



# 2017

## ANNUAL REPORT

VIRGINIA STATE CRIME COMMISSION





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Delegate Robert B. Bell, *Chairman*

Senator Mark D. Obenshain, *Vice-Chairman*

*Executive Director*  
Kristen J. Howard

June 29, 2018

TO: The Honorable Ralph S. Northam, Governor of Virginia  
The Honorable Members of the General Assembly of Virginia

Pursuant to the provisions of the Code of Virginia §§ 30-156 through 30-164 establishing the Virginia State Crime Commission and setting forth its purpose, please find attached herewith the Commission's 2017 Annual Report.

Very truly yours,

A handwritten signature in blue ink, appearing to read "R B Bell", is written over the typed name.

Robert B. Bell, Chairman



# 2017 Annual Report

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## **Authority of the Crime Commission**

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

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

**Crime Commission  
Members**

**HOUSE OF DELEGATES APPOINTMENTS**

The Honorable Robert B. Bell, Chairman  
The Honorable Richard L. Anderson  
The Honorable C. Todd Gilbert  
The Honorable Charniele L. Herring  
The Honorable Paul E. Krizek  
The Honorable G. Manoli Loupassi

**SENATE APPOINTMENTS**

The Honorable Mark D. Obenshain, Vice-Chairman  
The Honorable Janet D. Howell  
The Honorable Thomas K. Norment, Jr.

**ATTORNEY GENERAL**

Cynthia E. Hudson, Chief Deputy, Attorney General's Office,  
Designee for Attorney General Mark R. Herring

**GOVERNOR'S APPOINTMENTS**

Kristine R. Hall, Citizen Appointee  
The Honorable Arthur Townsend Jr., Sheriff,  
Lunenburg County  
Chief John Venuti, Associate Vice President of Campus  
Safety/Chief of Police, Virginia Commonwealth University  
Police Department

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**Crime Commission  
Staff**

Kristen J. Howard, Executive Director

Christina Barnes Arrington, Ph.D., Senior Methodologist  
Colin L. Drabert, Senior Staff Attorney  
Meghan R. Gaulding, Policy Analyst  
Liz K. Greenwood, Policy Analyst  
David A. Stock, Staff Attorney

Website: <http://vscc.virginia.gov>

## **Executive Summary of 2017 Activities**

In addition to a number of ongoing studies, the Crime Commission received numerous bill referrals and letter requests in 2017. Staff studied the following new issues as a result of bill referrals and letter requests: decriminalization of possession of marijuana, expansion of the DNA databank upon conviction of misdemeanor crimes, and admissibility of prior inconsistent statements of non-party witnesses as substantive evidence in criminal cases. Additionally, staff continued work on four previously authorized studies: pretrial services agencies, restitution, asset forfeiture, and the DNA Notification Project.

The Crime Commission held three meetings to review and discuss study findings on the following dates: October 30, November 29, and December 4. At its December meeting, Crime Commission members endorsed legislative and administrative recommendations on the topics of pretrial services agencies, expansion of the DNA databank upon conviction of misdemeanor crimes, admissibility of prior inconsistent statements of non-party witnesses as substantive evidence in criminal cases, and restitution.

As a result of efforts by the Crime Commission and other stakeholders, legislation was enacted during the Regular Session of the 2018 General Assembly which amended the Code of Virginia to require the following:

- Production of an annual report by the Virginia Department of Criminal Justice Services (DCJS) on the status of all pretrial services agencies across the Commonwealth;
- Submission of a DNA sample by all defendants convicted of misdemeanor assault and battery or trespassing;
- Collection of fingerprints for all defendants convicted of misdemeanor trespassing or disorderly conduct;
- Protection of the confidentiality of victims' phone numbers and email addresses in court records;
- Determination by the court of whether a defendant is in compliance with a restitution order; and,
- Implementation of procedures and practices to deliver unclaimed restitution to victims of crime more effectively.

The Crime Commission also requested that certain agencies take administrative action to address issues identified during this year's studies, including the following:

- DCJS was requested to create a stakeholder work group and internal agency processes to improve the administration of pretrial services agencies across the Commonwealth; and,
- Virginia Department of Forensic Science to update their DNA sample submission training materials to reflect current law.

Additionally, various administrative activities related to past Crime Commission studies on restitution and asset forfeiture were completed, including the following:

- Office of the Executive Secretary of the Supreme Court of Virginia assembled a group of stakeholders to address the topic of restitution and produced reports on (i) *Recommendations for the Enhancement of the Collection of Restitution* and (ii) *Best Practices for the Collection of Restitution*;
- DCJS worked with stakeholders and completed an informational brochure for victims of crime to explain the restitution process; and,
- Commonwealth's Attorneys' Services Council, Virginia Sheriffs' Institute, and DCJS sponsored an in-person training in March 2017 on *Asset Forfeiture: Law and Procedure* in Chesterfield County at no cost to over 200 participants.

In addition to these studies, the Executive Director of the Crime Commission serves on the Forensic Science Board,<sup>1</sup> Virginia Indigent Defense Commission,<sup>2</sup> and Advisory Committee on Sexual and Domestic Violence,<sup>3</sup> as mandated by the Code of Virginia.

Detailed study presentations can be found on the Crime Commission's website at <http://vscc.virginia.gov>.

## Endnotes

<sup>1</sup> VA. CODE § 9.1-1109(A)(7) (2018). The Executive Director serves as Chair of the DNA Notification Subcommittee at the designation of the Chairman of the Crime Commission.

<sup>2</sup> VA. CODE § 19.2-163.02 (2018). The Executive Director serves on the Budget Committee at the designation of the Chairman of the Crime Commission.

<sup>3</sup> VA. CODE § 9.1-116.2(A) (2018). The Executive Director serves on the Advisory Committee at the designation of the Chairman of the Crime Commission.

# Admissibility of Prior Inconsistent Statements

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## Executive Summary

During the Regular Session of the 2017 General Assembly, Senator Janet D. Howell introduced Senate Bill 1445 that proposed amending the rules of evidence in Virginia to permit the admission of prior inconsistent statements of a non-party witness as substantive evidence under certain circumstances in criminal cases.<sup>1</sup> Currently, such statements are only admissible to impeach the credibility of the witness.<sup>2</sup> The Crime Commission examined this potential amendment to the rules of evidence and ultimately endorsed Senate Bill 1445 as introduced.

Staff found that Virginia's rules of evidence could be amended to allow for the admission of prior inconsistent statements of a non-party witness as substantive evidence in criminal cases, provided that the witness who made the prior statement testifies at the trial or hearing and is subject to cross-examination. Subject to those conditions, no legal impediments exist to amending Virginia law to allow for the admission of prior inconsistent statements of non-party witnesses as substantive evidence. Senate Bill 1445 satisfies the Confrontation Clause of the U.S. Constitution by requiring that the witness who made the prior statement be present at trial and subject to cross-examination.

In a review of the rules governing the admissibility of prior inconsistent statements of non-party witnesses in other jurisdictions, staff found that 47 states, the District of Columbia, and the Federal Rules of Evidence allow for the admission of such statements as substantive evidence in some manner. Only three states, New York, North Carolina, and Virginia, limit the use of prior inconsistent statements solely to impeaching the credibility of the non-party witness.

Crime Commission members reviewed study findings at the December meeting and were presented with two policy options to consider - amend the existing law or maintain the status quo. By a majority vote, members endorsed SB 1445 to amend existing law to allow for the admission of prior inconsistent statements of non-party witnesses as substantive evidence in criminal cases.

Legislation was introduced by Senator Janet D. Howell (Senate Bill 135) and Delegate Robert B. Bell (House Bill 841) during the Regular Session of the 2018 General Assembly.<sup>3</sup> Senate Bill 135 was passed by indefinitely in the Senate Courts of Justice Committee. House Bill 841 was left in the House Courts of Justice Committee.



## Background and Methodology

During a criminal trial, a non-party witness may recant or deny a statement they made prior to trial.<sup>4</sup> Under current Virginia law, a prior statement by a non-party witness that is inconsistent with the witness's testimony at a hearing or trial is admissible only for impeachment of the witness's credibility.<sup>5</sup> Any inconsistencies between the witness's prior statements and statements at trial are matters to be taken into consideration by the trier of fact when weighing and evaluating the credibility of the witness's in-court testimony, but are inadmissible to prove the truth of the matter previously asserted.<sup>6</sup>

During the Regular Session of the 2017 General Assembly, Senator Janet D. Howell introduced Senate Bill 1445.<sup>7</sup> This bill proposed amending the rules of evidence in Virginia by adding a new section to the Code of Virginia (§ 19.2-268.4), which would have allowed evidence of a prior statement of a non-party witness to be admitted as substantive evidence in a criminal case. Admission of the prior inconsistent statement as substantive evidence under this bill required the following: (i) the prior statement must be inconsistent with the witness's testimony at a hearing or trial, (ii) the witness must be subject to cross-examination regarding the statement, and (iii) the prior statement must have been:

- Made by the witness under oath at a trial, hearing, or other proceeding;
- Written or signed by the witness;
- Captured using an audio recorder, video recorder, or some other similar means; or,
- Acknowledged under oath by the witness.

