five to ten years, sexting has attracted increased attention nationwide, as many of the participants taking and receiving such photos are minors. Sexting has raised debates across the country, both amongst policy makers and members of the general public, as to whether or not child pornography laws, which were meant to criminalize the predatory behavior of older adults, are appropriate or effective tools for prosecutors to use when faced with the voluntary actions of teenagers. Complicating the issue are the differing real world situations which arise, running the gamut from a completely non-malicious exchange of photos by two minors, sent as an admittedly inappropriate form of flirting, to the malicious posting of discovered photos on a public website. Should all recipients of sexting photos that involve minors be prosecuted, even if the photos were sent unsolicited, and were not forwarded? Should a minor who takes a sexual photo of himself be prosecuted for what is, technically speaking, the production of child pornography? Ultimately, everyone involved in the national debate is in agreement that sexting by juveniles should be curtailed, although there are differing opinions as to whether or not criminal charges, or the threat of criminal charges, are the best way to achieve this.

In Virginia, most acts of sexting that involve minors will be violations of Virginia's child pornography statutes, depending upon the nature of the pictures. Virginia Code § 18.2-374.1 criminalizes the production and distribution of child pornography. If a minor takes a lewd or sexual picture of himself, that would be a violation of subsection B(2) of that statute. The penalty would be, if the minor were 15 years of age or older, an unclassified felony carrying from 1 to 20 years; if the minor were younger than 15, the penalty would be an unclassified felony carrying from 5 to 30 years. It should be noted, though, that unless the minor were tried as an adult in circuit court, he almost certainly would not receive such a lengthy sentence. However, his "record" likely would be open for public inspection in court, as he would have been adjudicated delinquent of an offense that would be a felony if committed by an adult.[2] The possession of any such photos would be a violation of Va. Code § 18.2-374.1:1. A first offense would be a Class 6 felony, and a second or subsequent offense would be a Class 5 felony. If the recipient of such a photo re-sends or re-transmits it, or even displays it on the screen of his phone to another, his act of distribution or display would be an additional unclassified felony, carrying from 5 to 20 years. A second offense of distribution or display also carries from 5 to 20 years, but with a mandatory minimum punishment of 5 years. Once again, unless the juvenile were tried as an adult, he would not likely receive such a lengthy sentence, and would not be subject to the mandatory minimum punishment.

Under Virginia law, actual nudity is not required in order for a picture or image to be considered child pornography. Under the relevant definitions provided by Va. Code §§ 18.2-374.1 and 18.2-390, "nudity" includes "a state of undress so as to expose the human male or female genitals, pubic area or buttocks with less than a full opaque covering, or the showing of the female breast with less than a fully opaque covering of any portion thereof below the top of the nipple." On the other hand, not all photos

involving nudity automatically qualify as child pornography—the nudity in the image must involve a lewd exhibition.[3]

Lastly, a violation of Virginia's child pornography laws can occur even if no images are involved. If a minor solicits his girlfriend to send him a nude, sexually explicit photo of herself, his solicitation puts him in violation of Va. Code § 18.2-374.1(B), and carries the same penalties as the actual production of child pornography, even if the girlfriend never actually produced such an image. If the request was sent by e-mail, cell phone, or other communications system, that would be an additional offense of violating Va. Code § 18.2-374.3(B), which is a Class 6 felony.

Previous Crime Commission Study

In 2009, the Crime Commission examined the topic of sexting.[4] At that time, very few studies and surveys had been conducted on what was a relatively new social phenomenon. The most recent study available at the time of the Commission's report was an online survey conducted in 2008 that had found that 22% of teenage girls, and 18% of teenage boys, had sent or posted images or video showing themselves nude or semi-nude.[5] Eleven percent of young teenage girls, defined as between the ages of 13 and 16 for purposes of the survey, had posted nude or semi-nude images of themselves.[6] The Crime Commission deliberated upon a number of statutory options that could be enacted to treat sexting differently from other child pornography crimes. Possibilities included lower penalties for certain, limited acts of sexting, and as an alternative, not changing or creating any new criminal penalties, but enacting statutory language that would either mandate or strongly suggest that a child pornography charge should be dismissed after a period of probation, in cases where juveniles had engaged in non-malicious sexting. Ultimately, the Crime Commission decided not to endorse any statutory changes related to sexting. Instead, a letter was sent to the Virginia Department of Education, requesting that efforts be made to educate students on the dangers and illegality of sexting.[7]

Recent Studies on Sexting

Since 2009, published studies have indicated that sexting continues to be a problem in the United States. A probability sample of 1,839 students in Los Angeles high schools found that 15% of adolescents reported having engaged in sexting; 54% reported knowing someone who had sexted.[8] Another study examined "at risk" seventh graders; 5% of the sample reported having sexted images in the past 6 months.[9]

Other recent studies of high school adolescents have found that 18% to 28% reported sending nude or semi-nude photos. Around 50% of boys reported having received such a photo.[10] Ironically, one study found that students who reported being aware of the possible legal repercussions for sexting were actually more likely to have engaged in sexting.[11] One possible implication of this finding is that education about legal

consequences may be insufficient, by itself, to change adolescent behavior when it comes to sexting.

Recent Press Articles

Throughout 2014, a number of news articles described sexting incidents that occurred in Virginia. Several of the stories were reported nationally. Combined with the recent studies on the topic of sexting, they provide confirmation that this behavior is continuing, and perhaps even increasing, amongst teenagers, since the Crime Commission's previous report in 2009.

In February of 2014, in James City County, a 16 year old teenager was charged after taking nude self-photos of herself and then posting them on Twitter.[12] In April of 2014, the national press reported on a large sexting "ring" that was discovered in Louisa County. Over 1,000 images of underage teenagers had been posted on Instagram accounts, and over 100 teenagers were involved in some manner.[13] This story was later the subject of a lengthy feature article in the November 2014 issue of the *Atlantic Monthly.*[14]

In July of 2014, a Manassas City teenager, suspected of sexting, was the subject of a search warrant to undergo a medical procedure so that his genitals could be photographed, in an effort to compare the warrant photos with a previously sexted image.[15] This resulted in much public criticism; ultimately, the decision was made to not proceed with the warrant and the photos were not taken.[16]

Virginia Criminal Justice Conference Proposal

For three years, the Virginia Criminal Justice Conference (VCJC) has held a special subcommittee on the topic of sexting.[17] In 2012 and 2013, the subcommittee reported to the full Conference that because recent attempts to pass sexting legislation had not succeeded in the Virginia General Assembly, no proposed sexting laws or revisions should be drafted. In 2013, the entire VCJC unanimously voted that notwithstanding these concerns, the subcommittee should attempt to draft a sexting bill that could be brought to the General Assembly for their consideration.

In September of 2014, the sexting subcommittee decided on some broad parameters for a sexting statute. It should not completely decriminalize any sexting behavior, as even taking a lewd photo of oneself, as a minor, creates an unquestionable risk of harm. It should recognize that qualitatively, some sexting behaviors are less culpable than the conduct that is the primary focus of the child pornography statutes, and are therefore deserving of a lessened penalty. It should fit within existing child pornography statutes, rather than be completely based in newly created statutes. The new sexting crime should be very limited in scope, so that most bad or malicious behavior would still fall within the scope of existing child pornography laws. And, the sexting statute or statutes

should contain a "first offender" provision that would apply only to these limited, sexting behaviors.

Using these parameters, the sexting subcommittee drafted possible legislation, and submitted it to the full VCJC for their consideration. The VCJC made a few, minor amendments to the possible legislation. It was the consensus of the VCJC that taking a sexually explicit photo of oneself, without anyone else in the picture, is the least culpable form of juvenile sexting, and is more appropriately punished by a Class 1 misdemeanor, rather than the unclassified felonies which apply to the production of child pornography.[18] However, this new misdemeanor would not apply to images that depict excretory functions, sadomasochistic abuse, or crimes against nature as defined in Va. Code § 18.2-361. The language for this new subsection, which would be added to Va. Code § 18.2-374.1, should mirror the accommodation subsection of Virginia's drug distribution statute; i.e., the burden would be on the defendant to show that he met all of the requirements to be found guilty of sexting, rather than the production of child pornography.[19]

The VCJC also decided that in instances of consensual sexting, the simple possession of sexually explicit images of a minor should only be a Class 1 misdemeanor. However, this lower penalty would only apply if any child depicted in the images was at least 13 years of age; the possessor of the images was no more than 4 years older than every child depicted; and, the possession was with the knowing consent of every child. It would not apply to images that depict excretory functions, sadomasochistic abuse, or crimes against nature as defined in Va. Code § 18.2-361. As with the proposed subsection for taking a photo of oneself, this new crime would be a subsection, added to the statute dealing with possession of child pornography, Va. Code § 18.2-374.1:1. It should likewise mirror the accommodation subsection of Virginia's drug distribution statute, with the burden being on the defendant to show that he met all of the requirements to be found guilty of the lesser offense of possession of sexting images.

Lastly, the VCJC recommended that it should be a Class 1 misdemeanor if a child sends a sexting image of himself to another, provided that he is the only person depicted in the image. As with the other proposed new subsections, this misdemeanor would not apply to images depicting excretory functions, sadomasochistic abuse, or crimes against nature as defined in Va. Code § 18.2-361, and would be mirrored on the drug accommodation subsection, with the burden being on the defendant to show that he should not be found guilty of the felony of distribution of child pornography.

In addition to the three new criminal offenses, the VCJC also recommended that a first offender provision be created for sexting, mirroring the language used for Virginia's first offender statute for drug possession.[20] First offender status would only apply to the three new sexting offenses, and would allow a defendant to have the Class 1 misdemeanor dismissed if he successfully completed a treatment or education program; completed community service work, which, in the discretion of the judge, must be at least 10 hours and no more than 100 hours; and successfully complied with any other conditions the court deemed appropriate. This first offender provision would not be available if the defendant ever committed any future sexting offenses.

All other sexting offenses would not be covered by any special statutes or newly created subsections, and instead would be subject to Virginia's child pornography statutes. Examples include the following scenarios:

- The defendant possesses a sexting image, given to him by a friend who tells him that "It's okay to have, my girlfriend gave it to me to share," if the subject of the photo did not in fact knowingly consent for the defendant to possess it.

- The defendant takes a sexually explicit photo of himself, and another person appears in the photo, even though the other person is fully clothed and is not engaged in any sexual behavior.

- The defendant transmits a photo of himself, and another person appears in the photo, even if the other person is fully clothed and is not engaged in any sexual behavior.

- The defendant requested his girlfriend to take or send him a sexting image, even if she never actually did so.

Cases like these could still be handled by prosecutorial discretion, if the prosecutor felt it was appropriate.

Upon the completion of the VCJC's work in finalizing the possible legislation, the VCJC agreed to submit their work to the Crime Commission for their review.

Summary

At the October meeting, the Crime Commission reviewed the proposal that had been put forward by the VCJC. At the December meeting the Crime Commission considered the proposal, as well as the possibility of modifying it by placing further limitations on the proposed new misdemeanor crimes related to sexting. The possible limitations considered were:

- The Class 1 misdemeanor for possession of sexting images would be limited to cases where the defendant only possessed a limited number of such images; e.g., no more than 10.

- The Class 1 misdemeanor for transmission of sexting images would be limited to cases where the images were sent to a particular individual. If the images were sent to a public website, or to more than a certain number of people, the offense would not qualify for the reduced penalty.

- The Class 1 misdemeanor for possession of sexting images would not apply if the defendant paid for the images or their production.

At the conclusion of reviewing all of the proposals, the Crime Commission made no motions on the VCJC's proposed recommended legislation, and made no recommendations on the subject.

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[1] A more complete description of sexting, and the legal problems it creates, can be found in the Crime Commission's previous report on the topic. VA. STATE CRIME COMM'N, SEXTING (2009), available at http://vscc.virginia.gov/documents/sexting.pdf.

[2] *See* Va. Code Ann. § 16.1-305(B1) (2014). All court records regarding adjudications of delinquency, that would be a felony if committed by an adult, are open to the public, if the juvenile was 14 years or older at the time of the offense.

[3] VA. CODE ANN. § 18.2-374.1(A) (2014); Asa v. Commonwealth, 17 Va. App. 714 (1994) (photo of a naked teenager, standing, does not meet the definition of sexually explicit material, even though her breasts, buttocks and genitals are pictured, but a photo of her sitting with her knees drawn up to her breasts, with the camera's eye focused on her genitals, does meet the definition).

[4] *Supra* note 1.

[5] The National Campaign to Prevent Teen and Unplanned Pregnancy. (2008). *Sex and tech: Results from a survey of teens and young adults.* Washington, D.C.: Author. Retrieved from http://thenationalcampaign.org/sextech/PDF/SEXTech_Summary.pdf.

[6] Id.

[7] *Supra* note 1. Independently of this request, the Virginia Department of Education had already completed an information brief on sexting, which included a reminder to school districts that "schools should have a policy in place to address sexting." OFFICE OF EDUCATIONAL TECHNOLOGY, VA. DEPT. OF EDUC., SEXTING: IMPLICATIONS FOR SCHOOLS (Oct. 2009), retrieved from http://www.doe.virginia.gov/support/technology/info_briefs/sexting.pdf.

[8] Rice, E., et al. (2012). Sexually explicit cell phone messaging associated with sexual risk among adolescents. *Pediatrics*, 130(4), 667-673.

[9] Houck, C.D. (2014). Sexting and sexual behavior in at-risk adolescents. *Pediatrics*, 133(2), 1-7.

[10] Strassberg, D.S., McKinnon, R.K., Sustaita, M.A., & Rullo, J. (2013). Sexting by high school students: An exploratory and descriptive study. *Archives of Sexual Behavior*,42, 15-21; Temple, J.R., et al. (2012). Teenager sexting and its association with sexual behaviors, *Archives of Pediatrics & Adolescent Medicine*, 166(9), 828-833.

[11] Strassberg, *supra* note 10.

[12] *Va. Teen Faces Child Porn Charges For Tweeting Nude 'Selfie'*, Washington.CBSlocal.com, Feb. 7, 2014, retrieved from http://washington.cbslocal.com/2014/02/07/police-teen-faces-child-porn-charges-for-tweeting-nude-photos-of-self/.

[13] *Deputies Bust Massive Teen Sexting Ring in Louisa County*, WRIC.COM, Apr. 3, 2014, updated May 2, 2014, retrieved from http://www.wnct.com/story/25159973/deputies-bust-massive-teen-sexting-ring-in-louisa-county ; Larry O'Dell, *Va. 'Sexting' Probe Implicates More Than 100 Teens*, WRIC.COM, Apr. 9, 2014, retrieved from http://wric.com/2014/04/09/va-sexting-probe-implicates-more-than-100-teens/.

[14] Hanna Rosin, Why Kids Sext: An Inquiry into One Recent Scandal Reveals How Kids Think about Sexting—And What Parents and Police Should Do about It, ATLANTIC MONTHLY, Nov. 2014, retrieved from http://www.theatlantic.com/magazine/archive/2014/11/why-kids-sext/380798/.

[15] Tom Jackman, *In 'sexting' case Manassas City police want to photograph teen in sexually explicit manner, lawyers say*, WASHINGTONPOST.COM, July 9, 2014, retrieved from http://www.washingtonpost.com/blogs/local/wp/2014/07/09/in-sexting-case-manassas-city-police-want-to-photograph-teen-in-sexually-explicit-manner-lawyers-say/.

[16] Tom Jackman, *Manassas City police say they will not serve search warrant in teen 'sexting' case*, WASHINGTONPOST.COM, July 10, 2014, retrieved from http://www.washingtonpost.com/blogs/local/wp/2014/07/10/manassas-city-police-say-they-will-not-serve-search-warrant-in-teen-sexting-case / ; Tom Jackman, *Manassas City detective in teen 'sexting'*

case sues teen's lawyer for defamation, WASHINGTONPOST.COM, Nov. 13, 2014, retrieved from http://www.washingtonpost.com/blogs/local/wp/2014/11/13/manassas-city-detective-in-teen-sexting-case-sues-teens-lawyer-for-defamation/.

[17] The Virginia Criminal Justice Conference was created in 2006 to be the criminal justice system equivalent of the Boyd Graves Conference. It is made up of roughly an equal balance of prosecutors and criminal defense attorneys, and also includes jurists from Virginia's JDR, district, circuit and appellate courts, professors of law, and attorneys who are representatives for the Virginia legislature. The VCJC's goal is to improve criminal justice in Virginia and examine ways in which Virginia's criminal and criminal procedure laws can be strengthened. It is non-partisan and does not seek to favor either the prosecution or the defense. Recommendations are made by the group only if substantial consensus is reached amongst all of the members.

[18] VA. CODE ANN. § 18.2-374.1 (2014).

[19] VA. CODE ANN. § 18.2-248(D) (2014).

[20] VA. CODE ANN. § 18.2-251 (2014).

Sexual and Domestic Violence Victim Service Agency Funding

Executive Summary

House Bill 885 was introduced by Delegate Christopher Peace during the Regular Session of the 2014 General Assembly and was passed by the legislature and signed into law by the Governor. The main text of the bill extended the time period in which certain claims for compensation by victims of crime could be considered by the Criminal Injuries Compensation Fund, and increased the amounts that could be awarded for various types of expenses. House Bill 885 also contained a second enactment clause, which directed the Crime Commission to study the current federal and state funding streams for local programs that assist victims of sexual and domestic violence. Specifically, the Crime Commission was directed to:

> "…convene a stakeholder workgroup to include state and local representatives from the sexual and domestic violence coalition; representatives from the Department of Criminal Justice Services, the Department of Social Services, the Department of Health and the Criminal Injuries Compensation Fund; and representatives from other relevant state or local entities to support an efficient and comprehensive streamlining of current federal and state sexual and domestic violence victim service agency funding, including general fund, non-general fund, and special fund monies."

The work group had to complete its work by September 30, 2014. The purpose of the study was to look at the statewide system, as a whole, with the main objective of seeing what efficiencies could be brought to the grant funding process for local sexual and domestic violence agencies. Per the second enactment clause, three work group meetings were held and representatives from all state agencies, the Action Alliance, local sexual and domestic violence agencies, and other stakeholders attended.

In order to address the study mandate, Crime Commission staff met individually with all relevant state agencies, the Action Alliance, and many local sexual and domestic violence agency directors. Staff also surveyed all relevant state agencies, the Action Alliance, and all local sexual and domestic violence agency directors. The work group was convened on three separate occasions during 2014: June 11, July 30, and September 10. Recommendations were developed based on work group discussions, survey results, and independent staff analysis of the topic.

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 several of the following recommendations at its December meeting:

Recommendation 1: Statutorily require the creation of an Advisory Committee on Sexual and Domestic Violence Programs. The advisory committee would be similar to the existing Advisory Committee on Juvenile Justice. This 15 member Advisory Committee would help coordinate and provide communication between state agencies and local sexual and domestic violence agencies, review ways in which operational efficiencies in awarding and monitoring grant funds can be achieved, and make recommendations on needs and priorities for the development and improvement of local services to victims of sexual and domestic violence in Virginia. It would also develop a comprehensive plan for data collection on sexual and domestic violence. Membership would consist of the heads of the state agencies that award grant funds to sexual and domestic violence agencies, as well as the Attorney General of Virginia, a member of the Virginia Senate and a member of the House of Delegates, the Chair of the Virginia State Crime Commission, representatives from sexual and domestic violence agencies, a member of a victim/witness organization, and the Executive Director of the Action Alliance, or their designees.

Recommendation 2: Amend Va. Code § 9.1-102 to require the Va. Department of Criminal Justice Services to establish an Accreditation Center for local sexual and domestic violence agencies, in a manner similar to the Virginia Law-Enforcement Accreditation Center. The accreditation of local sexual and domestic violence agencies that receive funding from the state is a function that should be more directly overseen and managed by the state; if accreditation is tied to funding or the receipt of extra funds, the standards and evaluations should be carried out by an impartial body.

Recommendation 3: Request that the Virginia Department of Social Services review the hotline needs of local sexual and domestic violence agencies to see if more of them can locally manage a hotline, and evaluate the feasibility of assuming responsibility for a state hotline for local sexual and domestic violence agencies that are not able to maintain their own 24 hour hotline system.

Recommendation 4: The Virginia Department of Criminal Justice Services should assume control over the portion of the Victims of Crime Act federal funds that go towards the Domestic Violence Prevention and Services Grant and are currently administered by the Virginia Department of Social Services.

Recommendation 5: The portion of the Victims of Crime Act federal funds that go towards the Child Abuse and Neglect Treatment grant administered by the Virginia Department of Social Services should remain at the Virginia Department of Social Services.

Recommendation 6: The Virginia Department of Social Services should retain control over the Family Violence Prevention and Services Act federal funding stream that they currently administer via Virginia's Domestic Violence Prevention and Services Grant.

Recommendations 1, 2 and 3 were voted on and endorsed; Recommendations 1 and 3 were endorsed unanimously by the Crime Commission.

Recommendation 1 was introduced by Delegate Jennifer McClellan as House Bill 1954, and by Senator Janet Howell as Senate Bill 1057, during the 2015 Regular Session of the Virginia General Assembly. Both House Bill 1954 and Senate Bill 1057 were amended in the nature of a substitute, and were incorporated into other bills. House Bill 1954 was incorporated into House Bill 2092, and Senate Bill 1057 was incorporated into Senate Bill 1094. Both bills, after amendment, contained the substance of Recommendation 1, and created the Advisory Committee on Sexual and Domestic Violence. Both of the amended bills were passed by the General Assembly, and were signed into law by the Governor.

Recommendation 2 was introduced by Delegate Chris Peace as House Bill 2092, and by Senator Janet Howell as Senate Bill 1094, during the 2015 Regular Session of the Virginia General Assembly. Both House Bill 2092 and Senate Bill 1094 were amended in the nature of a substitute; both bills, after amendment, contained the substance of Recommendation 2, and created the Virginia Sexual and Domestic Violence Program Professional Standards Committee. The Committee would receive staffing assistance from the Department of Criminal Justice Services, and would consist of six directors of local sexual and domestic violence programs appointed by the Advisory Committee on Sexual and Domestic Violence Programs, and six directors of local sexual and domestic violence agencies appointed by the Action Alliance, as well as one non-voting member appointed by the Department of Criminal Justice Services, and one non-voting member appointed by the Action Alliance. Both of the amended bills were passed by the General Assembly, and were signed into law by the Governor.

For Recommendation 3, a letter was sent to the Virginia Department of Social Services, requesting them to review the current state hotline system in 2015, evaluate whether it would be feasible for the Department to assume responsibility for a hotline that might be less expensive for local programs to use, and report their findings back to the Crime Commission by December 1, 2015.

The Crime Commission unanimously voted to pass by Recommendations 4, 5, and 6.

Background

House Bill 885 (HB 885) was introduced by Delegate Christopher Peace during the Regular Session of the 2014 General Assembly and was passed by the legislature and signed into law by the Governor.[1] The main text of the bill extended the time period in which certain claims for compensation by victims of crime could be considered by the

Criminal Injuries Compensation Fund (CICF), and increased the amounts that could be awarded for various types of expenses.

When the bill was in the Senate, two floor amendments in the nature of substitutes were introduced, but were not adopted. The first substitute contained an enactment clause which would have created a joint subcommittee, with members appointed by the Chairmen of the House Appropriations Committee and the Senate Finance Committee, to examine current grant funding structures at state agencies that are used to support SDVAs. The joint subcommittee "may recommend a comprehensive and streamlined grant funding process…including the possible administration of such structure at the Criminal Injuries Compensation Fund."[2] The second substitute contained an enactment clause that stated that the CICF "shall convene a stakeholder workgroup to include state and local representatives from the sexual and domestic violence coalition, representatives from the Department of Criminal Justice Services, the Department of Social Services, and the Department of Health; and representatives from other relevant state or local entities to support an efficient and comprehensive streamlining of…funding…." A third floor amendment in the nature of a substitute was adopted by the Senate; this substitute used much of the enactment language from the proposed second substitute, but directed the Crime Commission to convene the stakeholder workgroup. This substitute was passed by the Senate, was agreed to by the House, and was the version of the bill that ultimately became law. Under this enactment language, the Crime Commission was specifically directed to:

> "…convene a stakeholder workgroup to include state and local representatives from the sexual and domestic violence coalition; representatives from the Department of Criminal Justice Services, the Department of Social Services, the Department of Health and the Criminal Injuries Compensation Fund; and representatives from other relevant state or local entities to support an efficient and comprehensive streamlining of current federal and state sexual and domestic violence victim service agency funding, including general fund, non-general fund, and special fund monies."

The work group had to complete its work by September 30, 2014. The purpose of the study was to look at the statewide system, as a whole, with the main objective of seeing what efficiencies could be brought to the grant funding process for local sexual and domestic violence victim service agencies (SDVAs). Per the second enactment clause, three work group meetings were held and representatives from all relevant state agencies, the state coalition (Action Alliance),[3] local sexual and domestic violence agencies (SDVAs), and other stakeholders attended.

There are a total of 53 SDVAs across Virginia that perform an array of critical services in communities throughout the Commonwealth. While each agency is unique, with 13 SDVAs focusing solely on domestic violence, 7 SDVAs focusing on sexual violence only, and 33 SDVAs providing both types of services, they often are important providers of victim counseling and general support in their areas. Many agencies assist victims in navigating the court system, both as witnesses and as plaintiffs seeking legal redress or protective orders. Some agencies maintain safe havens or temporary housing for

victims of domestic violence; all agencies find themselves helping refer victims to other available services and programs, both public and private. Local sexual and domestic violence agencies also frequently offer community education, including violence prevention programs, and help raise public awareness of the issues surrounding sexual and domestic violence. Funding for some SDVAs can be challenging. All agencies rely upon a combination of private donations, general fundraising, private grants obtained from various sources, and state and federal grants. Typically, any federal grants obtained by SDVAs in Virginia are funneled, as required by federal law, through a state agency.

To assist SDVAs, the Action Alliance serves as their general coalition organization. They provide information, guidance, and some training opportunities to local agencies, and serve as a collective voice to these diverse programs at a statewide level. Other important work done by the Action Alliance is the collection of data on the number of people served by programs, the operation of a 24 hour telephone hotline system that can be utilized by programs that are unable to maintain their own local hotline system, assistance with accreditation for SDVAs,[4] assistance for SDVAs in their interactions with state agencies, and general lobbying efforts with the state legislature.

In order to address the study mandate, Crime Commission staff met individually with all relevant state agencies, the Action Alliance, and many local SDVA directors. Staff also surveyed all relevant state agencies, the Action Alliance and all local SDVA directors. Recommendations were developed based on work group discussions, survey results, and independent staff analysis of the topic.