The Senate Courts of Justice Committee referred Senate Bill 1445 to the Crime Commission. The Executive Committee of the Crime Commission authorized a review of the subject matter of the bill. In conducting this study, Crime Commission staff reviewed the rules and case law governing the admissibility of prior inconsistent statements of non-party witnesses in all 50 states, the District of Columbia, and the federal courts.

Staff also consulted with the Virginia Association of Commonwealth's Attorneys, the Indigent Defense Commission, the Virginia Victim Assistance Network, and the Virginia Sexual and Domestic Violence Action Alliance ("Action Alliance"). Additionally, staff conferred with the State's Attorney's Office for the County of DuPage, Illinois, because Senate Bill 1445 was modeled after the Illinois rule. Finally, data regarding charges and convictions for the offenses of perjury and false statements to law enforcement officials was requested from the Virginia Criminal Sentencing Commission.

This study focused on the rules governing the admissibility of prior inconsistent statements by non-party witnesses. The prior statements of a witness who is a party to the proceeding, i.e. the criminal defendant, are currently admissible in Virginia as substantive evidence.<sup>8</sup> The study did not include an examination of other considerations, such as the rules of discovery in other jurisdictions or whether any of the jurisdictions followed the single witness doctrine found in Virginia law.<sup>9</sup> It should further be noted that the Code of Virginia was recently amended to permit the admission of prior statements as substantive evidence at criminal hearings and trials for specific offenses when the victim of the crime is under the age of thirteen and certain conditions are met.<sup>10</sup>

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### **Rules Governing the Admissibility of Prior Inconsistent Statements**

Staff conducted a review of the rules governing the admissibility of prior inconsistent statements of non-party witnesses for all 50 states, the District of Columbia, and the federal government. Two competing rules exist regarding the admissibility of prior inconsistent statements of non-party witnesses: the common law rule<sup>11</sup> and the modern rule.<sup>12</sup> New York,<sup>13</sup> North Carolina,<sup>14</sup> and Virginia<sup>15</sup> follow the common law rule. Under this rule, prior inconsistent statements of a non-party witness are inadmissible hearsay if offered to prove the truth of the matter asserted in the statement.<sup>16</sup> The prior statement may be admitted to impeach the credibility of the witness, but the trier of fact cannot consider the prior statement as substantive evidence.<sup>17</sup> Various rationales exist for deeming these prior out-of-court statements too unreliable to be admitted as substantive evidence, including the following: (i) the trier of fact was unable to observe the demeanor of the witness at the time the statement was made, (ii) the trier of fact could not evaluate the circumstances under which the statement was made, (iii) the witness was not under oath at the time of the statement, and (iv) the witness was not available to be cross-examined at the time of the statement.<sup>18</sup>

Variations of the modern rule are observed in 47 states, the District of Columbia, and the Federal Rules of Evidence. The degree to which prior inconsistent statements of non-party witnesses are admissible in these jurisdictions varies based upon the circumstances under which the statement was made. Under this rule, prior inconsistent statements of non-party witnesses are admissible as substantive evidence when the declarant testifies, is subject to cross-examination, and other circumstances prescribed by the jurisdiction are satisfied.<sup>19</sup> Numerous reasons have been cited for the adoption of the modern rule, including the following: (i) the prior statement was made closer in time to the event in question, when “memories are fresher and when there is less likelihood the statement is the product of corruption, false suggestion, intimidation or appeals to sympathy,”<sup>20</sup> (ii) the witness must testify and during cross-examination can repudiate or explain any variances between his prior statement and his testimony at trial, (iii) the trier

of fact has the opportunity to observe the witness's demeanor and explanation for any discrepancies between his prior statements and his testimony when determining the credibility of that witness, (iv) the common law rule requires the court to give confusing instructions to the jury, and (v) the oath sworn by the witness is not as strong of a guarantee of trustworthiness as it has been in the past.<sup>21</sup>

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### **Admissibility of Prior Inconsistent Statements under the Federal Rule of Evidence**

Rule 801 of the Federal Rules of Evidence was enacted in 1975.<sup>22</sup> Under this rule, the prior statement of a witness is not hearsay if it "is inconsistent with the declarant's testimony and was given under penalty of perjury at a trial, hearing, or other proceeding or in a deposition."<sup>23</sup> The District of Columbia<sup>24</sup> and the following 23 states have adopted a rule similar to this Federal Rule: Alabama,<sup>25</sup> Arkansas,<sup>26</sup> Florida,<sup>27</sup> Idaho,<sup>28</sup> Indiana,<sup>29</sup> Iowa,<sup>30</sup> Maine,<sup>31</sup> Michigan,<sup>32</sup> Minnesota,<sup>33</sup> Mississippi,<sup>34</sup> Nebraska,<sup>35</sup> New Hampshire,<sup>36</sup> New Mexico,<sup>37</sup> North Dakota,<sup>38</sup> Ohio,<sup>39</sup> Oklahoma,<sup>40</sup> Oregon,<sup>41</sup> South Dakota,<sup>42</sup> Texas,<sup>43</sup> Vermont,<sup>44</sup> Washington,<sup>45</sup> West Virginia,<sup>46</sup> and Wyoming.<sup>47</sup>

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### **Admissibility of Prior Inconsistent Statements in Addition to the Federal Rule**

Nine states have expanded the number of occasions when prior inconsistent statements of non-party witnesses are admissible as substantive evidence beyond the criteria set forth in Federal Rule. Such occasions include when the prior statement was made under the following circumstances:

- (i) written by the witness;
- (ii) written on a form signed by the witness;
- (iii) sworn to in an affidavit under penalty of perjury;
- (iv) audio recorded;
- (v) video recorded;
- (vi) recorded using some other reliable medium; or,
- (vii) acknowledged by the witness in his testimony.

Of these nine states, six observe the circumstances set forth in the Federal Rule and also provide for additional conditions under which the prior statements of a non-party witness are admissible. Those six states include the following: Hawaii,<sup>48</sup> Illinois,<sup>49</sup> Maryland,<sup>50</sup> Massachusetts,<sup>51</sup> New Jersey,<sup>52</sup> and Pennsylvania.<sup>53</sup> The remaining three states have enacted unique rule structures, including the following:

- Connecticut: the prior statement must have been (i) in writing or recorded by audio, video or some other reliable medium, (ii) authenticated as that of the witness, and (iii) the witness has personal knowledge of the contents of the statement.<sup>54</sup>
- Louisiana: in order for the prior statement to be admissible, additional evidence must exist to corroborate the matter asserted in the prior statement.<sup>55</sup>
- Tennessee: the prior statement must have been given under oath, in writing, or audio or video recorded; and, before admitting the statement, the court must conduct a hearing outside of the presence of the jury and find by a preponderance of the evidence that the statement was made under “circumstances indicating trustworthiness.”<sup>56</sup>

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## Broad Admissibility of Prior Inconsistent Statements

Fifteen states have adopted a broad rule allowing for the admissibility of any prior inconsistent statement of a non-party witness as substantive evidence regardless of the circumstances under which the statement was made. For example, the rule in Alaska provides that “a statement is not hearsay if the declarant testifies at the trial or hearing and the statement is inconsistent with the declarant’s testimony.”<sup>57</sup> The states which have adopted this form of the rule include the following: Alaska,<sup>58</sup> Arizona,<sup>59</sup> California,<sup>60</sup> Colorado,<sup>61</sup> Delaware,<sup>62</sup> Georgia,<sup>63</sup> Kansas,<sup>64</sup> Kentucky,<sup>65</sup> Missouri,<sup>66</sup> Montana,<sup>67</sup> Nevada,<sup>68</sup> Rhode Island,<sup>69</sup> South Carolina,<sup>70</sup> Utah,<sup>71</sup> and Wisconsin.<sup>72</sup>

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## Policy and Implementation Questions

Various questions were raised in regard to amending Virginia’s rules of evidence to allow for the admission of the prior inconsistent statements of non-party witnesses as substantive evidence in a criminal case.<sup>73</sup> Those questions included the following:

- Does the admission of a prior inconsistent statement of a non-party witness as substantive evidence violate the Confrontation Clause of the U.S. Constitution?
- What qualifies as a “prior inconsistent statement?”
- How would the admission of prior inconsistent statements of non-party witnesses impact criminal defendants and victims of crime?

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## **Does the admission of a prior inconsistent statement of a non-party witness as substantive evidence violate the Confrontation Clause of the U.S. Constitution?<sup>74</sup>**

Senate Bill 1445 satisfies the Confrontation Clause because it requires that a non-party witness *testify* at the hearing or trial and be subject to *cross-examination* in order for their prior inconsistent statement to be admitted as substantive evidence. All of the jurisdictions which have adopted a rule allowing for the admission of a prior inconsistent statement made by a non-party witness as substantive evidence have imposed these requirements.