Federal Funds and Their Legal Limitations

Overview of Federal Grant Funds

Several Virginia agencies administer federal funds connected with SDVAs, including the Virginia Department of Criminal Justice Services (DCJS), the Virginia Department of Social Services (VDSS), the Virginia Department of Health (VDH), the Virginia Department of Housing and Community Development (DHCD), and the CICF. It is their role, in this context, to receive various sources of federal funding, and then distribute the funds to SDVAs in accordance with federal and state requirements. For example, all federal criminal justice funds that are distributed to the states must be received, in each state, by an official State Administering Agency (SAA), which is chosen by the Governor. In Virginia, the SAA is DCJS; they are the only agency which may directly receive federal criminal justice funds. All of the Virginia state agencies that disburse federal grant money, including criminal justice funds, play the key role of deciding which local programs will receive the limited amount of federal and state funding that is available. It is also their role to monitor and ensure that funds are used properly, for the limited purposes allowed by federal and state laws and regulations. And, they help verify that the required accountings for these funds are performed correctly. Some federal funds are passed directly by the state agency to the recipient SDVAs; in other instances, federal funds are combined with state funds, and it is this "combined" state grant to

which SDVAs apply for funding. Lastly, it should be noted that some federal funds, such as VOCA, are given to multiple state agencies to administer.

Table 1 illustrates the relevant federal funds, their acronyms and who administers each in Virginia.

Table 1: Overview of Relevant Funding Streams

Name of Federal Fund	Acronym	Who Administers
Victims of Crime Act	VOCA	DCJS, VDSS, CICF
Virginia- Services, Training, Officers, and Prosecution	V-STOP	DCJS
Sexual Assault Services Program	SASP	DCJS
Family Violence Prevention and Services Act	FVPSA	VDSS
Rape Prevention and Education	RPE	VDH
Emergency Solutions Grant	ESG	DHCD

Source: Virginia State Crime Commission.

All federal funds that are received must be used only for their intended and limited purposes. Legally, the Virginia General Assembly cannot "direct" the Governor to reallocate federal funds in a manner that would be inconsistent with the authorizing federal act.[5] Each federal grant is very specific about what the money can be used for, including who is an eligible recipient or sub-grantee, if matching state funds must be provided, and what audits or reporting requirement must be performed. Each grant has different requirements.

VOCA Funds[6]

Victims of Crime Act (VOCA) funding is a major source of federal grant money to all states, including Virginia, which received $10.7 million in 2013 for victim assistance.[7] VOCA funds are distributed by the Office for Victims of Crime, an office within the United States Department of Justice (DOJ). The enabling statutes for VOCA funds are found in the U.S. Code, at 42 U.S.C. § 10601 *et seq.* Some VOCA funds go towards crime victim compensation, per 42 U.S.C. § 10602, and are made directly to a crime victim compensation program. In Virginia, this is the CICF, established by Va. Code § 19.2-368.18, which is under the Virginia Workers' Compensation Commission. The CICF received $1.16 million during State Fiscal Year 2013 (FY13).[8]

The VOCA funds that go toward victim assistance, per 42 U.S.C. § 10603, must go to "the chief executive of each State for the financial support of eligible crime victim assistance programs." The chief executive must certify that the funds are used in accordance with the requirements listed under 42 U.S.C. § 10603(a)(2). Under the definitional subsection, 42 U.S.C. § 10603 (d)(5), the chief executive can include "a person designated by a chief executive to perform the functions of the chief executive." Per the VOCA Final Program Guidelines, the Governor designates which state agency will administer these funds. The certifications required for VOCA grants mean that a non-executive branch agency probably would not be able to administer them—the governor, or any chief executive he designated, would probably not be willing to provide a

certification about the compliance of an agency that is outside of his purview and direct authority.

There are additional requirements for receipt of VOCA funds. First, funds that are used for victim compensation can only go to state agencies that will provide compensation for victims of federal crimes, and will use the same criteria for out-of-state and in-state victims. Second, grants received cannot be used to supplant State funds otherwise available for victim compensations. Third, VOCA funds that are used for victim assistance must give priority to assistance programs that serve victims of sexual assault, spousal abuse, or child abuse. Fourth, no more than 5% of the funds received may be used for training and the administration of the victim assistance program. Fifth, with some exceptions, there must be 20% matching contributions of non-federal monies to each VOCA funded project. Sixth, VOCA recipients must maintain records that clearly show the source, amount, and period during which these matching funds were allocated. They must also maintain records on all disbursement of funds, daily time and attendance records, client files, and other records which facilitate an effective audit. Seventh, in-patient treatment facilities are not eligible for VOCA funds. Eighth, VOCA can be used for training non-VOCA funded service providers; however, VOCA funds cannot be used for management and administrative training for executive directors, board members, and other individuals that do not provide direct services. Finally, VOCA funds can be used to purchase equipment, such as furniture, that provides direct services to crime victims; however, the funds cannot be used to support the entire cost of an item that is not exclusively used for victim services—instead, the cost of the item must be prorated. Therefore, for example, the CICF, which is not an executive branch agency, would probably not be granted the authority by any governor of the Commonwealth to administer VOCA funds.

V-STOP Funds[9]

Services, Training, Officers, and Prosecutors (STOP) funding is another important source of federal funding to all states, including Virginia, which received $2.8 million in 2013.[10] In Virginia, these funds are known as Virginia-STOP or V-STOP funds. This funding comes from the federal Violence Against Women Act Grant Program (VAWA), which is the ultimate source for a number of criminal justice grant programs that are distributed or awarded to the states. These funds are distributed by the federal Office on Violence Against Women (OVW), an office within DOJ. STOP funding is authorized by 42 U.S.C. § 3796gg *et seq.* Unlike VOCA funding, the relevant subsections under § 3796gg refer simply to "the State," and not the "chief executive." For example, per § 3796gg(i), "A State applying for a grant under this part shall develop an implementation plan…" However, the STOP Program Guide specifically requires that the Governor of each state be the person responsible for ensuring these requirements are met. Therefore, as with VOCA funds, the CICF, which is not an executive branch agency and is not under the direct authority of the governor, would probably not be granted the authority to disburse V-STOP funds by any governor of the Commonwealth.

STOP funding requires, per 42 U.S.C. § 3796gg-1(c)(2), implementation plans, and with:

- The State sexual assault and domestic violence coalition;

- Law enforcement entities within the State;
- Prosecutors' offices and state and local courts;
- Representatives from underserved populations;
- Victims service providers and population specific organizations; and,
- Other entities identified as needed.

STOP funding also specifies, per 42 U.S.C. § 3796gg-1(c)(3), minimum percentages that shall be granted to each group:

- No less than 25% to law enforcement;
- No less than 25% to prosecutors;
- No less than 30% to victims services, of which at least 10% shall be to culturally specific community-based organizations; and,
- No less than 5% to courts.

Further, at least 20% of the total must go to programs, in at least two of these group allocations, that meaningfully address sexual assault.

V-STOP funds may not be used for certain expenses or activities, such as indirect costs, food expenses, national training expenses for V-STOP grantees, or services to children younger than 11, unless those services are tied to primary service of an adult parent. Finally, V-STOP does not allow more than 15% of services to be provided to male victims.

SASP Funds[11]

The Sexual Assault Service Program (SASP) is also funded through VAWA. Sexual Assault Service Program funding specifically is authorized by 42 U.S.C § 14043g *et seq*. Virginia received $274,000 in CY14.[12] For SASP grants that are awarded to states, there must be an identified state agency that is responsible for the administration of programs and activities, per 42 U.S.C. §14043g(b)(3)(B). In Virginia, DCJS is responsible for administering these grants. There is also a requirement that each eligible entity that desires a grant must include in its application "procedures designed to ensure meaningful involvement of the State sexual assault coalition," which in Virginia is the Action Alliance.

FVPSA Funds[13]

The Family Violence Prevention and Services Act (FVPSA) is authorized by 42 U.S.C. § 10401 *et seq*. and comes from the U.S. Department of Health and Human Services, rather than the U.S. Department of Justice. It requires the "chief executive officer of a State" to be the one who applies for any FVPSA formula grants going to that state, per 42 U.S.C. § 10407(a)(1). Virginia received $2.1 million in FY13.[14]

In the application, the chief executive office must "specify the State agency to be designated as responsible for the administration of programs within the jurisdiction of the State." In Virginia, that agency is VDSS. Federal law, per 42 U.S.C. § 10406(d), requires the state to submit an annual performance report to the federal Secretary of

Health and Human Services describing the grantee and sub-grantee activities that have been carried out with the grant funds, and containing an evaluation of the effectiveness of such activities. Similar to V-STOP funds, because the Governor is responsible for selecting the agency that will distribute FVPSA funds, that responsibility would probably not be given to a non-executive branch agency, such as the CICF. In Virginia, FVPSA funds are combined with a portion of VOCA funds received from DCJS, and additional state general fund monies. The VOCA funds provided for this grant program were $2.3 million in FY13, and the additional state general fund monies were $2.75 million.[15]

RPE Funds[16]

The Rape Prevention and Education (RPE) Initiative funding is authorized by federal statute, 42 U.S.C. § 280b-1b, which permits the disbursal of VAWA funds by the United States Secretary of Health and Human Services to states via the federal Centers for Disease Control (CDC). Per 42 U.S.C. § 280b-1b, these funds are "to be used for rape prevention and education programs conducted by rape crisis centers, State sexual assault coalitions, and other public and private nonprofit entities." These funds are sent directly to the VDH. The amount received in FY14 was $653,000.[17] Since the RPE funding comes directly from the federal CDC to VDH, in a general "public health" context, rather than one of "victim services," it is unclear if the CDC would be willing to send these grant funds to a different state agency, even if so requested.

ESG Funds[18]

Emergency Solutions Grant (ESG) funding comes from the federal Department of Housing and Urban Development, and is distributed by the Virginia Department of Housing and Community Development (DHCD). A portion of these funds is used to help support shelters for victims of domestic violence, although it should be noted that the main purpose of these federal funds is to help alleviate homelessness in general (e.g., people suffering from substance abuse, mental illness, displaced as a result of financial circumstances, etc.). Federal regulations, in particular 24 C.F.R. § 576.400, require that ESG fund recipients must consult with a "Continuum of Care" (CoC) that serves the recipient's jurisdiction, in order to coordinate with other targeted homeless services in the area. In other words, it is the CoC or local planning group that proposes which grantees in a given jurisdiction will carry out the activities of funding (and thus receive funds). Federal requirements, and Virginia's Homeless Solutions grant process, would make it extremely difficult to transfer ESG funds from DHCD to another state agency. During FY13, $2.4 million was awarded from the ESG funds distributed to Virginia.[19]

Overview of State Agencies that Administer Funding for SDVAs

Virginia Department of Criminal Justice Services

The Virginia Department of Criminal Justice Services is responsible for administering numerous grant programs covering an array of criminal justice topics. There are four grant programs that are relevant to SDVAs: the Sexual Assault Grant Program (SAGP), the Sexual Assault Services Program (SASP), the Virginia Sexual and Domestic Violence

Victim Fund (the Victim Fund), and the V-STOP grant programs. Each of these grant funds is unique, not only in the goal or purpose for the fund, but also in how it receives its funding; i.e., solely from a federal funding stream, solely from state general funds, or through a combination of the two. The grants that SDVAs receive from DCJS vary:

- 64% (34 of 53) received the SAGP grant in FY14;
- 57% (30 of 53) received the SASP grant in CY14;
- 38% (20 of 53) received the Victim Fund grant in CY14; and,
- 53% (28 of 53) received the V-STOP grant in CY14.[20]

SAGP

The Sexual Assault Grant Program distributes funds to local sexual assault crisis centers and to statewide programs that provide or enhance direct services to victims of sexual assault. This program receives its funds from two sources: state general funds, and VOCA funds. It awarded $3.4 million is FY14 to sexual assault crisis centers.[21]

Table 2: Sexual Assault Grant Program (SAGP) Breakdown

Name of Grant Program:	**Sexual Assault Grant Program (SAGP)**
Administered By:	DCJS.
Funding Stream:	Combination. 1 Federal (VOCA) and 1 State Grant (State General Funds).
Grant Cycle:	State Fiscal Year.
Proposal Process:	Typically written for 2 year grants. Awards made each year. Multiple hard copies submitted (1 original, 4 copies).
Selection Process:	DCJS staff and external subject matter experts make rec's to the Victim Services Grant Review Subcommittee who then makes rec's to the full Criminal Justice Services Board (CJSB). CJSB approves grants to programs during scheduled meetings.
Submission of Materials:	Online (GMIS).
Disbursement of Funds:	Advance quarterly payment via EDI.
Financial Reports:	Quarterly vouchers and financial reports via GMIS.
Progress/Final Reports:	Semi-annual basis via GMIS. On-site review at least once every 4 years.
Accreditation Preference:	No.
VAdata Requirement:	No. However, programs sign release form to allow DCJS to see data.
Outcome Measure Requirements:	Yes. 7 required and 2 optional service objectives; 3 additional program objectives (2 for VOCA/state match and 1 for non-match state funds).
Renewal Option:	Yes.
Budget Amendments:	Yes. No more than 2 amendments.
Match Requirement:	Yes. However, state fund portion is used for matching requirement of federal grant.
Unique Restrictions:	Cooperative agreements strongly encouraged.

Source: Virginia State Crime Commission in conjunction with the 2014 SDVA Funding Work Group.

SASP

The Sexual Assault Service Program provides funds to rape crisis centers and other nonprofit, nongovernmental organizations that provide direct services and other assistance to victims of sexual assault. It consists solely of federal funds, specifically VAWA funds that are distributed by the federal Office on Violence Against Women (OVW). The Department of Criminal Justice Services limits the awarding of SASP funds to sexual assault crisis centers that already receive a SAGP grant; the SASP funds are used to supplement those agencies. In FY13, DCJS awarded a total of $204,532 to eligible sexual assault crisis centers.[22]

Table 3: Sexual Assault Service Program (SASP) Grant Program Breakdown

Name of Grant Program:	**SASP**
Administered By:	DCJS.
Funding Stream:	Federal (SASP).
Grant Cycle:	Calendar Year.
Proposal Process:	Application for predetermined amount of funding. Multiple hard copies of proposal are submitted.
Selection Process:	DCJS staff and external subject matter experts make rec's to the Victim Services Grant Review Subcommittee who then makes rec's to the full Criminal Justice Services Board (CJSB). CJSB approves grants to programs during scheduled meetings.
Submission of Materials:	Online (GMIS).
Disbursement of Funds:	Advance quarterly payment via EDI.
Financial Reports:	Quarterly vouchers and financial reports via GMIS.
Progress/Final Reports:	Annual basis via GMIS.
Accreditation Preference:	No.
VAdata Requirement:	No.
Outcome Measure Requirements:	Yes. SASP Target Form (Service Objectives).
Renewal Option:	Yes.
Budget Amendments:	Yes. No more than 2 amendments.
Match Requirement:	No.
Unique Restrictions:	Must also receive funding from SAGP grant; must be a sexual assault crisis center (non-profit) or government-based agency that operates like a sexual assault crisis center (not a part of the criminal justice system).

Source: Virginia State Crime Commission in conjunction with the 2014 SDVA Funding Work Group.

The Victim Fund Program

The Victim Fund Program is used to support the prosecution of domestic violence cases, law enforcement efforts, and general victim services, including victims of sexual assault, domestic violence, or stalking. One half of the grants from the Victim Fund are dedicated to supporting prosecutions; the other half are dedicated to a variety of victim

services programs connected with sexual and domestic violence. The Victim Fund consists solely of state funds that are generated from court costs. More specifically, it is funded through the Virginia Sexual and Domestic Violence Victim Fund (VSDVVF), which was created by the Virginia General Assembly in 2004 as the Virginia Domestic Violence Victim Fund; the fund was given its current name in 2006. The ultimate source of this funding is a $2 court cost that is assessed against defendants that have been convicted of a misdemeanor. Over the most recent two year period, approximately $2.4 million was deposited into the VSDVVF fund for the purposes of funding victims' services programs, and an additional $2.4 million was deposited for the purposes of funding local attorneys for Commonwealth's Attorneys' Offices.[23]

Table 4: Victim Fund Grant Program Breakdown

Name of Grant Program:	**Victim Fund**
Administered By:	DCJS.
Funding Stream:	State (VSDVVF).
Grant Cycle:	Calendar Year.
Proposal Process:	Typically 2 year grants. Awards are made each year. Multiple hard copies of proposals submitted (1 original, 3 copies).
Selection Process:	DCJS staff and external subject matter experts make rec's to the Victim Services Grant Review Subcommittee who then makes rec's to the full Criminal Justice Services Board (CJSB). CJSB approves grants to programs during scheduled meetings. Competitive applications are evaluated using a scoring point system.
Submission of Materials:	Online (GMIS).
Disbursement of Funds:	Advance quarterly payment via EDI.
Financial Reports:	Quarterly vouchers and financial reports via GMIS.
Progress/Final Reports:	Quarterly basis via GMIS and SDVVF Report (a different online system).
Accreditation Preference:	No.
VAdata Requirement:	No.
Outcome Measure Requirements:	Must submit goals & objectives to include services and/or training, and coordination/ collaboration.
Renewal Option:	Yes.
Budget Amendments:	Yes. No more than 2 amendments.
Match Requirement:	No. However, localities submit in-kind match to demonstrate agency's commitment to project.
Unique Restrictions:	May not be used for perpetrators; required cooperative agreements with professionals in project service area.

Source: Virginia State Crime Commission in conjunction with the 2014 SDVA Funding Work Group.

V-STOP

The V-STOP grant program is used to develop and strengthen the response of the criminal justice system to cases involving domestic violence, sexual assault, and stalking, as well as support and enhance services for victims. This program is made up entirely of STOP federal funds and is distributed by the OVW to Virginia. Virginia received $2.8 million in 2013;[24] DCJS distributed these funds to law enforcement agencies, Commonwealth's Attorneys' Offices, courts, sexual assault crisis centers, and domestic violence programs.

Table 5: V-STOP Grant Program Breakdown

Name of Grant Program:	**V-STOP**
Administered By:	DCJS.
Funding Stream:	Federal (STOP).
Grant Cycle:	Calendar Year.
Proposal Process:	Typically 2 year grants. Awards are made each year. Multiple hard copies of proposals submitted (1 original, 3 copies).
Selection Process:	DCJS staff and external subject matter experts make rec's to the Victim Services Grant Review Subcommittee who then makes rec's to the full Criminal Justice Services Board (CJSB). CJSB approves grants to programs during scheduled meetings.
Submission of Materials:	Online (GMIS).
Disbursement of Funds:	Advance quarterly payment via EDI.
Financial Reports:	Quarterly vouchers and financial reports via GMIS.
Progress/Final Reports:	Semi-annual basis via GMIS.
Accreditation Preference:	No.
VAdata Requirement:	No.
Outcome Measure Requirements:	Yes. Goals and objectives must fall into VAWA purpose areas (1 or more). Also must include coordination, collaboration, training, or services.
Renewal Option:	Yes. Contingent upon funds.
Budget Amendments:	Yes. No more than 2 amendments.
Match Requirement:	Yes. 25% match required except programs funded in the victim services category are exempt.
Unique Restrictions:	May not be used for youth (under 11) or perpetrators. Encourage cooperative agreements.

Source: Virginia State Crime Commission in conjunction with the 2014 SDVA Funding Work Group.

Virginia Department of Social Services

The Virginia Department of Social Services administers two relevant grant programs that SDVAs receive: the Domestic Violence Prevention and Services (DVPS) Grant Program and the Child Abuse and Neglect Treatment Grant Program. The vast majority, 83% (44 of 53) of SDVAs received the DVPS Grant while only 23% (12 of 53%) received the Child Abuse/Neglect Treatment Grant.[25]

DVPS Grant Program

The Domestic Violence Prevention and Services Grant Program is used to help fund SDVAs that focus on domestic violence prevention and services. This program is made up of federal VOCA funds, which are initially received by DCJS and then transferred to VDSS; federal FVPSA funds, which are received directly by VDSS from the U. S. Department of Health and Human Services; state funds received from the Virginia Family Violence Prevention Program (VFVPP); and general state funds. All of these funding sources are combined by VDSS into the large, DVPS Grant Program, to which those SDVAs that work in the area of domestic violence can apply. The total amount of grants awarded by this program was $7.1 million in FY13.[26]

Table 6: Domestic Violence Prevention and Services Grant Program Breakdown

Name of Grant Program:	**DV Prevention & Services**
Administered By:	VDSS.
Funding Stream:	Combination. Combines 2 Federal (VOCA and FVPSA) and 2 State Grants (VFVPP and a combination of general and non-general state funds).
Grant Cycle:	State Fiscal Year.
Proposal Process:	Annual proposal; however, contract is sometimes/usually extended for another year or two. Extensions do not require full re-write, but usually just new budget and work plans. Multiple hard copies of proposals are submitted (1 original, 5 copies, 1 CD). Optional oral presentation.
Selection Process:	Proposals are evaluated by a multidisciplinary panel of individuals who have expertise in areas such as domestic violence, family violence, contracts management, program development, non-profit management and other related fields of experience. The evaluation panel makes programmatic and budgetary recommendations for contract awards. "Best Value Acquisition" (BVA) to rank.
Submission of Materials:	Mail and email.
Disbursement of Funds:	Reimbursement monthly or quarterly via EDI.
Financial Reports:	Invoices submitted monthly or quarterly. Original copies are mailed.
Progress/Final Reports:	Semi-annual basis via email.
Accreditation Preference:	Yes.
VAdata Requirement:	Yes.
Outcome Measure Requirements:	Yes. DOW federal outcome measures and VDSS outcome measures.
Renewal Option:	Yes. Up to 2 years.
Budget Amendments:	Must have prior written VDSS approval. No more than 2 amendments permitted. None approved within 60 days of the end of grant year.
Match Requirement:	Yes. 20% for established programs; 35% for new programs.
Unique Restrictions:	Must update VAdata on a daily basis.

Source: Virginia State Crime Commission in conjunction with the 2014 SDVA Funding Work Group.

Child Abuse/Neglect Treatment Grant Program

The Child Abuse/Neglect Treatment Grant Program receives its funding from federal VOCA funds, which are initially received by DCJS and then transferred to VDSS. This amount was $1.7 million in FY14.[27] The Child Abuse/Neglect Treatment Grant Program is used for an array of services, not all of which involve SDVAs. In FY13, roughly $600,000 was distributed to SDVAs to provide specific services for children.[28]

Table 7: Child Abuse and Neglect Treatment Grant Program Breakdown

Name of Grant Program:	**Child Abuse/Neglect Treatment**
Administered By:	VDSS.
Funding Stream:	Federal (VOCA).
Grant Cycle:	State Fiscal Year.
Proposal Process:	Annual proposal; however, contract is sometimes/usually extended for another year or two. Extensions do not require full re-write, but usually just new budget and work plans. Multiple hard copies of proposals are submitted (1 original, 5 copies, 1 CD).
Selection Process:	Proposals are evaluated by a multidisciplinary panel of individuals who have expertise in areas such as: child abuse and neglect, mental health treatment services, criminal justice, community-based family support programs, contract management, program administration, program development, or program evaluation. Using the criteria, the panel makes programmatic and budgetary recommendations for contract awards. "Best Value Acquisition" (BVA) to rank.
Submission of Materials:	Mail and email.
Disbursement of Funds:	Reimbursement quarterly via EDI. (Can be monthly in cases of hardship).
Financial Reports:	Invoices and reports submitted quarterly or monthly. Original copies are mailed.
Progress/Final Reports:	Quarterly narrative via email. (VOCA Narrative and Statistical Reports).
Accreditation Preference:	No.
VAdata Requirement:	Yes.
Outcome Measure Requirements:	Yes. Receive a rating of "fully met requirements" or "exceeds requirements" on 75% of the criteria.
Renewal Option:	Yes. Up to 2 one-year periods.
Budget Amendments:	Must have prior written VDSS approval. No more than 2 amendments permitted. Must be submitted at least 30 days prior to intended effective date.
Match Requirement:	Yes. 20% match from nonfederal sources.
Unique Restrictions:	Must not be used for perpetrators; Must have volunteer component; Must assist victims in securing victim compensation funds. Must promote within the community, coordinated public and private effort to aid crime victims; Must provide services to crime victims at no charge through the VOCA-funded project.

Source: Virginia State Crime Commission in conjunction with the 2014 SDVA Funding Work Group.

Virginia Department of Health

The Virginia Department of Health administers one relevant grant program for SDVAs, the RPE grant, which is received directly by them from the CDC. Seventeen percent (9 of 53) of SDVAs currently receive Rape Prevention Education Grant funds; approximately $352,000 was distributed, in total, in federal FY13.[29]

Table 8: Rape Prevention and Education Grant Program Breakdown

Name of Grant Program:	**RPE**
Administered By:	VDH.
Funding Stream:	Federal (RPE).
Grant Cycle:	Adjusted Federal Fiscal Year (February 1-January 31). Current contract year runs November 1-October 31, there will be an option to extend these to January 31.
Proposal Process:	Annual proposal; however, contract is typically extended with new budget and work plans. Multiple hard copies of proposals are submitted (1 original, 5 copies); optional oral presentation.
Selection Process:	Point system to rank (100 points).
Submission of Materials:	Mail and email.
Disbursement of Funds:	Reimbursement quarterly.
Financial Reports:	Invoices and financial reports submitted quarterly via mail. Must include copies of receipts.
Progress/Final Reports:	Quarterly basis via email.
Accreditation Preference:	No. (But used to be.)
VAdata Requirement:	No.
Outcome Measure Requirements:	Yes. Narrative response to at least 1 of 4 specified goals/outcomes.
Renewal Option:	Yes. Up to 4 one-year periods.
Budget Amendments:	Yes. Submitted electronically.
Match Requirement:	No.
Unique Restrictions:	Must involve primary prevention programming; attend annual VDH contractors meeting; Complete primary prevention guidelines assessment tool, complete assessment of cultural relevance, and full participation in at least one of the State Plan Implementation Workgroup Subcommittees.

Source: Virginia State Crime Commission in conjunction with the 2014 SDVA Funding Work Group.

Virginia Department of Housing and Community Development

The Virginia Department of Housing and Community Development administers one relevant grant program that SDVAs receive: the Virginia Homeless Solutions Program. The source of this funding is federal ESG funding, as well as some funding from the federal Housing Opportunities for Persons with AIDS/HIV. These two funding streams are combined with three state funding streams that are from state general funds: the Child Services Coordination Grant, Homeless Assistance, and Homeless Prevention. Although the main focus of the Homeless Solutions Program is homelessness in general,

rather than the temporary housing needs of the victims of domestic violence, a portion of the funds support such shelters. However, local SDVAs that provide shelters are required to apply for their funding in conjunction with other organizations in the locality, as part of an overall plan presented in a CoC proposal, to reduce homeless in the area. Nearly half, 47% (25 of 53), of SDVAs received some portion of the total funding distributed in FY15, which was approximately $15 million.[30]

Table 9: Virginia Homeless Solutions Grant Program Breakdown

Name of Grant Program:	**VA Homeless Solutions**
Administered By:	DHCD.
Funding Stream:	Combination. Combines 2 Federal (Emergency Solutions Grant and Housing Opportunities for Persons with AIDS/HIV) and 3 State Grants (Child Services Coordination Grant, Homeless Assistance, and Homeless Prevention state general funds).
Grant Cycle:	State Fiscal Year.
Proposal Process:	Bi-annual; Proposals are submitted electronically via CAMS, as part of the local planning group or Continuum of Care's (CoC) proposal. Must be submitted by CoC or Balance of State local planning group online via CAMS. CoC/local planning group proposes which grantees will carry out the activities of funding. The grantees must be approved by DHCD, but it is the community that proposes which organization will be a part of the proposal. Competitive process.
Selection Process:	Point system. Must score 60 points out of possible 100 points to be considered for funding. DHCD reserves the right to fund CoCs and local planning groups scoring below the 60 point threshold to assure statewide access to VHSP. Community-based application process.
Submission of Materials:	Online (CAMS).
Disbursement of Funds:	Remittances via CAMS; payments via EDI.
Financial Reports:	Remittances submitted 6 times per year via CAMS, which tracks balances.
Progress/Final Reports:	Annual basis via CAMS. Moving to quarterly reporting.
Accreditation Preference:	No.
VAdata Requirement:	No.
Outcome Measure Requirements:	Yes. Assessment system and tool requirements. PIT count. The goals and outcomes associated with the funding are to: reduce the # of homeless; shorten the length of time of homelessness; and, reduce the # that return to homelessness.
Renewal Option:	Grants will be renewable based on performance, compliance and available funding for a second year.
Budget Amendments:	Yes. Submitted electronically.
Match Requirement:	Yes. 25% match required from private or local sources (may include cash, in-kind or volunteer labor).
Unique Restrictions:	CoC participation required; MOUs/agreements must be submitted; funding is to support a community-wide emergency response system to homelessness; must use local centralized or coordinated assessment system; all participants must be assessed with community-based common assessment tool; must use "Annual Point in Time" (PIT) count; recertification requirement (every 3 months for financial and every 12 months for services/case management).