In Crawford v. Washington, 541 U.S. 36 (2004), the U.S. Supreme Court addressed the introduction of a prior out-of-court statement in a criminal trial where the defendant was not afforded an opportunity to cross-examine the person who made the statement. The Court held that “[w]here testimonial statements are at issue, the only indicium of reliability sufficient to satisfy constitutional demands is the one the Constitution actually prescribes: confrontation.”<sup>75</sup> Additionally, the Court noted that “when the declarant appears for cross-examination at trial, the Confrontation Clause places no constraints at all on the use of his prior testimonial statements.”<sup>76</sup> Furthermore, in California v. Green, 399 U.S. 149 (1970), the U.S. Supreme Court vacated a ruling by the California Supreme Court which held that the admission of prior inconsistent statements as substantive evidence at a trial violated the Confrontation Clause.

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## **What qualifies as a “prior inconsistent statement”?**

A prior inconsistent statement must be material and must in some way contradict a statement made by a witness prior to their testimony at a trial or hearing. Inconsistent statements can include direct contradictions, evasive answers, changes in position, silence, claims of memory loss, or an inability to recall a previous statement.

In order for a statement to qualify as a prior inconsistent statement, it “must in fact be inconsistent with or contradictory to the present testimony.”<sup>77</sup> “The test of whether a prior statement is sufficiently inconsistent to permit its utilization is that the statement have a reasonable tendency to discredit the direct testimony on a material matter.”<sup>78</sup> Whether a statement is material is within the discretion of the trial court.<sup>79</sup> A prior statement does not need to directly contradict

a witness's testimony in order to be considered "inconsistent."<sup>80</sup> Inconsistent statements can include "evasive answers, silence, or changes in position."<sup>81</sup>

Under Virginia law, if a witness testifies that they do not recall making a prior statement, a sufficient foundation has been laid for impeachment and counsel may cross-examine the witness regarding the inconsistency.<sup>82</sup> Under Illinois law, a claim of memory loss regarding a prior out-of-court statement does not preclude its admission as substantive evidence.<sup>83</sup> The Utah rule specifically provides that a prior statement is admissible as substantive evidence if the "declarant denies having made the statement or has forgotten."<sup>84</sup>

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## **How would the admission of prior inconsistent statements of non-party witnesses in criminal cases impact criminal defendants and victims of crime?**

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### *Impact to Criminal Defendants*

Staff was unable to determine the impact on criminal defendants if Senate Bill 1445 had become law. It is important to note that if the rules of evidence were amended as proposed, both the Commonwealth and the defendant would be permitted to introduce prior inconsistent statements of non-party witnesses as substantive evidence.

A common question raised was whether amending the rules of evidence as proposed by Senate Bill 1445 would result in greater advantages or disadvantages to defendants due to varying discovery practices throughout the Commonwealth. The answer to this question falls within the broader, unresolved discussion of criminal discovery reform which is currently ongoing in the Commonwealth.<sup>85</sup> Advocates of such reform in Virginia contend that the current rules governing criminal discovery are too restrictive and that these rules, coupled with a lack of investigative resources for defendants, create a "toxic blend of ill prepared defense lawyers and inability to review for prosecutorial mistakes."<sup>86</sup>

Under current Virginia law, the amount of information available to the defendant through the criminal discovery process is very limited. For all jailable misdemeanors and preliminary hearings on felony offenses in the district court, the defendant is entitled to his statements and criminal record.<sup>87</sup> For all felonies or any misdemeanor brought by direct indictment in the Circuit Court, the defendant is entitled to his statements, written scientific reports, and the opportunity to inspect

and copy any documents, tangible items, buildings, or places, that may be material in preparing his defense.<sup>88</sup> The Circuit Court rule specifically provides that statements made by witnesses or potential witnesses of the Commonwealth are not subject to discovery.<sup>89</sup>

In practice, the amount of information provided during the criminal discovery process varies by locality, with some Commonwealth's Attorneys providing only the information required by law and others providing additional information.<sup>90</sup> Based on these varying discovery practices, defendants in some jurisdictions may be aware of a witness's statements before a trial or hearing, while defendants in other jurisdictions may not learn of the prior statements until the witness testifies at a trial or hearing.<sup>91</sup>

Virginia law currently allows for the admissibility of prior statements as substantive evidence at hearings and trials for specific offenses where the victim of the crime is under the age of thirteen.<sup>92</sup> This statute includes a provision that requires the party offering the statement into evidence to notify the opposing party in writing at least 14 days before the proceeding and to provide or make available copies of the statement.<sup>93</sup> In order to provide greater consistency throughout the Commonwealth in the use of prior inconsistent statements as substantive evidence, a similar notice provision could be included in any legislation amending Virginia's rules of evidence.

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### *Impact to Victims of Crime*

Concerns were raised about whether any change to the rules of evidence would result in more prosecutions of victims for these offenses, in essence re-victimizing the victim. No evidence was found to indicate that Senate Bill 1445 would or would not lead to more prosecutions of victims. Crime Commission staff met with various stakeholders regarding the proposed rule change.<sup>94</sup> No one reported that victims of crime are being routinely prosecuted in Virginia for providing inconsistent statements at trial.

Under existing Virginia law, a witness who testifies contrary to a previous statement could potentially be prosecuted for a violation of a number of criminal statutes, including the following:

- Perjury;<sup>95</sup>
- Giving conflicting testimony on separate occasions;<sup>96</sup>
- Obstruction of justice;<sup>97</sup> or,
- Giving false reports to law enforcement officials.<sup>98</sup>

Data on the number of charges and convictions for these offenses between FY15-FY17 was requested from the Virginia Criminal Sentencing Commission. Staff was unable to determine from this data whether any of the persons charged or convicted was the victim of a crime who had provided testimony that was inconsistent with a prior statement.

During the study, the Action Alliance was requested to contact victim advocacy groups in states where the rules of evidence permit the admission of prior inconsistent statements as substantive evidence in an attempt to determine the impact of such rules on victims of crime.<sup>99</sup> The Action Alliance was unable to identify any substantial survivor impacts caused by these rules.<sup>100</sup> Concern was raised that the use of such statements could impact the trauma-informed process for victims; however, this issue could be addressed with training and guidance to prosecutors on trauma-informed interviewing practices and victim dynamics.<sup>101</sup>

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## Conclusion

Crime Commission members reviewed study findings at the December meeting and were presented with the following two policy options:

**Policy Option 1:** Amend existing law to allow for the admission of prior inconsistent statements of non-party witnesses as substantive evidence by:

- Endorsing Senate Bill 1445 as introduced; or,
- Allowing for the admission of prior inconsistent statements made under specified circumstances, which could include the following:
  - Under oath at a trial, hearing, deposition, or other proceeding;
  - Grand jury testimony;
  - Written by the witness;
  - Written form signed by the witness;
  - Audio recorded;
  - Video recorded;
  - Recorded by any similar electronic means;
  - Acknowledged under oath at trial by the witness;
  - Comprised of more than a mere confirmation or denial of an allegation by the interrogator (Massachusetts); or,
  - Any statement previously made by the witness, regardless of the circumstance under which the statement was made.



- Requiring advance notice and a copy of the statement to the opposing party before admitting the statement at the trial or hearing.

**Policy Option 2:** Maintain the status quo. Prior inconsistent statements would remain admissible only for impeaching the credibility of the non-party witness, unless some other exception exists under Virginia law.

By a majority vote, Crime Commission members endorsed Senate Bill 1445 (2017) as provided in Policy Option 1. Legislation for this recommendation was introduced by Senator Janet D. Howell (Senate Bill 135) and Delegate Robert B. Bell (House Bill 841) during the Regular Session of the 2018 General Assembly.<sup>102</sup> Senate Bill 135 was passed by indefinitely in the Senate Courts of Justice Committee. House Bill 841 was left in the House Courts of Justice Committee.

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## Acknowledgements

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

Indigent Defense Commission

State's Attorney's Office for the County of DuPage, Illinois

Virginia Association of Commonwealth's Attorneys

Virginia Criminal Sentencing Commission

Virginia Sexual and Domestic Violence Action Alliance

Virginia Victim Assistance Network

## APPENDIX A

### Rules of Evidence Governing the Admissibility of Prior Inconsistent Statements of a Non-Party Witness

Jurisdiction	Rule
Alabama	ALA. R. EVID. RULE 801(d)(1)(A)
Alaska	ALASKA R. EVID. 801(d)(1)(A)
Arizona	ARIZ. R. EVID. R. 801(d)(1)(A)
Arkansas	A.R.E. 801(d)(1)
California	CAL. EVID. CODE § 770
Colorado	C.R.E. 801(d)(1)
Connecticut	CONN. CODE OF EVIDENCE 8-5(1)
Delaware	D.R.E. 801(d)(1)
District of Columbia	D.C. CODE § 14-102(b)
Federal Rules of Evidence	FED. R. EVID. 801(d)(1)(A)
Florida	FLA. STAT. § 90.801(2)(a)
Georgia	O.C.G.A. § 24-8-801(d)(1)(A)
Hawaii	HRS CHAP. 626, HRS RULE 802.1(1)
Idaho	I.R.E. RULE 801(d)(1)
Illinois	ILL. R. EVID. 801(d)(1)(A)
Indiana	IND. R. EVID. 801(d)(1)(A)
Iowa	IOWA R. EVID. 5.801(d)(1)(A)
Kansas	K.S.A. § 60-460(a)
Kentucky	KRE RULE 801A(a)(1)
Louisiana	LA. C.E. ART. 801(D)(1)(a)
Maine	ME. R. EVID. 801(d)(1)(A)
Maryland	MD. RULE 5-802.1(a)
Massachusetts	ALM G. EVID. § 801(d)(1)(A)
Michigan	MRE 801(d)(1)
Minnesota	MINN. R. EVID. 801(d)(1)
Mississippi	MISS. R. EVID. 801(d)(1)(A)
Missouri	§ 491.074 R.S.Mo.
Montana	TITLE 16, Ch. 10, RULE 801(d)(1), MCA
Nebraska	R.R.S. NEB. § 27-801(4)(a)
Nevada	NEV. REV. STAT. ANN. § 51.035(2)(a) NEV. REV. STAT. ANN. § 51.035(2)(d)
New Hampshire	N.H. EVID. RULE 801(d)(1)(A)