Source: Virginia State Crime Commission in conjunction with the 2014 SDVA Funding Work Group.

Limitations on the Transferring of Federal Grant Funds

As noted previously, funding received from federal grant programs may only be used in a manner consistent with the requirements and regulations governing those grants. An Attorney General Opinion from May 31, 2002, explicitly reinforced this obvious restriction, by stating that the Virginia General Assembly cannot "direct" the Governor to reallocate federal funds in a way that would be inconsistent with the authorizing federal act.[31]

In addition, VOCA, V-STOP, SASP, and FVPSA funds are the direct responsibility of the Governor, or his designee, who must certify to the relevant federal agency that the funds have been used appropriately and with all required conditions met. While any of these funds could, in theory, be transferred from one state agency to another, as long as they were used for their intended purposes, it remains a fact that the Governor would only likely transfer them to an executive branch agency. Otherwise, it would be problematic for him to certify or guarantee that all funds were lawfully used. This is why it is doubtful that the CICF, which is not an executive branch agency, would ever be selected to be the agency responsible for disbursing these federal funds. Practically speaking, RPE funds likely cannot be transferred either, as they are directly sent from the federal CDC to the Virginia Department of Health for a specific purpose, and the CDC would probably be reluctant to send this grant money to a state agency that was not connected with health and human services. And, ESG funds could not be transferred easily to another agency, as these funds are intended to help with housing, and can only be disbursed by a state agency to local CoC groups that have created a coordinated plan to address homelessness in a given jurisdiction.

It should also be noted that while the purview of this study is primarily limited to the streaming funds noted above, SDVAs also rely upon additional grant sources, including private foundations, private donations, the United Way, corporations, the *Combined Federal and Virginia Campaign,* direct federal grants, trust funds, and local governments.[32]

Survey Findings and the SDVA Funding Work Group

Survey Findings

In order to gain a better understanding of SDVA funding, staff disseminated a survey to local SDVA directors.[33] The purpose of the survey was to provide a mechanism where <u>all</u> SDVAs had the opportunity to provide feedback regarding grant funding processes in a confidential manner and to identify what is working well and areas needing improvement. All SDVA directors were asked to complete a detailed, online survey, as well as submit their CY13 VAdata Report and FY13 profit/loss statement to include itemized budget. The response rate was excellent with 96% (51 of 53) of SDVA directors responding.

SDVA Profiles

As mentioned earlier, there exists much diversity across Virginia's 53 SDVAs. On average, SDVAs serve 5-6 localities and have been established anywhere from less than 5 years to over 100 years. Over 75% have been in existence for over 20 years. Most agencies, 62% (33 of 53), provide dual services, with another 25% (13 of 53) providing domestic violence services only and 13% (7 of 53) offering sexual violence services only.[34] Most SDVAs, 89% (47 of 53), are accredited with an additional 6% (3 of 53) in the process of accreditation. Six percent (3 of 53) of SDVAs are currently not accredited.[35] Current SDVA directors had served anywhere from less than a year to around 30 years in their positions and within the general sexual and domestic violence field. Staffing levels at SDVAs also varied greatly; from 2 to 35 full-time employees; 0 to 40 part-time employees; and/or, 0 to 300 volunteers/interns.

Grant Workload

Staff attempted to determine the number of grants each SDVA managed per grant cycle, as well as the total amount of time dedicated to managing such grants. The total number of grants that each SDVA managed fluctuated, with over 60% of responding SDVAs managing four or fewer grants:

- 30% (16 of 53) managed 0-2 grants;
- 32% (17 of 53) managed 3-4 grants;
- 28% (15 of 53) managed 5-6 grants; and,
- 9% (5 of 53) managed 7-8 grants.[36]

Likewise, the number of hours per year dedicated to managing grant programs varied enormously across SDVAs. Directors reported spending anywhere from 20 hours to hundreds or thousands of hours per grant cycle depending on how many grants they managed and how they defined "managing grants."

Overall SDVA Directors' Satisfaction with Grant Programs

One of the main findings of the survey was that SDVA directors, on average, are "somewhat to mostly satisfied" with the vast majority of grant funding processes and grant-related services provided by all of the state agencies. This is an important finding because it shows that there are currently many things that are being done well. There was no single state agency that stood out in terms of being good, bad, or otherwise. All state agencies received positive feedback. SDVA directors noted many things that they liked with how state agencies administered grant-related services, such as the grant application and award process being facilitated in a timely manner, consistency and simplicity of guidelines and the grant application process, clarity in instructions, grant monitors who were knowledgeable about sexual and domestic violence issues and responsive to calls for assistance, timely reimbursement/disbursement of funds, reports that were user-friendly, and electronic/on-line submission of materials and communication. The Action Alliance also received a lot of positive feedback from SDVA directors. For instance, many directors reported that they were satisfied with the Action

Alliance's advocacy for state funding and legislative changes, as well as the informative training opportunities provided.

Overall SDVA Directors' Concerns with Grant Programs

While there was much positive feedback, there were also some overall areas of concern that SDVA directors consistently mentioned. It is important to note that some of these concerns overarched more than one state agency, while other concerns were state agency-specific. As will be discussed in more detail later, staff developed initial recommendations based on these findings for the work group to consider and discuss. A general discussion of these concerns is provided below.

Grant cycles

First, many directors voiced their frustration over the lack of consistency in the grant cycles and how such variation impacts their workload. While some noted in the work group that smaller SDVAs can sometimes benefit from variations in the grant cycle, most stressed that consistency is helpful to plan services for the upcoming year and noted that work is sometimes disrupted when there are multiple budget cycles. This concern was specifically noted for DCJS where both a fiscal year and a calendar year is used depending on the grant program, as well as VDH, where the fiscal year grant cycle varies. Since the grant program administered by VDH is dependent upon the release of funds from the federal Centers for Disease Control, the timing of the grant cycle tends to differ.

Grant monitors

Staff found that SDVA directors' experience with grant monitors varied tremendously in terms of quality, responsiveness and accountability. Some directors reported having a very good relationship with their grant monitors. For instance, many SDVA directors expressed that VDSS grant monitors were very responsive to calls for assistance and were knowledgeable about domestic violence issues. Similarly, other directors noted that both VDH and DHCD grant monitors had helpful, friendly and knowledgeable staff. It should be noted that the state agencies who received the most positive comments about their grant monitors also had a more thorough evaluation system in place. On the other hand, a significant number of directors noted that DCJS grant monitors could be doing a better job in their response time, accessibility, and the information they provided. DCJS was aware of this issue and had already undertaken steps to address the concern by hiring additional grant monitors, and creating program manager positions. During the same time frame of this study, DCJS conducted their own independent review of victim services funding and a needs assessment of SDVAs.

Reimbursement/disbursement of funds

A third issue dealt with the reimbursement and disbursement of funds. SDVA directors expressed concern that when money is not reimbursed or disbursed in a timely manner, it can have an undesirable impact on their agency. Sometimes this issue is exacerbated by a lack of communication or miscommunication with a grant monitor that may create

subsequent delays in funds being reimbursed or disbursed. Staff turnover at SDVAs can also be problematic if the new staff member is not knowledgeable with the administration of grants. Directors reported satisfaction with the timely disbursement of funds from DCJS grant programs, as well as that DCJS is willing to consider requests to disburse funds in advance. Others noted difficulty in receiving funds in advance from VDSS' procurement (reimbursement)-based grant programs. Staff conducted a preliminary legal analysis of whether VDSS grant funding could be changed from a reimbursement based system to one that awards grant funds before expenses are incurred. Staff was unable to identify any federal prohibition to such a change. However, staff concluded that this action may require statutory changes in Title 63.2 and the Virginia Public Procurement Act (Chapter 43 of Title 2.2), as well as budget language.

At the work group, the importance of SDVAs having an enormous amount of cash reserve and/or lines of credit for protection was noted. Training is available to SDVA staff but when there is turnover, new employees often struggle to understand the requirements of each grant program. State agency representatives at the work group pointed out that they are bound to finance rules where monies must be reimbursed or disbursed to SDVAs within so many days of approval.

Electronic submission of materials

Findings on this issue were very clear: electronic submission of grant materials is preferred. Directors expressed a clear desire for not only progress and financial reports to be submitted electronically, but also grant application materials. Currently, DCJS and DHCD have electronic options for submitting grant materials for progress and financial reports.[37] However, VDSS and VDH currently do not have a mechanism for submitting grant materials electronically. Further, except for DHCD, none of the agencies have a mechanism for electronically submitting grant applications. Affording the ability to submit all grant materials electronically would be more cost and time efficient.

Budget amendments and other guidelines

Additional concerns revolved around the limited number of budget amendments permitted and other restrictive guidelines. For example, several directors explained how having only two budget amendments per year can be problematic in addressing routine changes relating to staff turnover, extended leave (such as maternity), or increases in salary or other compensation. Directors appeared to prefer that positions or services be funded rather than specific individuals. Naturally, most directors noted that they would like to have more autonomy in how they utilize their funds, but acknowledged that many of the guideline restrictions, while frustrating, were likely out of the control of the state agency if the restriction is a federal requirement.

Training/Meetings

Another theme that emerged in regard to all state agencies dealt with trainings and meetings. Directors clearly expressed that they would like state agencies to consider/continue teleconferences and webinars in order to limit travel expenses.

Additionally, directors would like to see training offered more consistently in various locations across the state.

SDVA Coalition/Action Alliance Services

There were three general areas of concern relating to services that the Action Alliance provides to SDVAs, including accreditation, the VAdata system, and the state hotline.

Accreditation

The accreditation process was a concern consistently mentioned by directors. Many acknowledged the importance of accreditation as a measure of baseline services provided and legitimacy; however, many also felt that there needed to be a reevaluation of accreditation standards and oversight thereof. This is an important concern as accreditation status is linked to some of the funding streams. There was mixed support for linking accreditation to funding. Most directors supported the idea if they were only competing against other SDVAs for grant funding, but opposed the idea if they had to compete in a pool of applicants that included non-SDVAs, as they are not held to the same requirements. Many of the directors also mentioned, as a general concern, that the accreditation process should be managed in such a way as to avoid appearances of favoritism, and that all objective criteria be applied consistently to all agencies. The costs of the accreditation process were also mentioned as a concern by some of the directors.

VAData

VAdata is an electronic, web-based system that collects statewide data from SDVAs. The system was implemented in April 1996 through the support of VAWA's V-STOP funds.[38] There is an annual fee of $600 for those who are members of Action Alliance; however, this fee may be waived for accredited SDVAs.[39] Many directors noted that VAdata was helpful in some aspects, but was a limited tool that requires much needed upgrades and improvements.[40] Further, some directors felt that the VAdata system was not fully capturing local agency needs. For instance, many SDVAs use the VAdata system to comply with accreditation, but also use an additional program or case management system to better capture their agency's data. As a result, SDVAs must then enter duplicative information into an additional locally-based system that better fits their needs and local requirements.

Family Violence & Sexual Assault Hotline

Some SDVAs are able to independently operate a 24-hour crisis hotline. The total cost of this service to these agencies can vary widely; anywhere from hundreds to thousands of dollars per year depending on how they choose to staff the hotline and what technology they utilize. Other SDVAs may only be able to partially operate a hotline during certain days and times; others are not able to operate a hotline at all. In order to assist those SDVAs that are not able to monitor a hotline 24-7 (a condition for accreditation), the Action Alliance developed a statewide hotline that SDVAs can contract with to provide this service. The cost for this service varies between approximately $3,000-$6,000

annually depending on the outcome of the formula that Action Alliance uses to determine cost. The Action Alliance's statewide Family Violence & Sexual Assault Hotline responded to 1,970 hotline calls and 15,449 calls on behalf of 27 local SDVAs from June 2013 to April 2014.[41]

Concerns relating to the cost and consistency of services provided by the state hotline were frequently mentioned by directors. While it is difficult for some agencies to afford access to the 24-hour crisis hotline, it may be the only option they have in order to be accredited, which is also tied to some of the grant program requirements. Ultimately, the goal is for more SDVAs to locally manage their own hotlines so that they can provide the most *direct* assistance to clients in their localities.

Funding Formulas, Administrative Changes and Streamlining Processes

There were mixed findings as to whether SDVA directors favored or opposed a funding formula grant process versus a competitive grant process. On one hand, formulas could be helpful because an agency would know the total amount of funds they will receive; however, some fear a formula would cause their agency to lose or receive less funding. Some directors mentioned a potential for a combination of the two approaches: a baseline amount of funds based on a formula, plus a competitive grant process for additional funds. In sum, directors supported actions that would maintain or increase their funding levels, and, opposed actions that would decrease or make funding levels uncertain.

Administrative changes at the state-level are also a concern for SDVAs. During any administrative change, directors are concerned about the impact it may have on their agency and level of funding. Many directors felt that there needed to be protections in place to avoid funding being subject to political fluctuations. Directors reported wanting the services that they provide to remain uninterrupted and consistent, regardless of administrative changes at the state-level.

Directors were asked to what degree they favored or opposed streamlining grant programs into one agency. The findings were somewhat mixed, with 61% (28 of 46) of responding directors favoring the idea to some degree. Yet, it is important to note that 33% (15 of 46) of responding directors opposed it. Directors were then asked who they would prefer to administer the grants <u>if</u> funds were streamlined into one state agency. There was an equal distribution of support between DCJS, VDSS and maintaining the status quo in terms of directors' preferences. The vast majority of directors emphasized that there is a greater need for the *overall process* to be more efficient regardless of who administers the grant programs.

SDVA Funding Work Group

The second enactment clause mandated that Crime Commission staff convene a work group to discuss the topic of sexual and domestic violence funding. Representatives from the following agencies participated:

- Action Alliance;
- Children's Advocacy Centers of Virginia;
- Commonwealth's Attorneys' Services Council;
- Criminal Injuries Compensation Fund;
- Department of Criminal Justice Services;
- Department of Health;
- Department of Housing and Community Development;
- Department of Social Services;
- Family and Children's Trust Fund;
- Local Sexual and Domestic Violence Agency Directors;
- Office of the Attorney General;
- Office of the Executive Secretary of the Supreme Court of Virginia;
- Prosecutors;
- SANE Nurse;
- Victim Network of Victims and Witnesses of Crimes;
- Virginia Chiefs of Police Association;
- Virginia Sheriffs' Association; and,
- Worker's Compensation Commission.

The work group met on June 11, July 30, and September 10, 2014, to discuss the issues delineated in the second enactment clause of HB 885. At the meetings, survey findings and the general legal parameters guiding the administration and disbursal of these funds were reviewed. Open discussion was encouraged as to the practical difficulties SDVAs face in either applying for, or utilizing, grant monies received from these programs. Prior to the September meeting, all work group members were asked if they had any proposals, either specific or general in nature, which they thought might improve Virginia's current SDVA funding systems. Staff provided the opportunity for work group members to submit these to staff confidentially. Crime Commission staff presented the submitted proposals by work group members, as well as proposals developed from the initial survey to SDVA directors, in an anonymous manner to the work group. Work group members were then given the chance to evaluate each proposed recommendation, also in an anonymous manner. The specific list of proposed recommendations evaluated by the work group, along with the rationale for each included:[42]

1. All grant programs should be on a consistent state fiscal year grant cycle (July 1-June 30).
   Rationale: Having different cycles is inefficient, time consuming and challenging for grantees to manage.

2. Allow grantees to submit grant application materials electronically.
   Rationale: Submitting materials in a hard copy format or via mail is inefficient and costly.

3. Allow grantees to submit all grant materials (progress and financial reports, budget amendments, etc.) electronically.
   Rationale: Submitting routine grant materials in a hard copy format or via mail is inefficient and costly.

4. Develop new processes to determine what procedures, forms, etc. can be combined, eliminated or otherwise made more efficient for grantees.
   Rationale: By having all state agencies collaborate to encourage improved efficiencies across all programs, efficiency should be improved and duplicative efforts reduced.

5. Allow grantees to budget by job functions/services rather than by name of individual.
   Rationale: Eliminates need for personnel budget amendment requests, which can be cumbersome.

6. Allow grantees to request carryover funding into the next fiscal year without penalty.
   Rationale: This approach would allow for flexibility in budgeting for different operation expenses during the end of one fiscal year and the start of the next.

7. Remove accreditation as a factor in funding decision-making.
   Rationale: The accreditation process can be inconsistent, unclear, and/or unreasonable.

8. Conduct an independent review of Vadata.
   Rationale: Independent needs assessments are beneficial in identifying areas of need and improvement.

9. Data collection efforts should be the responsibility of a state agency.
   Rationale: Data collection from SDVAs should be the responsibility of a state agency. Duplicative data entry into multiple systems is inefficient and unnecessary.

10. Alternatives to the current hotline system should be considered.
    Rationale: The current hotline system is expensive and there may be more cost-effective options available to programs.

11. VDSS should provide one-quarter (3 months) of funding at the start of the grant period, and then make future disbursements contingent upon meeting outputs, outcomes, or milestones during the first quarter.
    Rationale: This only puts one-quarter of the funding at risk for non-performance, but provides upfront cash flow for the programs.

12. All grant programs should operate under a grant philosophy rather than procurement.
    Rationale: By having funds provided upfront, it makes budgeting for local programs much easier, and helps them avoid cash flow problems.

13. VDSS should review budgetary percentage allocation and budget amendment requirements.
    Rationale: Flexibility in reallocating budget funds would help local programs respond to unexpected expenses or unforeseen, necessary changes in program activities.

14. DCJS should retain the VOCA funds that are now granted to VDSS.
    Rationale: Maintaining VOCA funding at one agency streamlines the grant process.

15. VDSS should continue to maintain the DV Prevention and Services Grant Program Funds, provided they can update to an electronic system.
    Rationale: VDSS currently does not have an electronic system, which is preferred.

16. VDSS should become responsible for two grants currently administered by DCJS (SASP and SAGP).
    Rationale: Streamlines the grant process.

17. DCJS should be responsible for handling all DV and SV grant programs, excluding DHCD's Homeless Solutions Program grant, 25% of VDH's RPE grant, and V-STOP funds that do not currently go to SDVAs.
    Rationale: Consolidation of all funding sources into one state fund could allow for efficiencies in applying for and monitoring of all these grants to local programs.

18. VDSS should be responsible for handling all grant programs.
    Rationale: VDSS has a good working knowledge of domestic and sexual violence and is the best candidate as their sole purpose is working with agencies that deal with family violence.

Two additional recommendations were developed at the work group meeting and added to the list for evaluation:

19. VDSS should be responsible for handling all DV and SV grant programs, excluding DHCD's Homeless Solutions Program grant, 25% of VDH's RPE grant, and V-STOP funds that do not currently go to SDVAs.

20. DCJS should be responsible for handling all grant programs.

The work group's evaluation of proposed recommendations showed that a majority had strongly supported Recommendations 1, 2, 3, 4, 8, 10, and 12. The remaining recommendations had mixed levels of support. A follow-up survey was then sent to all SDVA directors to gauge their support or non-support for the same list of preliminary recommendations. Over half, 58% (31 of 53), of SDVA directors responded and the results showed a similar level of support for the seven recommendations strongly supported by the work group.

Preliminary recommendations that received a general consensus were reviewed by staff, in conjunction with all survey results, to determine what improvements feasibly could be made in Virginia, and were presented to the Crime Commission.

Summary and Recommendations

House Bill 885 contained a second enactment clause directing the Crime Commission to study the current federal and state funding streams for local programs that assist victims of sexual and domestic violence and create a work group.

There are eight grant streams administered by four state agencies to these local programs, referred to as SDVAs, which are relevant to HB 885 discussions. The Department of Criminal Justice Services manages four grant programs for SDVAs: the Sexual Assault Grant Program (SAGP), is derived from federal VOCA funds and state General Fund money. DCJS also administers federal STOP funds, which in Virginia are known as V-STOP, as well as the federal SASP funds. Finally, DCJS administers the disbursal of grants from the Virginia Victim Fund, which is derived from fees collected from defendants convicted of misdemeanor crimes in Virginia.

DCJS also provides some VOCA funds to VDSS, which they utilize in the two grant programs they administer. The first grant program administered by VDSS is the Domestic Violence Prevention and Services Program, which in addition to the VOCA funding, is also made up of federal FVPSA funding, and state general funds. The other grant program administered by VDSS is the Child Abuse and Neglect Treatment Grant Program, which consists entirely of federal VOCA fund money.

The Virginia Department of Health administers the RPE Grant Program, which consists of federal VAWA funds, known as RPE Initiative funding, given directly to the Department by the CDC. The last of these grant programs is the VA Homeless Solutions program, administered by the Virginia Department of Housing and Community Development, which combines two federal funds (Emergency Solutions Grant funds and Housing Opportunities for Persons with AIDS/HIV) with three state grants (the Child Services Coordination Grant, the Homeless Assistance Grant, and Homeless Prevention state general funds).

Due to the certification requirements of these grants, none of them would likely be transferred to a state agency that was not in the executive branch of government. In addition, the RPE Grant Program receives its funding directly from the CDC, which would be unlikely to transfer its funding to a state agency that did not focus on health and human services. The VA Homeless Solutions Grant Program explicitly requires that its funds be used to address homelessness in given locales, and that all applications must be made by local planning groups or Continuums of Care, that have submitted coordinated plans of actions for the entire area. Thus, it would be impractical, to the point of impossibility, for those portions of this grant fund that goes to victim shelters to be administered by a different state agency.

Both surveys and individual interviews revealed that, overall, SDVAs are at least "somewhat satisfied" with the vast majority of grant funding processes and grant-related services. There are many things about how grant programs and services are administered that SDVAs liked. However, there were a number of concerns as well, including grant cycles, grant monitors, reimbursement/disbursement of funds,

submission of materials, lack of electronic reporting systems, budget amendments, guidelines, accreditation, VAdata, the statewide hotline, and access to trainings and meetings. In particular, the majority of respondents expressed thoughts that the accreditation process might be changed in order to avoid appearances of favoritism. Clear majorities also expressed curiosity as to whether or not the statewide hotline could be made more efficient, or an alternative hotline system could be developed which would be less expensive for local programs to use. Finally, a number of respondents indicated that they thought the VAdata system was antiquated, and oftentimes proved to be more of a burden than a useful data compilation system, at least from the perspective of local programs.

There were mixed findings as to whether SDVA directors favored or opposed a funding formula grant for the grant programs. It is important to note that one-third of responding SDVAs opposed streamlining grant programs into one agency. If streamlining to one agency were to take place, no one agency stood out among the rest, as there was an equal distribution of support as to where the grant programs should be administered: VDSS, DCJS, or the status quo. The vast majority of SDVAs indicated support for the overall process to be more efficient regardless of who administers the grant programs. In sum, SDVAs supported actions that would maintain or increase their funding levels, and opposed actions that would decrease or make funding levels uncertain.

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 several of the following recommendations at its December meeting:

Recommendation 1: Statutorily require the creation of an Advisory Committee on Sexual and Domestic Violence Programs. The advisory committee would be similar to the existing Advisory Committee on Juvenile Justice. This 15 member Advisory Committee would help coordinate and provide communication between state agencies and local sexual and domestic violence agencies, review ways in which operational efficiencies in awarding and monitoring grant funds can be achieved, and make recommendations on needs and priorities for the development and improvement of local services to victims of sexual and domestic violence in Virginia. It would also develop a comprehensive plan for data collection on sexual and domestic violence. Membership would consist of the heads of the state agencies that award grant funds to sexual and domestic violence agencies, as well as the Attorney General of Virginia, a member of the Virginia Senate and a member of the House of Delegates, the Chair of the Virginia State Crime Commission, representatives from sexual and domestic violence agencies, a member of a victim/witness organization, and the Executive Director of the Action Alliance, or their designees.

Recommendation 2: Amend Va. Code § 9.1-102 to require the Va. Department of Criminal Justice Services to establish an Accreditation Center for local sexual and domestic violence agencies, in a manner similar to the

Virginia Law-Enforcement Accreditation Center. The accreditation of local sexual and domestic violence agencies that receive funding from the state is a function that should be more directly overseen and managed by the state; if accreditation is tied to funding or the receipt of extra funds, the standards and evaluations should be carried out by an impartial body.

Recommendation 3: Request that the Virginia Department of Social Services review the hotline needs of local sexual and domestic violence agencies to see if more of them can locally manage a hotline, and evaluate the feasibility of assuming responsibility for a state hotline for local sexual and domestic violence agencies that are not able to maintain their own 24 hour hotline system.

Recommendation 4: The Virginia Department of Criminal Justice Services should assume control over the portion of the Victims of Crime Act federal funds that go towards the Domestic Violence Prevention and Services Grant and are currently administered by the Virginia Department of Social Services.

Recommendation 5: The portion of the Victims of Crime Act federal funds that go towards the Child Abuse and Neglect Treatment grant administered by the Virginia Department of Social Services should remain at the Virginia Department of Social Services.

Recommendation 6: The Virginia Department of Social Services should retain control over the Family Violence Prevention and Services Act federal funding stream that they currently administer via Virginia's Domestic Violence Prevention and Services Grant.

Recommendations 1, 2 and 3 were voted on and endorsed; Recommendations 1 and 3 were endorsed unanimously by the Crime Commission.

Recommendation 1 was introduced by Delegate Jennifer McClellan as House Bill 1954, and by Senator Janet Howell as Senate Bill 1057, during the 2015 Regular Session of the Virginia General Assembly. Both House Bill 1954 and Senate Bill 1057 were amended in the nature of a substitute, and were incorporated into other bills. House Bill 1954 was incorporated into House Bill 2092, and Senate Bill 1057 was incorporated into Senate Bill 1094. Both bills, after amendment, contained the substance of Recommendation 1, and created the Advisory Committee on Sexual and Domestic Violence. Both of the amended bills were passed by the General Assembly, and were signed into law by the Governor.