<b>Jurisdiction</b>	<b>Rule</b>
New Jersey	N.J. R. EVID. 803(a)(1)
New Mexico	11-801(D)(1)(a) NMRA
New York	NY CLS CPLR R 4514
North Carolina	N.C. GEN. STAT. § 8C-1, RULE 613 N.C. GEN. STAT. § 8C-1, RULE 801
North Dakota	N.D.R. EV. RULE 801(d)(1)(A)
Ohio	OHIO EVID. R. 801(D)(1)
Oklahoma	12 OKL. ST. § 2801(B)(1)(a)
Oregon	ORS § 40.450 RULE 801(4)(a)(A)
Pennsylvania	PA.R.E. 803.1(1)
Rhode Island	R.I. R. EVID. ART. VIII, RULE 801(d)(1)
South Carolina	RULE 801(d)(1), SCRE
South Dakota	S.D. CODIFIED LAWS §19-19-801(d)(1)(A)
Tennessee	TENN. R. EVID. RULE 803(26)
Texas	TEX. EVID. R. 801(e)(1)(A)(ii)
Utah	UTAH R. EVID. RULE 801(d)(1)(A)
Vermont	V.R.E. RULE 801(d)(1)
Virginia	VA. SUP. CT. R. 2:801(d)
Washington	WASH. ER 801(d)(1)
West Virginia	W.V.R.E., RULE 801(d)(1)(A)
Wisconsin	WIS. STAT. § 908.01(4)(a)(1)
Wyoming	W.R.E. RULE 801(d)(1)

Source: Virginia State Crime Commission staff analysis.

## Endnotes

- <sup>1</sup> VA. SUP. CT. R. 2:803(0). The prior statements of a witness who is a party to the proceeding, i.e. the criminal defendant, are admissible as substantive evidence under current Virginia law.
- <sup>2</sup> VA. SUP. CT. R. 2:801(d).
- <sup>3</sup> Both Senate Bill 135 and House Bill 841 were identical to Senate Bill 1445 as introduced in 2017.
- <sup>4</sup> Such recantations may be more common in certain types of cases (domestic violence, gang activity, and human trafficking), but can occur in any criminal matter.
- <sup>5</sup> VA. SUP. CT. R. 2:801(d). *See also* VA. SUP. CT. R. 2:613.
- <sup>6</sup> CHARLES E. FRIEND & KENT SINCLAIR, *THE LAW OF EVIDENCE IN VIRGINIA* § 12-3, at 651 (7th ed. 2012).
- <sup>7</sup> Delegate C. Todd Gilbert introduced House Bill 935 during the Regular Session of the 2008 General Assembly and House Bill 2363 during the Regular Session of the 2009 General Assembly, both of which were similar to Senate Bill 1445. These bills were left in the House Courts of Justice Committee during each Session.
- <sup>8</sup> VA. SUP. CT. R. 2:803(0).
- <sup>9</sup> *See, e.g., McCary v. Commonwealth*, 36 Va. App. 27, 41, 548 S.E.2d 239, 246 (2001), regarding the single witness doctrine in Virginia.
- <sup>10</sup> VA. CODE § 19.2-268.3 (2018). Under this provision, prior statements are admissible as substantive evidence if the following are established: (i) the declarant victim is under 13 years old at the time of the trial or hearing, (ii) the victim testifies at trial, or if the victim is declared to be an unavailable witness and evidence exists to corroborate the prior statement, (iii) the court conducts a hearing and finds that there is sufficient indicia of reliability of the statement, and (iv) the defendant is charged with a specified offense enumerated within the statute.
- <sup>11</sup> The common law rule may also be referred to as the “orthodox rule.”
- <sup>12</sup> *See* Appendix A for the rules of evidence governing the admissibility of prior inconsistent statements of non-party witnesses for other jurisdictions.
- <sup>13</sup> N.Y. CVP C.P.L.R. R 4514.
- <sup>14</sup> N.C. GEN. STAT. § 8C-1, Rule 613; N.C. GEN. STAT. § 8C-1, Rule 801.
- <sup>15</sup> VA. SUP. CT. R. 2:801(d).
- <sup>16</sup> *See Hall v. Commonwealth*, 233 Va. 369, 374, 355 S.E.2d 591, 594-95 (1987).
- <sup>17</sup> *Id.*
- <sup>18</sup> *Id. See also State v. Whelan*, 513 A.2d 86, 90, 200 Conn. 743, 749 (1986).
- <sup>19</sup> *See Gibbons v. State*, 248 Ga. 858, 863, 286 S.E.2d 717, 721-22 (1982).
- <sup>20</sup> *Id.* at 721, citing 3A Wigmore, *Evidence* (Chadbourn rev.) § 1018; McCormick, *Handbook of the Law of Evidence*, 2d ed., § 251; Morgan, *Hearsay Dangers and the Application of the Hearsay Concept*, 62 HARV. L. REV. 177, 192 *et seq.* (1948).
- <sup>21</sup> *Id. See also State v. Whelan*, 513 A.2d 86, 90-91, 200 Conn. 743, 749-51 (1986); *Nance v. State*, 629 A.2d 633, 640-43, 331 Md. 549, 564-69 (1993).
- <sup>22</sup> Pub. L. No. 93-595, § 1, 88 Stat. 1938 (1975).
- <sup>23</sup> FED. R. EVID. 801(d)(1)(A).
- <sup>24</sup> D.C. CODE § 14-102(b).
- <sup>25</sup> ALA. R. EVID. RULE 801(d)(1)(A).
- <sup>26</sup> A.R.E. 801(d)(1).
- <sup>27</sup> FLA. STAT. § 90.801(2)(a).
- <sup>28</sup> I.R.E. RULE 801(d)(1).
- <sup>29</sup> IND. R. EVID. 801(d)(1)(A).
- <sup>30</sup> IOWA R. EVID. 5.801(d)(1)(A).

- 31 ME. R. EVID. 801(d)(1)(A).  
32 MRE 801(d)(1).  
33 MINN. R. EVID. 801(d)(1).  
34 MISS. R. EVID. 801(d)(1)(A).  
35 R.R.S. NEB. § 27-801(4)(a).  
36 N.H. EVID. RULE 801(d)(1)(A).  
37 11-801(D)(1)(a) NMRA.  
38 N.D.R. EVID. RULE 801(d)(1)(A).  
39 OHIO EVID. R. 801(D)(1).  
40 12 OKL. ST. § 2801(B)(1)(a).  
41 ORS § 40.450 RULE 801(4)(a)(A).  
42 S.D. CODIFIED LAWS §19-19-801(d)(1)(A).  
43 The Texas rule is substantially similar to the Federal Rule; however, Texas specifically precludes the  
admissibility of a prior statement given at a grand jury proceeding. TEX. EVID. R. 801(e)(1)(A)(ii).  
44 V.R.E. RULE 801(d)(1).  
45 WASH. ER 801(d)(1).  
46 W.V.R.E., RULE 801(d)(1)(A).  
47 W.R.E. RULE 801(d)(1).  
48 HRS CHAP. 626, HRS RULE 802.1(1).  
49 ILL. R. EVID. 801(d)(1)(A). Senate Bill 1445 was substantially modeled upon this rule.  
50 MD. RULE 5-802.1(a).  
51 ALM G. EVID. § 801(d)(1)(A). The Massachusetts rule further requires that the prior statement be  
“more than a mere confirmation or denial of an allegation by the interrogator.”  
52 N.J. R. EVID. 803(a)(1).  
53 PA.R.E. 803.1(1).  
54 CONN. CODE OF EVIDENCE 8-5(1).  
55 LA. C.E. ART. 801(D)(1)(a).  
56 TENN. R. EVID. RULE 803(26)(B)-(C).  
57 ALASKA R. EVID. 801(d)(1)(A).  
58 *Id.*  
59 ARIZ. R. EVID. R. 801(d)(1)(A).  
60 CAL. EVID. CODE § 770.  
61 C.R.E. 801(d)(1).  
62 D.R.E. 801(d)(1).  
63 O.C.G.A. § 24-8-801(d)(1)(A).  
64 K.S.A. § 60-460(a).  
65 KRE RULE 801A(a)(1).  
66 § 491.074 R.S.Mo. The rule in Missouri is exceptionally broad as it provides that a prior inconsistent  
statement “shall be received as substantive evidence.”  
67 TITLE 16, CH. 10, RULE 801(d)(1), MCA.  
68 NEV. REV. STAT. ANN. § 51.035(2)(a); NEV. REV. STAT. ANN. § 51.035(2)(d).  
69 R.I. R. EVID. ART. VIII, RULE 801(d)(1).  
70 RULE 801(d)(1), SCRE.  
71 UTAH R. EVID. RULE 801(d)(1)(A).  
72 WIS. STAT. § 908.01(4)(a)(1).  
73 Because Senate Bill 1445 was substantially modeled upon the rule in Illinois (ILL. R. EVID. 801(d)(1)  
(A)), this analysis focused primarily on Virginia law, Illinois law, and rulings from the U.S. Supreme Court.