Recommendation 2 was introduced by Delegate Chris Peace as House Bill 2092, and by Senator Janet Howell as Senate Bill 1094, during the 2015 Regular Session of the Virginia General Assembly. Both House Bill 2092 and Senate Bill 1094 were amended in the nature of a substitute; both bills, after amendment, contained the substance of Recommendation 2, and created the Virginia Sexual and Domestic Violence Program Professional Standards Committee. The Committee would receive staffing assistance

from the Department of Criminal Justice Services, and would consist of six directors of local sexual and domestic violence programs appointed by the Advisory Committee on Sexual and Domestic Violence Programs, and six directors of local sexual and domestic violence agencies appointed by the Action Alliance, as well as one non-voting member appointed by the Department of Criminal Justice Services, and one non-voting member appointed by the Action Alliance. Both of the amended bills were passed by the General Assembly, and were signed into law by the Governor.

For Recommendation 3, a letter was sent to the Virginia Department of Social Services, requesting them to review the current state hotline system in 2015, evaluate whether it would be feasible for the Department to assume responsibility for a hotline that might be less expensive for local programs to use, and report their findings back to the Crime Commission by December 1, 2015.

The Crime Commission unanimously voted to pass by Recommendations 4, 5, and 6.

Acknowledgements

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

Domestic Violence and Sexual Assault Funding Work Group Members

Local Sexual and Domestic Violence Agencies

Virginia Sexual and Domestic Violence Action Alliance

Virginia Department of Criminal Justice Services

Virginia Department of Health

Virginia Department of Housing and Community Development

Virginia Department of Social Services

[1] 2014 Va. Acts ch. 665.

[2] During the Regular Session of the 2014 General Assembly, there were also two bills that would have placed the Criminal Injuries Compensation Fund in charge of funds "to be used for sexual and domestic violence prevention, intervention, or prosecution, unless otherwise required by state or federal law to be directed elsewhere." H.B 1, 2014 Gen. Assem., Reg. Sess. (Va. 2014); S.B. 4, 2014 Gen. Assem., Reg. Sess. (Va. 2014). Neither of these bills passed.

[3] The state coalition is properly known as the Virginia Sexual and Domestic Violence Action Alliance; they are commonly referred to as the Action Alliance.

[4] The Action Alliance was instrumental in creating the original standards for SDVAs to become accredited in Virginia, and has helped update the standards periodically. They also play an important role, indirectly, in the accreditation process for SDVAs in Virginia.

[5] Va. Att. Gen. Opinion, May 31, 2002.

[6] General information on VOCA funding can be found on the DOJ's Office for Victims of Crime website, retrieved at http://ojp.gov/ovc/grants/; additional information can be found on the DCJS website, retrieved at http://dcjs.virginia.gov/grants/grantDescription.cfm?grant=23.
[7] Information available on DOJ's Office for Victims of Crime website, searchable by state and year, retrieved at http://ojp.gov/ovc/grants/grant_award_search.html.
[8] Id.
[9] General information on V-STOP funding can be found on the DCJS website, retrieved at http://dcjs.virginia.gov/grants/grantDescription.cfm?grant=22.
[10] Information provided by DCJS; *see also* Office of the Attorney General of Virginia, Domestic and Sexual Violence in Virginia 2013 Annual Report, p. 19 (2013).
[11] General information on SASP funding can be found on the DCJS website, retrieved at http://dcjs.virginia.gov/grants/grantDescription.cfm?grant=88&code=9.
[12] Information provided by DCJS; *see also* Office of the Attorney General of Virginia, Domestic and Sexual Violence in Virginia 2013 Annual Report, p. 20 (2013).
[13] General information on FVPSA funding can be found on the Dept. of Health and Human Services, Family & Youth Services Bureau website, retrieved at http://www.acf.hhs.gov/programs/fysb/programs/family-violence-prevention-services/about.
[14] Information provided by VDSS; *see also* Office of the Attorney General of Virginia, Domestic and Sexual Violence in Virginia 2013 Annual Report, p. 21 (2013).
[15] Information provided by DCJS; *see also* Office of the Attorney General of Virginia, Domestic and Sexual Violence in Virginia 2013 Annual Report, pgs. 18, 24 (2013).
[16] General information on RPE funding can be found on the CDC website, retrieved at http://www.cdc.gov/violenceprevention/rpe/states.html.
[17] Information provided by VDH.
[18] General information on ESG funding can be found at the Department of Housing and Urban Development website, retrieved at https://www.hudexchange.info/esg.
[19] Information provided by DHCD.
[20] Information provided by DCJS.
[21] Information provided by DCJS; *see also* Office of the Attorney General of Virginia, Domestic and Sexual Violence in Virginia 2013 Annual Report, pgs. 24-25 (2013).
[22] Information received from DCJS; *see also* Office of the Attorney General of Virginia, Domestic and Sexual Violence in Virginia 2013 Annual Report, pgs. 24-25 (2013).
[23] Office of the Attorney General of Virginia, Domestic and Sexual Violence in Virginia 2013 Annual Report, pgs. 21-22, 26 (2013).
[24] Information received from DCJS; *see also* Office of the Attorney General of Virginia, Domestic and Sexual Violence in Virginia 2013 Annual Report, p. 19 (2013).
[25] Information provided by VDSS.
[26] Information provided by VDSS; *see also* Office of the Attorney General of Virginia, Domestic and Sexual Violence in Virginia 2013 Annual Report, p. 24 (2013).
[27] Information provided by VDSS.
[28] Information provided by VDSS.
[29] Information provided by VDH.
[30] Information provided by DHCD.
[31] *Supra* note 5.
[32] As reported by local SDVA directors in the Crime Commission's 2014 *SDVA Director Survey.*
[33] Copies of the 2014 *SDVA Director Survey* are available upon request.
[34] Information provided by the Virginia Sexual and Domestic Violence Action Alliance.
[35] Id.
[36] Information provided by DCJS, VDSS, VDH and DHCD.
[37] DCJS utilizes the GMIS system and DHCD utilizes the CAMS online system.
[38] *See* http://vadata.org/.
[39] *See* http://vadata.org/information.html.

[40] This issue is not unique. Many of the state-wide data collection systems are also antiquated and could benefit from updates.
[41] *See*, *http://storage.cloversites.com/virginiasexualdomesticviolenceactionallianc/documents/2013%20Annual%20Report-FINAL-SPREAD2.pdf*.
[42] *See* http://vscc.virginia.gov/VSCC%20SDVA%20WG%20Polling%20Results%20Sept%2010%202014.pdf.

2014 Domestic Violence and Sexual Assault Funding Work Group Membership

Action Alliance
Kristi VanAudenhove, Executive Director

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Child Advocacy Center (CAC)
Wanda Ostrander, Executive Director, Children's Advocacy Centers of Virginia

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Local Domestic Violence and Sexual Assault Program Agency Directors
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Chana Ramsey, Executive Director, James House Intervention/Prevention Services, Hopewell

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The Honorable Michael Doucette, Commonwealth's Attorney, City of Lynchburg

SANE Nurse
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Victim Network of Victims and Witnesses of Crimes (VA Victim Assistance Network)
Mindy Stell, Coordinator, Dinwiddie, Victim Witness Assistance Program (Network President)

Robin Bostic, Director, King William & King and Queen Counties, Witness Assistance Program (Network Legislative Chair)

Worker's Compensation Commission
Evelyn McGill, Executive Director

Criminal Injuries Compensation Fund (CICF)
Leigh Snellings, Assistant Director of the Fund

Shannon Freeman, Crime Victims' Ombudsman

Special Conservators of the Peace and Private Police Departments

Executive Summary

Special Conservators of the Peace

During the Regular Session of the 2014 General Assembly, Delegate L. Scott Lingamfelter, Chairman of the House Militia and Police Committee, formally requested Secretary of Public Safety and Homeland Security Brian Moran to create a bipartisan Task Force to study the issue of special conservators of the peace in Virginia. Pursuant to this request, Secretary Moran created a Task Force which met four times in 2014: June 25, July 24, August 27, and September 29. The Task Force examined the issue of required training for special conservators of the peace, as well as other topics concerning the appointment process and jurisdictional issues. The Task Force was able to come to consensus on a number of issues: the number of training hours required to become a special conservator of the peace is inadequate; the order forms appointing special conservators of the peace should be made uniform; the application form should be standardized; and, all special conservators of the peace should be required to be registered by the Virginia State Police and the Virginia Department of Criminal Justice Services. However, there were a number of other issues where the Task Force was unable to reach a clear consensus. For example, while there was consensus that special conservators of the peace require more training, there was no consensus on how many additional hours should be required. Also, while there was a general consensus that appointment orders for special conservators of the peace should specify the exact geographical area in which the special conservator is allowed to exercise his authority, there was no agreement on what the statutory limits of such areas should be.

Secretary Moran, along with staff from the Virginia Department of Criminal Justice Services, presented the findings and conclusions of the Task Force to the Crime Commission at its October meeting. The Crime Commission requested that staff from the Department of Criminal Justice Services prepare two pieces of draft legislation, one containing only those items that were consensus items from the Task Force, and the other containing the additional non-consensus measures, including specifically increased training requirements.

At its December meeting, the Crime Commission unanimously endorsed the draft legislation concerning special conservators of the peace that contained consensus items that were substantially agreed to by the Task Force. A general request was made to draft a second bill containing additional items, including specific increases in the number of training hours for special conservators of the peace; however, this was not a formal motion and no votes were taken.

Draft legislation to modify Virginia's special conservator of the peace statutes, which consisted of the consensus items that were discussed by the Crime Commission at its December meeting, was introduced as Senate Bill 1194 by Senator Thomas Norment during the Regular Session of the 2015 General Assembly. A second bill containing non-consensus items, Senate Bill 1195, was also introduced by Senator Norment during the Regular Session. Two other special conservator of the peace bills were independently introduced by other legislators as well: Delegate Jeffery Campbell introduced House Bill 2206, and Delegate Mark Berg introduced House Bill 2369. All of these bills were amended during the course of the legislative process. Ultimately, Senate Bill 1194 was left in the Senate, while Senate Bill 1195 and House Bill 2206 went into Conference, and were then conformed to each other, with amendments. Both bills were then passed by the General Assembly. The Governor proposed numerous technical and substantive amendments to the bills during Reconvened Session, some of which were rejected by the General Assembly. Both bills, now identical, were signed into law by the Governor on April 30, 2015.

Private Police Departments

Also at the Crime Commission's October meeting, Dana Schrad, the Executive Director of the Virginia Association of Chiefs of Police, presented on the topic of private police departments. There are nine private police departments in Virginia: Aquia Harbor Police Department, Babcock & Wilcox Police Department, Bridgewater Airpark Police Department, Carillion Clinic Police and Security Services Department, Kings Dominion Park Police Department, Kingsmill Police Department, Lake Monticello Police Department, Massanutten Police Department, and Wintergreen Police Department. All of them have been in existence for decades. Although they are funded by private corporations, and all of their officers are technically special conservators of the peace, the training these officers receive is much greater than that normally received by special conservators. In fact, all of the officers go through a criminal justice training academy and receive training that is practically identical to that received by regular law enforcement. These nine private police departments had been recognized as "private police departments" by the Virginia Department of Criminal Justice Services, and had relied upon the status granted by this recognition. All of them had entered into mutual aid agreements with local law enforcement agencies, all of them contributed to a criminal justice training academy, and all of them currently had access to Virginia's Criminal Information Network, which is maintained by the Virginia State Police. However, in 2013, a letter sent from the Attorney General of Virginia to the Department of Criminal Justice Services stated that without express recognition by the Virginia legislature, the Department could not recognize these departments as "private police departments." In order to maintain the current operational status of these police departments, the Virginia Association of Chiefs of Police sought legislation to recognize these departments as official "private police departments." At the same time, such legislation should make clear that any future private police departments could only be created by the General Assembly. The Crime Commission requested that the Virginia Association of Chiefs of Police provide legislation to review at the Commission's December meeting.

At its December meeting, the Crime Commission unanimously endorsed the draft legislation relating to private police departments that was presented by the Virginia Association of Chiefs of Police. The proposed legislation to formally recognize the nine existing private police departments, and specify that no other private police departments may be created without explicit approval of the General Assembly, was introduced as Senate Bill 1217 by Senator Thomas Norment and House Bill 1809 by Delegate Charniele Herring during the Regular Session of the 2015 General Assembly. House Bill 1809 was referred to the House Militia and Police Committee, and was left in Committee. Senate Bill 1217 passed the Senate with amendments in the nature of a substitute, and was amended in the House. The Senate accepted the House amendments, and the bill was signed by the Governor on March 16, 2015. With this new law, which contained an emergency enactment clause and went into effect immediately upon the Governor's signature, the nine existing private police departments became officially recognized as such. In addition, it has now been codified that "[n]o entity is authorized to operate a private police department or represent that it is a private police department unless such entity has been authorized by statute or an act of assembly."

Background

During the Regular Session of the 2014 General Assembly, Delegate L. Scott Lingamfelter, Chairman of the House Militia and Police Committee, formally requested Secretary of Public Safety and Homeland Security Brian Moran to create a bipartisan Task Force to study the issue of special conservators of the peace (SCOPs) in Virginia. The request specifically noted the topic of the appropriate number of hours of training that should be required of special conservators of the peace, as well as referring generally to the subject of improvements that might be made to relevant sections in the Code of Virginia. Pursuant to this request, Secretary Moran created a Task Force, which met four times in 2014: June 25, July 24, August 27, and September 29.

At the June meeting of the Task Force, staff from the Crime Commission was invited to present a brief, historical overview of SCOPs in Virginia, and how the relevant Code sections had evolved from their initial enactment in 1860. Other topics covered at the June meeting were the current role the Virginia Department of Criminal Justice Services (DCJS) plays in the appointment process and in the regulation of SCOPs, and the available data on the numbers of people who currently hold court orders appointing them as SCOPs. The July meeting focused on training, qualifications and responsibilities for SCOPs and certified law enforcement officers, as well as the roles played by circuit court judges, circuit court clerks, DCJS, and the Virginia State Police (VSP) in the current SCOP system. The August meeting focused on civil liability issues related to SCOPs, as well as general constitutional issues related to the performance of their duties. At the September meeting, the Task Force reviewed all areas of the current SCOP system, and formulated several consensus points for possible legislative changes. Some of the consensus points were detailed; e.g., mandatory order forms should be used by judges when appointing SCOPs, for the sake of uniformity and consistency throughout the Commonwealth. Other consensus points were more general; i.e., while there was consensus that the amount of training SCOPs receive should be increased, there was no specific agreement as to how many additional hours of training there should be.

Presentations to the Crime Commission

October Commission Meeting

Secretary Moran, along with DCJS staff, presented the findings and general conclusions of the Task Force to the Crime Commission at its October meeting, as well as the specific issues on which consensus had been reached. It was noted that under current law, the entry-level training that the Virginia Criminal Justice Services Board may require of SCOPs is limited to no more than 24 hours for unarmed SCOPs, and no more than 40 hours for armed SCOPs.[1] This is in stark contrast with the amount of entry-level training required of regular law enforcement officers—480 hours of academy training, with an additional 100 hours of field training.[2] For law enforcement officers, these are minimum, and not maximum requirements; many law enforcement officers receive training in excess of 1,000 hours before they are permitted to begin their regular duties. Similarly, armed security officers, who are licensed and regulated by DCJS, are required to have a minimum of 50 hours of entry-level training.[3] Many other occupations that are regulated in Virginia have minimum entry-level training standards that are greater than 40 hours. As an example, licensed nail technicians are generally required to have received at least 150 hours of instruction, in addition to apprenticeship requirements, before they can begin their careers.[4] Information was also presented that the total number of SCOPs doubled from 2005 to 2013. Specifically, the number of armed SCOPs increased by 121%, and the number of unarmed SCOPs increased by 76%. Although DCJS does not have a precise count of the number of SCOPs in Virginia, due to the fact that law enforcement officers who have been appointed as a SCOP do not register with them, there are approximately 450 armed, and 300 unarmed SCOPs in the Commonwealth according to their records. Lastly, it was demonstrated that many SCOPs have badges and uniforms that are practically indistinguishable from the badges and uniforms worn by regular law enforcement. At the conclusion of the presentation, it was requested that the staff at DCJS draft possible legislation in the form of two bills. One bill would contain only the consensus items that had been agreed to by the Task Force, while the other bill would contain additional measures, including specific enhanced training requirements for SCOPs. These bills would be considered by the Commission at its December meeting.

Also at the October meeting, Dana Schrad, the Executive Director of the Virginia Association of Chiefs of Police (VACP), gave a presentation on the related topic of private police departments. There are nine private police departments that currently operate in Virginia; each of them has been in existence for decades.[5] They are private departments that are funded by corporations. Therefore, their officers are sworn as SCOPs and not as regular law enforcement.[6] However, all of the officers in these private police departments receive standard law enforcement training, a minimum of 480 hours, and are graduates of a criminal justice training academy. All of the private police departments have mutual aid agreements and memoranda of understanding with local sheriffs' offices or police departments in their areas, and are paying members of a Virginia criminal justice academy. These departments have long relied on their status as private police departments being recognized by DCJS to operate. Without such state recognition, they would not be able to participate in mutual aid agreements with regular law enforcement agencies, join criminal justice training academies, or comply with basic

operational standards, such as record keeping, preserving evidence, or receiving official accreditation from the Virginia Law Enforcement Professional Standards Commission.

In 2013, the Attorney General of Virginia sent a letter to DCJS, stating that because the Virginia General Assembly had not specifically given legislative authority for these departments to be recognized as "private police departments," DCJS must cease recognizing them or certifying them as such. This loss in status for the nine departments meant that potentially millions of dollars in police services, currently funded by private corporations, could be jeopardized. No longer would these departments have access to the Virginia Criminal Information Network (VCIN) maintained by the VSP, and the status of pending criminal cases, where the arresting officer was employed by one of these departments, could be thrown into doubt.

Therefore, the VACP indicated they sought to specifically recognize these nine police departments as official "private police departments." The legislation would be limited to these nine departments, and would further clarify that no other private police departments may be created except with the express authorization of the General Assembly. Recognizing the nine private police departments as a distinct category would ensure they remain distinguishable from private security businesses and corporations that employ SCOPs. It was requested that the VACP provide possible legislation for the Crime Commission to consider at its December meeting.

December Commission Meeting

At its December meeting, the Crime Commission reviewed the two proposed SCOP bills prepared by DCJS staff. After discussion on which issues were consensus items agreed to by all of the members of the Task Force, and which issues were not, a better understanding of the true consensus items was developed. Consensus items included the following:

- Current training standards are insufficient;
- The application process for all SCOPs should be standardized;
- The appointment order for all SCOPs should be standardized;
- A copy of the SCOP application should be given to the chief law enforcement officer and the Commonwealth's Attorney in the jurisdiction where application is made;
- Every SCOP must be registered with DCJS and VSP, with no exceptions or exemptions;
- The appointment order for a SCOP should precisely describe exactly the geographic location where conservator powers may be lawfully exercised; and,
- The Virginia Code should be made clear that the appointing court has the authority to revoke an order of appointment for good cause.

Items for which there was not a clear consensus included:

- The number of training hours that should be required for SCOPs;
- Whether a SCOP who works in multiple jurisdictions would require a separate appointment order for each jurisdiction;
- Whether a SCOP who works for a corporation should be limited in his authority to the real property owned by the corporation, or whether a court could extend those boundaries;
- The use of the word "Police" on badges or automobiles;
- The use of the Seal of the Commonwealth on badges or automobiles; and,
- The use of blue lights on automobiles.

The Crime Commission voted unanimously to endorse the drafting of a bill that would encompass all of the consensus issues. Staff was requested to draft legislation for all of the remaining non-consensus items that the Crime Commission later endorsed.

The Crime Commission also reviewed the proposed legislation prepared by the VACP, which would establish the nine existing private police departments as official "private police departments," while mandating that any additional private police departments in the future would have to be specifically approved by the General Assembly. The Crime Commission voted unanimously to endorse the VACP proposed legislation.

Summary of SCOP Legislation

Draft legislation to modify Virginia's SCOP statutes, which consisted of the consensus items that were discussed by the Crime Commission at its December meeting, was introduced as Senate Bill 1194 (SB 1194) by Senator Thomas Norment during the Regular Session of the 2015 General Assembly. A second bill containing non-consensus items, Senate Bill 1195 (SB 1195), was also introduced by Senator Norment during the Regular Session. Two other SCOP bills were introduced as well: Delegate Jeffery Campbell introduced House Bill 2206 (HB 2206), and Delegate Mark Berg introduced House Bill 2369 (HB 2369).

All of these bills were amended during the course of the legislative process; ultimately, SB 1194 was left in the Senate, while SB 1195 and HB 2206 went into Conference, and were then conformed to each other, with amendments. Both bills were then passed by the General Assembly. After some proposed amendments by the Governor were accepted by the General Assembly, with others being rejected, both bills, now identical, were then signed into law by the Governor on April 30, 2015.[7]

House Bill 2369 was amended in the House of Delegates, and was then amended in the nature of a substitute in the Senate. The bill ultimately went to Conference, and was amended, before being passed by the General Assembly. All of the provisions in this amended version of the bill were also contained in the final amended versions of

SB 1195 and HB 2206. House Bill 2369 was then signed into law by the Governor on March 26, 2015.[8]

The final language of these bills resulted in the following changes to the SCOP statutes in Virginia, which go into effect on July 1, 2015:

- The exemption from training requirements for current law enforcement officers is maintained, but if the officer has been decertified, he must then take the required entry-level training before becoming a SCOP.
- All SCOPs, even those that are current law enforcement, must be registered with both DCJS and VSP.
- All SCOPs will be required to have an insurance policy; cash or surety bonds will no longer be acceptable.
- The entry-level training standards are increased: 98 hours for an unarmed SCOP, and 130 hours for an armed SCOP.
    - Existing SCOPs have 36 months from July 1, 2015, to comply with these new minimum training standards.
- The training that potential SCOPs receive must be provided by either an official criminal justice training academy, or at a private security training school that is certified by DCJS.
- Potential SCOPs must undergo not just a criminal background check (current law), but also a background investigation performed a law enforcement agency.
- Prior to entering an order appointing a person to be a SCOP, the court shall transmit a copy of the application to the local Commonwealth's Attorney and local law enforcement, who may submit the to the court a sworn, written statement indicating whether the appointment order should be granted.
- The appointing court will retain jurisdiction over its order for 4 years, and may revoke a SCOP's appointment order for good cause.
- The Commonwealth's Attorney for the jurisdiction, or the sheriff or chief of police of the jurisdiction, or DCJS, may file a sworn petition to revoke the appointment order of a SCOP.
    - Prior to a revocation, a hearing must be set, and the SCOP must be given the opportunity to be heard.
    - The court may suspend the appointment order pending the revocation hearing, for good cause shown.
- If an appointment order is revoked, the clerk of the court shall notify DCJS, VSP, the SCOP's employer, and the applicable law enforcement agencies in all cities and counties where the SCOP had been authorized to serve.
- For SCOPs appointed pursuant to an application from a corporation, the authority of the SCOP is limited to:
    - The real property where the corporate applicant is located;
    - Any real property contiguous to such real property;

  - Any real property owned or leased by the corporation in other specifically named cities and counties; the clerk of the appointing court must transmit the appointment order to the VSP and the clerk of court and law enforcement for each of the other jurisdictions; and,
  - An extended geographical area, if permitted by the court, in which a fleeing suspect may be arrested if the SCOP is in close pursuit; the court may delineate a limitation or distance beyond which such an arrest may no longer be made.

- The appointment order must specify that the SCOP must comply with all of the requirements of the Virginia and United States Constitutions.
- The appointment order must specifically state that the SCOP is not a "qualified law-enforcement officer" within the meaning of the federal Law Enforcement Officer Safety Act.
- The appointment order may not identify the SCOP to be "a law-enforcement officer pursuant to Va. Code § 9.1-101."
  - However, the order may identify the SCOP to be a law enforcement officer for purposes of Chapter 8 of Title 37.2 and Article 16 of Chapter 11 of Title 16.1 (allowing them to transport civilly committed persons).
- Upon request and for good cause shown, the appointment order may authorize the SCOP to use the Seal of the Commonwealth of Virginia, and may authorize the use of the word "police" on badges and uniforms.
- The appointment order shall prohibit the use of blue flashing lights, but upon request and for good cause shown, may permit the use of flashing lights and sirens on any vehicles used by the SCOP while in the performance of his duties.
- All applications and appointment orders shall be submitted on forms developed by the Office of the Executive Secretary of the Supreme Court.
- No one who is required to register as a sex offender may become a SCOP.
- A SCOP must report to DCJS and the chief law-enforcement officer of all localities in which he is authorized to serve if he is arrested, charged with, or convicted of any misdemeanor or felony offense within 3 days of his arrest.
- If a SCOP is convicted of a disqualifying criminal offense (crimes of moral turpitude, felonies, misdemeanors involving assault and battery, damage to property, controlled substances, sexual behavior, or firearms), he may be the subject of a petition to suspend or revoke his appointment order.
- If a SCOP leaves employment, his employer must notify DCJS, the VSP, the circuit court, and the chief law enforcement officer of all localities in which the SCOP is authorized to serve.
- The governing body of any locality, or the sheriff of a locality where there is no police department, may enter into a mutual aid agreement with any entity located in such locality that employs SCOPs.

— While performing their duties under such a mutual aid agreement, the SCOP shall have the same authority as lawfully conferred on him within his own jurisdiction.

Summary of Private Police Department Legislation

The proposed legislation to formally recognize the nine existing private police departments, and specify that no other private police departments may be created without explicit approval of the General Assembly, was introduced as Senate Bill 1217 by Senator Thomas Norment and House Bill 1809 by Delegate Charniele Herring during the Regular Session of the 2015 General Assembly. House Bill 1809 was referred to the House Militia and Police Committee, and was left in Committee. Senate Bill 1217 passed the Senate with amendments in the nature of a substitute, and was amended in the House. The Senate accepted the House amendments, and the bill was signed by the Governor on March 16, 2015.[9] With this new law, which contained an emergency enactment clause and went into effect immediately upon the Governor's signature, the nine existing private police departments became officially recognized as such.[10] In addition, it has now been codified that "[n]o entity is authorized to operate a private police department or represent that it is a private police department unless such entity has been authorized by statute or an act of assembly."[11]

[1] VA. CODE ANN. § 9.1-150.2 (2014).
[2] 6 Va. Admins. Code 20-20-21 (2014).
[3] 6 Va. Admins. Code 20-171-350 (2014).
[4] 18 Va. Admins. Code 41-20-200 (5)(c) (2014).
[5] Aquia Harbor Police Department, Babcock & Wilcox Police Department, Bridgewater Airpark Police Department, Carillion Clinic Police and Security Services Department, Kings Dominion Park Police Department, Kingsmill Police Department, Lake Monticello Police Department, Massanutten Police Department, and Wintergreen Police Department.
[6] They derive their conservator powers from a court order, and must petition the issuing circuit court for a new order of appointment every four years. VA. CODE ANN. § 19.2-13(A) (2014). This is in contrast with regular law enforcement, who maintain their police authority as long as they are employed by a regular police department or sheriff's office, and have not been decertified for a criminal conviction or failing to meet continuing training requirements.
[7] 2015 Va. Acts chs. 766,772.
[8] 2015 Va. Acts ch. 602.
[9] 2015 Va. Acts ch. 224.
[10] Id., *see supra* note 5.
[11] Id.