<sup>74</sup> U.S. Const. amend. VI.

<sup>75</sup> Crawford v. Washington, 541 U.S. 36, 68-69 (2004).

<sup>76</sup> *Id.* at footnote 9.

<sup>77</sup> CHARLES E. FRIEND & KENT SINCLAIR, *THE LAW OF EVIDENCE IN VIRGINIA* § 12-3[a], at 652 (7th ed. 2012).

<sup>78</sup> People v. Williams, 147 Ill. 2d 173, 244, 588 N.E.2d 983, 1011 (1991).

<sup>79</sup> *Id.*

<sup>80</sup> People v. Martinez, 348 Ill. App. 3d 521, 532, 810 N.E.2d 199, 210 (2004).

<sup>81</sup> *Id.* See also *supra* note 77, § 12-3[d], at 658 (7th ed. 2012).

<sup>82</sup> Smith v. Commonwealth, 15 Va. App. 507, 511, 425 S.E.2d 95, 98 (1992).

<sup>83</sup> See People v. Hampton, 387 Ill. App. 3d 206, 899 N.E.2d 532 (2008).

<sup>84</sup> UTAH R. EVID. RULE 801(d)(1)(A).

<sup>85</sup> On April 4, 2018, the Virginia State Bar Criminal Discovery Reform Task Force presented its proposed amendments to Rules 3A:11 and 3A:12 of the Rules of the Supreme Court of Virginia, which included reciprocal disclosure of witness lists and expert witness information, exchanging witness statements, sharing police reports and witness statements with defense counsel, and subpoenas. See Virginia State Bar (2018, January 17). *Progress in Criminal Discovery Reform*. Available at [http://www.vsb.org/site/news/item/criminal\\_discovery\\_reform](http://www.vsb.org/site/news/item/criminal_discovery_reform). See also Virginia State Bar (2018, March 6). *Supreme Court of Virginia Seeks Comments on Criminal Discovery Reform*. Available at [http://www.vsb.org/site/news/item/SCV\\_comments\\_criminal\\_discovery](http://www.vsb.org/site/news/item/SCV_comments_criminal_discovery). A copy of the proposed amendments to Rules 3A:11 and 3A:12 is available at <http://www.vsb.org/docs/prop-rule-3A11.pdf>.

<sup>86</sup> Douglas A. Ramseur, *A Call for Justice: Virginia's Need for Criminal Discovery Reform*, 19 RICH. J. L. & PUB. INT. 247, 248-49 (2016).

<sup>87</sup> VA. SUP. CT. R. 7C:5(c).

<sup>88</sup> VA. SUP. CT. R. 3A:11(b).

<sup>89</sup> VA. SUP. CT. R. 3A:11(b)(2). While these statements are not subject to discovery, any exculpatory material in the statements must be disclosed pursuant to Brady v. Maryland, 373 U.S. 83, 83 S. Ct. 1194 (1963). Additionally, if a witness testifies and the government is aware of a prior statement made by the witness which is inconsistent with his testimony, the government must disclose that information to the defense pursuant to Giglio v. United States, 405 U.S. 150 (1972).

<sup>90</sup> See Jenia I. Turner and Allison D. Redlich, *Two Models of Pre-Plea Discovery in Criminal Cases: An Empirical Comparison*, 73 WASH & LEE L. REV. 285 (2016).

<sup>91</sup> Pursuant to Giglio v. United States, 405 U.S. 150 (1972), if a witness testifies and the government is aware of a prior statement made by the witness which is inconsistent with his testimony, the government must disclose that information to the defense.

<sup>92</sup> VA. SUP. CT. R. 3A:11(b).

<sup>93</sup> See *supra* note 89.

<sup>94</sup> Stakeholders included the Virginia Association of Commonwealth's Attorneys, the Indigent Defense Commission, the Virginia Victim Assistance Network, and the Virginia Sexual and Domestic Violence Action Alliance.

<sup>95</sup> VA. CODE § 18.2-434 (2018).

<sup>96</sup> VA. CODE § 18.2-435 (2018).

<sup>97</sup> VA. CODE § 18.2-460(D) (2018).

<sup>98</sup> VA. CODE § 18.2-461 (2018).

<sup>99</sup> Virginia Sexual and Domestic Violence Action Alliance, personal communication, October 17, 2017. The states suggested for examination included Illinois, Louisiana, Missouri, New Mexico, Pennsylvania, and Tennessee.

<sup>100</sup> Virginia Sexual and Domestic Violence Action Alliance, personal communication, November 30, 2017.

<sup>101</sup> *Id.*

<sup>102</sup> Both Senate Bill 135 and House Bill 841 were identical to Senate Bill 1445 as introduced.

# Decriminalization of Possession of Marijuana

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## Executive Summary

Based upon a letter request<sup>1</sup> and two bills referred during the Regular Session of the 2017 General Assembly,<sup>2</sup> the Executive Committee of the Crime Commission authorized a study on decriminalizing possession of marijuana. Decriminalization, for purposes of this study, is defined as the removal of criminal penalties for possessing small amounts of marijuana for personal use; it is not the same as legalization.<sup>3</sup>

Staff identified four penalty structures during a review of the possession of marijuana laws for all 50 states, the District of Columbia, and the federal government, including the following:

- Criminal penalties (30 states and federal law);
- Legal recreational possession (9 states and D.C.);
- Civil or non-criminal penalties (6 states); and,
- Blended civil and criminal penalties (5 states).<sup>4</sup>

Staff found that a conviction for possession of marijuana can impact a person in a variety of ways, including the following: court costs and fees, driver's license revocation, difficulties obtaining or maintaining employment, security clearance implications, loss of federal higher education financial aid, struggles obtaining housing, immigration impediments, restrictions on purchasing and possessing firearms, and obtaining concealed handgun permits. Staff also noted that concerns have been raised over racial disparities in the criminal enforcement of marijuana laws in Virginia.<sup>5</sup>

Study findings were presented to the Crime Commission at the October meeting. Crime Commission members were provided with three policy options at the December meeting; however, no motions were made on any of the options.

### **Policy Option 1: Maintain the status quo.**

Virginia currently punishes possession of marijuana as a criminal offense and authorizes incarceration for a violation of this law.<sup>6</sup> As such, an indigent defendant charged with this offense must be provided with court-appointed counsel, unless the potential jail sentence is waived.<sup>7</sup> Virginia law also includes a mechanism for first time drug offenders to have their criminal drug charge deferred and dismissed so that a conviction will not appear on their criminal record.<sup>8</sup>



Data demonstrated that males, young adults, and Blacks/African Americans are overrepresented in the total number of arrests for first and subsequent possession of marijuana as compared to their overall general population in Virginia. Data further revealed that the majority of possession of marijuana charges are filed and concluded in the general district courts. The vast majority of these charges are for first offense possession of marijuana and there appears to be a large attrition rate between the total first offense charges filed and total convictions obtained. Staff also found that an extremely low number of offenders serve jail time solely for possession of marijuana.

**Policy Option 2:** Remove the jail sentence as punishment for possession of marijuana.

Virginia law includes criminal offenses which authorize a fine but not incarceration.<sup>9</sup> The jail sentence could be removed as a punishment under Virginia's possession of marijuana statute; however, concerns have been raised that jail time is rarely imposed in current practice and that indigent defendants would be most impacted because they would no longer be entitled to court-appointed counsel.

**Policy Option 3:** Decriminalize possession of small amounts of personal use marijuana.

The Code of Virginia could be amended to decriminalize possession of small amounts of marijuana for personal use. Staff was unable to identify any specific effects other states experienced solely as the result of decriminalizing possession of personal use quantities of marijuana. Eleven states have decriminalized possession of marijuana in some manner using varying penalty structures, punishments, and quantity limits.<sup>10</sup> The laws of these eleven states could serve as models to guide policy decisions relating to decriminalization in Virginia. Any legislation that decriminalizes possession of marijuana should consider implications to current possession laws and enforcement practices, as well as other areas of the Code that may be impacted. Even if Virginia were to decriminalize possession of marijuana, such possession would remain a criminal offense under current federal law.<sup>11</sup>

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## Background & Methodology

In November 2016, Senator Thomas K. Norment, Jr., sent a letter to the Crime Commission requesting that the agency study a potential change to the Code of Virginia in relation to the criminal penalties for possession of small amounts of marijuana. Additionally, during the Regular Session of the 2017 General Assembly, legislation was introduced by Senators L. Louise Lucas (Senate Bill 908) and Adam P. Ebbin (Senate Bill 1269) to decriminalize possession of marijuana in Virginia. Both of these bills

were referred to the Crime Commission by the Senate Courts of Justice Committee. Based on the letter request and the two bill referrals, the Executive Committee of the Crime Commission authorized a study on decriminalizing possession of small amounts of marijuana for personal use.

Decriminalization of marijuana for purposes of this study means the removal of criminal penalties for possessing small amounts of marijuana for personal use. Decriminalization does not mean legalization of marijuana. In jurisdictions that have decriminalized marijuana, possession of small quantities for personal use is punishable as a civil offense; however, marijuana remains a prohibited substance. Staff did not extensively examine other issues relating to marijuana as part of this study, such as legalization, medical usage, cannabidiol or THC-A oils, health effects, or industrial hemp. The Virginia Joint Commission on Health Care conducted a study on the medical use and health effects of cannabis during 2017.<sup>12</sup>

Virginia currently punishes possession of marijuana as a criminal offense and authorizes incarceration for a violation of this law.<sup>13</sup> As such, an indigent defendant charged with this offense must be provided with court-appointed counsel, unless the potential jail sentence is waived on the charge.<sup>14</sup> Staff reviewed possession of marijuana laws for all 50 states, the District of Columbia, and the federal government.<sup>15</sup> Staff identified four penalty structures, including the following:

- Criminal penalties (30 states and federal law);
- Legal recreational possession (9 states and D.C.);
- Civil or non-criminal penalties (6 states); and,
- Blended civil and criminal penalties (5 states).

It is important to note that current Virginia law also includes a mechanism for first time drug offenders to have their criminal drug charge deferred and dismissed so that a conviction will not appear on their criminal record.<sup>16</sup> If the court determines that sufficient evidence exists to find the offender guilty of the drug charge, the court may defer a finding of guilt and place the offender on probation under terms and conditions.<sup>17</sup> The terms commonly include drug testing, drug education and/or treatment, and community service.<sup>18</sup> If the offender is compliant with these terms, the court may dismiss the drug charge.<sup>19</sup> This process is commonly referred to as the first offender program.

Crime Commission staff conducted various activities during this study, including the following:

- Examined relevant literature and reports relating to decriminalization;
- Obtained and analyzed data regarding arrests, charges, and convictions for first and subsequent possession of marijuana;
- Reviewed possession of marijuana and related statutes under Virginia law;
- Researched the marijuana laws of the other 49 states, District of Columbia, and the federal government;
- Conducted informal surveys of prosecutors and criminal defense attorneys; and,
- Consulted with practitioners and subject-matter experts.

Staff also requested written comments from the public in relation to this study. Over 5,665 comments were received. Staff reviewed these comments and found the following:

- 68% (3,850 of 5,665) were directly related to decriminalization; and,
  - 3,743 supported decriminalization
  - 107 did not support decriminalization
- 32% (1,815 of 5,665) were duplicative or related to legalization, medical marijuana, or other topics.<sup>20</sup>

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## **Consequences of a Conviction for Possession of Marijuana**

Staff found that a conviction for possession of marijuana can impact a defendant in a variety of ways. Decriminalization of marijuana has been proposed as a potential solution to mitigate these consequences,<sup>21</sup> which can include the following:

- Court Costs and Fees
- Driver's License Revocation
- Employment
- Security Clearance
- Higher Education Financial Aid
- Housing
- Immigration
- Federal Firearm Purchases and Sales
- Virginia Handgun Purchases and Transportation
- Virginia Concealed Handgun Permit

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## **Court Costs and Fees**

Currently a conviction for possession of marijuana or entry into the first offender program results in a variety of court costs and fees.<sup>22</sup> Some of these costs and fees are mandatory while others are discretionary. For example, a defendant who was represented by court-appointed counsel and convicted of first offense possession of marijuana can expect to pay approximately \$400 to \$800 in costs and fees depending on whether probation was ordered.

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## **Driver's License Revocation**

If a person is convicted of possession of marijuana, or if the court finds that the person possessed marijuana while operating a motor vehicle, the person's driver's license must be revoked for six months.<sup>23</sup> However, the court may grant that person a restricted license to operate a motor vehicle for certain purposes.<sup>24</sup> If a person enters the first offender program and was not operating a motor vehicle while in possession of marijuana, the court may impose additional community service in lieu of revoking that person's driver's license.<sup>25</sup>

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## **Employment**

Staff was unable to determine specifically how a conviction for possession of marijuana affects employment. A person's employment or ability to obtain employment may be impacted as a result of a conviction for possession of marijuana; however, policies on drug use and criminal history vary by employer.<sup>26</sup> Additionally, based upon discussions with stakeholders, staff found that some employers will use private data mining companies to screen whether potential employees have had any prior contacts with the criminal justice system.

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## **Security Clearance**

Illegal drug use or possession is a consideration when screening an individual for a security clearance.<sup>27</sup> Such use or possession is not an automatic disqualifier and depending on the clearance level or employer, can be mitigated by time, completion of a drug treatment program, or a demonstrated intent not to use drugs in the future.<sup>28</sup>

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## Higher Education Financial Aid

A college student who was convicted of possession of a controlled substance for an offense that occurred while receiving any federal grant, loan or work assistance is ineligible to receive any federal grant, loan, or work assistance for 1 year for the first offense, 2 years after the second offense, and indefinitely after a third or subsequent offense.<sup>29</sup> A student whose federal aid has been suspended can regain eligibility by completing an approved drug rehabilitation program, passing two unannounced drug tests administered by an approved program, or having the conviction reversed, set aside, or rendered invalid.<sup>30</sup> A student's Virginia state financial aid is not impacted by a conviction for possession of marijuana.<sup>31</sup>

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## Housing

A criminal conviction can serve as a basis for the denial of housing. The Fair Housing Act prohibits discrimination in the sale, rental, or financing of housing on the basis of race, color, religion, sex, disability, familial status, or national origin.<sup>32</sup> While the presence of a conviction on a person's criminal record is not a protected characteristic under this Act, in April 2016 the U.S. Department of Housing and Urban Development issued guidance which concluded that "arbitrary and overbroad criminal history-related bans are likely to lack a legally sufficient justification" if the application of the ban results in a discriminatory effect.<sup>33</sup>

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## Immigration

The impact of a conviction for possession of marijuana to a non-United States citizen will depend on that person's status (green card, visa, student, refugee, undocumented, visa overstay, etc.), the person's prior criminal record, and whether the quantity of marijuana possessed was greater than 30 grams.<sup>34</sup> A conviction will render a non-United States citizen inadmissible, which means that the person will not be eligible to seek admission to the United States, whether applying for status or returning from travel abroad.<sup>35</sup> Under immigration law, the term "conviction" includes a charge where a finding of guilt was withheld, such as a deferred disposition under Virginia's first offender program.<sup>36</sup>

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## **Federal Firearm Purchases and Sales**

Federal law prohibits the purchase or possession of firearms by any person who is an unlawful user of or addicted to any controlled substance.<sup>37</sup> Similarly, federal law forbids the sale of firearms to any person who is an unlawful user of or addicted to any controlled substance.<sup>38</sup> The National Instant Background Check System provides various examples of what constitutes an unlawful drug user or addict, such as a person who has been convicted of unlawful drug possession or who has submitted a positive drug screen within the past year.<sup>39</sup>

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## **Virginia Handgun Purchases and Transportation**

A person who has been convicted of two or more charges of misdemeanor drug possession within a 36 consecutive-month period is ineligible to purchase or transport a handgun.<sup>40</sup> This prohibition expires after five years from the date of the second conviction, provided that no more convictions occur during those five years.<sup>41</sup>

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## **Virginia Concealed Handgun Permit**

A person who has been convicted of possession of marijuana or who has had such a charge deferred and dismissed is disqualified from obtaining a concealed handgun permit for three years.<sup>42</sup> Similarly, anyone who is addicted to or is an unlawful user of marijuana is also disqualified from obtaining a concealed handgun permit.<sup>43</sup>

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## **Virginia Laws and Enforcement Data**

The term “marijuana” as defined by the Code of Virginia means “any part of a plant of the genus Cannabis, whether growing or not, its seeds or resin; and every compound, manufacture, salt, derivative, mixture, or preparation of such plant, its seeds, or its resin.”<sup>44</sup> Tetrahydrocannabinol (THC) is the active ingredient in marijuana and is classified in Schedule I of Virginia’s Drug Control Act.<sup>45</sup> Drugs in this schedule have a high potential for abuse and either no accepted medical use in the United States or a lack of accepted safety for use under medical supervision.<sup>46</sup>

The current criminal penalty structure in Virginia for possession of marijuana has been in place since 1979.<sup>47</sup> Under the current law, first offense possession of marijuana is punishable by up to 30 days in jail and a maximum \$500 fine.<sup>48</sup> Subsequent offense possession of marijuana is punishable as a Class 1 misdemeanor by up to 12 months in jail and

a maximum \$2,500 fine.<sup>49</sup> As such, an indigent defendant charged with this offense must be provided with court-appointed counsel, unless the potential jail sentence is waived.<sup>50</sup>

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## Arrest Data

Over the past ten years (CY07-CY16), there were 133,256 arrests for possession of marijuana under Virginia Code § 18.2-250.1,<sup>51</sup> and of those arrests:

- 84% (112,581 of 133,256) were for a first offense; and,
- 16% (20,675 of 133,256) were for a subsequent offense.<sup>52</sup>

The number of first offense arrests may be overrepresented because a law enforcement officer may not be aware of prior violations at the time of arrest. If a defendant is charged with first offense possession of marijuana and it is discovered that he has a prior conviction for possession of marijuana, the Commonwealth can request permission from the court to amend the charging document to possession as a subsequent offense. However, if jail time is waived for the offense, the Commonwealth's Attorney may not be involved in the prosecution of the offense.

Data demonstrated that males, young adults, and Blacks/African Americans are overrepresented in the total number of arrests for possession as compared to their percentage of the overall general population in Virginia.

The U.S. Census Bureau estimated that as of 2016, Virginia's total population of approximately 8.4 million was comprised of 51% females and 49% males.<sup>53</sup> When examining the sex of persons arrested for possession of marijuana over the past ten years (CY07-CY16), the data showed the following:

- 81% (90,904 of 112,581) of first offense arrests were of males; and,
- 91% (18,772 of 20,675) of subsequent offense arrests were of males.<sup>54</sup>

When analyzing the data based on the age of persons arrested for possession of marijuana over the past ten years (CY07-CY16), it showed the following:

- 54% (60,868 of 112,581) of first offense arrests were of persons aged 18 to 24; and,
- 37% (7,628 of 20,675) of subsequent offense arrests were of persons aged 18 to 24.<sup>55</sup>

The U.S. Census Bureau estimated that as of 2016, approximately 70% of Virginia's population of 8.4 million was White and 19.8% was Black/African American.<sup>56</sup> When considering the race of persons arrested for possession of marijuana over the past ten years (CY07-CY16), the data showed the following:<sup>57</sup>

- First offense arrests:
  - 46% (51,177 of 112,581) were of Blacks/African Americans; and,
  - 53% (59,883 of 112,581) were of Whites.
- Subsequent offense arrests:
  - 46% (9,586 of 20,675) were of Whites; and,
  - 53% (10,888 of 20,675) were of Blacks/African Americans.

A number of theories exist that attempt to explain the racial disparity in drug arrests. Those theories include, but are not limited to, the following: racial inequality, area of residence of the offender, and conscious/subconscious racial bias.<sup>58</sup> Staff did not specifically examine the rationale behind these theories in relation to Virginia arrest data.

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## Charge and Conviction Data

Data revealed that the majority of possession of marijuana charges were filed and concluded in the general district courts.<sup>59</sup> The vast majority of these charges were for first offense possession of marijuana.<sup>60</sup> There appeared to be a large attrition rate between the total first offense charges filed and total convictions obtained. Of the first offense charges filed in the general district courts from FY08-FY17, approximately 55% (97,147 of 175,542) resulted in a conviction for possession of marijuana or some other related offense, and 45% (78,395 of 175,542) resulted in dismissal, *nolle prosequi*, or a finding of not guilty.<sup>61</sup>

Staff was unable to ascertain how many of these first offense possession of marijuana charges were of defendants who previously had a



possession of marijuana charge dismissed pursuant to the first offender statute. Staff was able to ascertain from OES' Court Management system data that there were approximately 3,423 charges of possession of marijuana dismissed under the first offender statute in CY15.<sup>62</sup> For reference purposes, it is important to note that there were over 21,000 charges of first offense possession of marijuana filed in the general district courts during CY15.<sup>63</sup>

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## Jail Sentences

While the existing statute allows for incarceration, staff found that an extremely low number of offenders serve jail time solely for possession of marijuana offenses. According to the Compensation Board (LIDS database), on July 20, 2017, there were a total of 96 pre-trial and 31 post-trial inmates in Virginia jails solely on a charge or conviction for possession of marijuana. The average operating cost per jail inmate per day was \$85.17 in FY16.<sup>64</sup>

An informal survey of Commonwealth's Attorneys, Public Defenders, and court-appointed counsel found that jail time is frequently waived for first offense possession of marijuana. Oftentimes persons charged with a first offense are permitted to enter into the first offender program. Other times the charge is disposed of by amending it to another Code section or a general continuance with conditions.

This informal survey also indicated that the punishment for subsequent possession of marijuana commonly varied between a fine only, suspended jail time plus a fine, or jail time plus a fine. Data revealed that in FY16, 31% (578 of 1,859) of sentencing events for subsequent possession of marijuana convictions resulted in an active jail term, with a median effective jail sentence of 15 days.<sup>65</sup>

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## Removal of Jail Penalty for Possession of Marijuana

As an alternative to decriminalization, Virginia could continue to punish possession of marijuana as a criminal offense, but remove the jail penalty by reclassifying the charge as a Class 3 or Class 4 misdemeanor. Under current Virginia law, a Class 3 misdemeanor is punishable by up to a \$500 fine and a Class 4 misdemeanor by up to a \$250 fine.<sup>66</sup> Neither a Class 3 nor a Class 4 misdemeanor carry the potential for any term of incarceration.<sup>67</sup>

Two primary concerns were raised in regard to this option. First, jail time is rarely imposed in current practice in Virginia solely for possession of marijuana charges. Second, if jail time is removed as a penalty, then indigent defendants would no longer be entitled to court-appointed counsel on such charges.<sup>68</sup>

Three other states have adopted penalty structures where possession of marijuana is treated as a criminal offense, but incarceration is not authorized for at least the first offense, including the following:

- Missouri: first offense possession of not more than 10 grams of marijuana is punishable by up to a \$500 fine.<sup>69</sup>
- Montana: first offense possession of 60 grams or less of marijuana is punishable by up to a \$500 fine.<sup>70</sup>
- North Carolina: possession of ½ ounce or less of marijuana is punishable by up to 30 days incarceration and up to a \$200 fine; however, any term of imprisonment which is imposed must be suspended.<sup>71</sup>

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## Considerations Related to Decriminalization

### Effects of Decriminalization

Staff was unable to identify any specific effects other states experienced solely as the result of decriminalizing possession of personal use quantities of marijuana. When examining literature related to marijuana policy, staff found that legalization and medical use of marijuana has been at the forefront of recent studies. Literature specifically relating to decriminalization was mostly outdated and referenced the wave of decriminalization during the 1970's and 1980's in the United States.<sup>72</sup> A more recent publication focused on trends in marijuana use and attitudes among youth before and after decriminalization of marijuana in California; however, the authors noted three significant limitations and caveats to the study.<sup>73</sup> Additionally, states such as Connecticut (2011),<sup>74</sup> Rhode Island (2012),<sup>75</sup> Vermont (2013),<sup>76</sup> Maryland (2014),<sup>77</sup> Delaware (2015),<sup>78</sup> Illinois (2016),<sup>79</sup> and New Hampshire (2017),<sup>80</sup> only recently decriminalized possession of marijuana. Due to the recentness of these changes, reliable information was not available on the short and long-term effects of decriminalization.

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### Policy Considerations Related To Decriminalization

The Code of Virginia could be amended to decriminalize possession of small amounts of marijuana for personal use. Eleven states have decriminalized possession of marijuana in some manner using varying

penalty structures, punishments, and quantity limits.<sup>81</sup> The laws of these eleven states could serve as models to guide policy decisions relating to decriminalization in Virginia. Any legislation that decriminalizes possession of marijuana in Virginia should consider implications to current possession laws and enforcement practices, as well as other areas of the Code that may be impacted, including the following:

- Penalty Structure
- Quantity Limit for Civil Possession
- Punishment for Possession over the Quantity Limit
- Penalties for Possession in Certain Locations
- Forms of Marijuana to Decriminalize
- Potency of Marijuana
- Drug Paraphernalia
- Searches Based on the Odor of Marijuana
- Trial Matters
- Revocation of Driver's License and Federal Highway Funding
- DUI Statutes
- First Offender Drug Statute
- Firearms Statutes: Handguns and Concealed Handgun Permits

It must be noted that even if Virginia were to decriminalize possession of marijuana, such possession would remain a criminal offense under current federal law.<sup>82</sup>

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### ***Penalty Structure***

Three different penalty structures were identified in states that have decriminalized possession of marijuana. Examples of these three penalty structures include the following:

- Single civil offense: Illinois punishes possession of not more than 10 grams of marijuana by a civil fine of \$100 to \$200, regardless of the number of prior offenses.<sup>83</sup>
- Escalating civil offense: Maryland punishes possession of less than 10 grams of marijuana by a civil fine of up to \$100 for a first offense, up to \$250 for a second offense, and up to \$500 for a third or subsequent offense.<sup>84</sup>

- Escalating civil and criminal blended offense: Nebraska punishes possession of one ounce or less of marijuana by a civil fine of \$300 for a first offense.<sup>85</sup> Second and third offense convictions are punished criminally by up to 5 days in jail and a \$400 fine for a second offense<sup>86</sup> and up to 7 days in jail and a \$500 fine for a third or subsequent offense.<sup>87</sup>

In addition to determining a penalty structure, an agency will need to be selected to serve as a repository of records for these civil violations. For example, Mississippi records are kept by the Mississippi Bureau of Narcotics<sup>88</sup> while Rhode Island records are maintained by the Rhode Island traffic tribunal.<sup>89</sup> Staff conducted a search of the Code of Virginia for a similar escalating civil offense and found that the sale of nicotine or tobacco to minors is punishable by a civil penalty up to \$100 for a first offense, \$200 for a second offense, and \$500 for a third or subsequent offense.<sup>90</sup> However, staff determined that no central repository of records exists for the sale of nicotine or tobacco to minors.

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### ***Quantity Limit for Civil Possession***

States have enacted various weight thresholds for what constitutes civil versus criminal possession of marijuana. The weight limits in these states vary from 10 grams to 100 grams.<sup>91</sup>

Currently, the Virginia statute prohibiting possession of marijuana does not include any bright line weight measurement.<sup>92</sup> If such a weight limit was added to the statute to differentiate between civil and criminal possession, then other policy matters relating to weight limits must be considered. Those matters include the development of weighing practices and procedures,<sup>93</sup> calibration of all equipment used to weigh the contraband, and training for law enforcement on uncertainty of weight measurements.<sup>94</sup>

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### ***Punishment for Possession over the Quantity Limit***

Similar to the quantity limits, states that have decriminalized possession of marijuana have also established varying penalties when the quantity of marijuana exceeds a weight threshold. For example, possession of more than ½ ounce of marijuana in Connecticut is punishable by up to 1 year in jail and a \$2,000 fine.<sup>95</sup> Similarly, possession of more than 1 ounce of marijuana in Delaware is punishable by up to 3 months in jail and a \$575 fine.<sup>96</sup>

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### ***Penalties for Possession in Certain Locations***

While certain states have decriminalized possession of marijuana, some of those states continue to maintain penalties for possession or use in specified locations. In Minnesota, possession of more than 1.4 grams of marijuana “within the area of the vehicle normally occupied by the driver or passengers” is a criminal offense punishable by incarceration up to 90 days and a \$1,000 fine.<sup>97</sup> In New York, possession of burning marijuana in a public place is a criminal offense punishable by up to 3 months incarceration and a \$500 fine.<sup>98</sup> In Maryland, smoking marijuana in a public place is a civil offense punishable by up to a \$500 fine.<sup>99</sup>

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### ***Forms of Marijuana to Decriminalize***

Marijuana can take many forms, such as plant material, hashish, hashish oil, edibles, or synthetic. States that have decriminalized possession of marijuana have done so in varying forms. For example, Delaware solely decriminalized leaf marijuana,<sup>100</sup> while New Hampshire decriminalized marijuana, hashish, and marijuana-infused products.<sup>101</sup>

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### ***Potency of Marijuana***

Research is being conducted to determine whether the potency of some marijuana has risen over time. For instance, one nationwide study found that the THC content of cannabis plant material has risen from approximately 4% in 1995 to approximately 12% in 2014.<sup>102</sup> Current Virginia law provides that an oily extract that contains less than 12% of THC by weight falls under the definition of marijuana; however, there is no THC content limit for leaf marijuana or non-oily extracts.<sup>103</sup>

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### ***Drug Paraphernalia***

States have adopted varying approaches for possession of drug paraphernalia. Illinois punishes possession of drug paraphernalia in relation to marijuana use as a civil offense by a \$100 to \$200 fine.<sup>104</sup> Conversely, Maryland specifically excludes possession of drug paraphernalia from punishment if it was involved in the use or possession of marijuana.<sup>105</sup>

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### ***Searches Based on the Odor of Marijuana***

The odor of marijuana provides law enforcement with probable cause to conduct a search.<sup>106</sup> During this study, the question was raised whether decriminalization of marijuana would negate probable cause to conduct a search based on the odor of marijuana. Courts in California,<sup>107</sup> Colorado,<sup>108</sup> Maine,<sup>109</sup> Maryland,<sup>110</sup> Minnesota,<sup>111</sup> and Oregon<sup>112</sup> have upheld such searches on the grounds that marijuana remained a prohibited substance and that several other marijuana-related activities aside from possession remain illegal. Conversely, while the Supreme Judicial Court of Massachusetts remanded a case on this issue on other grounds, the Court noted in its ruling that it was “not confident...that a human nose can discern reliably the presence of a criminal amount of marijuana, as distinct from an amount subject only to a civil fine.”<sup>113</sup>

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### ***Trial Matters***

*What will be the burden of proof if possession of marijuana becomes a civil offense?*

Currently, possession of marijuana is a criminal offense in Virginia requiring proof beyond a reasonable doubt. Both Maryland<sup>114</sup> and Connecticut<sup>115</sup> have lowered the burden of proof for this offense to a preponderance of the evidence standard. Compare this with Virginia’s approach to civil refusal of a blood or breath test, which requires proof beyond a reasonable doubt.<sup>116</sup>

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*Who will prosecute the offense?*

Both Senate Bills 908 and 1269 authorized the attorney for the Commonwealth or the county, city, or town attorney to prosecute the civil violation of possession of marijuana. Staff inquired about this practice in Maryland and were advised that only 3 of the 24 State’s Attorney’s Offices engage in the prosecution of civil marijuana offenses.<sup>117</sup> In the remainder of the jurisdictions, the charging officer handles the case much like a traffic summons.<sup>118</sup>

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*Which discovery process will apply?*

The rules of discovery for criminal cases<sup>119</sup> in Virginia are much narrower than the rules of discovery in civil proceedings.<sup>120</sup> Any legislation decriminalizing possession of marijuana should specify which rules will apply during the discovery process.

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*What other trial-related matters should be considered?*

In addition to the above questions, any legislation decriminalizing possession of marijuana in Virginia should consider various other matters incidental to trial, including the following:

- Will the Virginia Department of Forensic Science continue to conduct laboratory testing of suspected marijuana material in civil possession cases?
  - If an escalating penalty structure is adopted, how will convictions for possession of marijuana that were incurred prior to the effective date of decriminalization be counted toward future charges and convictions?
  - Will a “conviction” for civil possession of marijuana constitute a violation of a defendant’s probation or suspended sentence for a criminal offense?
- 

***Other Areas of the Code of Virginia Impacted by Decriminalization***

*Revocation of Driver’s License and Federal Highway Funding*

As previously noted, if a person in Virginia is found guilty of possession of marijuana, or if the court finds that the person possessed marijuana while operating a motor vehicle, the person’s driver’s license must be revoked for six months.<sup>121</sup> Under federal law, states receiving federal highway funds must either revoke the driver’s license of a person convicted of a drug offense for six months or formally opt out of this revocation requirement.<sup>122</sup> Failure to follow one of these two requirements will result in an 8% withholding of federal highway funds under the National Highway Performance Program and the Surface Transportation Block Grant Program.<sup>123</sup>

This federal law contains a definitions section; however, the term “conviction” is not specifically defined, other than to note that it includes juvenile adjudications.<sup>124</sup> Therefore, it is unclear whether a finding of guilt for civil possession of marijuana would qualify as a “conviction” under the federal statute.

When the Virginia legislature sought to remove the license suspension for individuals placed in the first offender program for possession of marijuana during the Regular Session of the 2017 General Assembly, that legislation included a second enactment clause requiring written assurance from the Federal Highway Administration that Virginia would not lose any federal funds as a result of implementing the law.<sup>125</sup> Those written assurances were received and that legislation has taken effect.<sup>126</sup>

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### *DUI Statutes*

A conviction for driving under the influence of marijuana can be obtained under Virginia’s existing DUI statute<sup>127</sup> by proof that the driver was under the influence of THC to the extent that his ability to drive was impaired. This typically requires a blood test confirming the presence of THC and witness testimony as to the degree of impairment. A specific level of THC could be added to the Virginia presumption statute for DUI;<sup>128</sup> however, current research does not support a reliable correlation between THC blood levels and degree of impairment while operating a motor vehicle.<sup>129</sup>

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### *First Offender Drug Statute*

If possession of marijuana were decriminalized in Virginia, the first offender drug statute would need to be amended to clarify whether a person found guilty of a civil violation for such possession would later be disqualified from entering into the first offender program on a subsequent criminal drug charge. Virginia law allows for a person who has never been convicted of a drug offense or had a drug offense deferred and dismissed to enter into the first offender program.<sup>130</sup> If the offender successfully completes the requirements of the program, their current drug charge may be dismissed.<sup>131</sup>

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### *Firearms Statutes: Handguns and Concealed Handgun Permits*

If possession of marijuana is amended to a civil offense in Virginia,



then the legislation would need to clarify whether a civil violation is a disqualifying offense for purposes of purchasing or possessing a handgun or obtaining a concealed handgun permit. Under Virginia law a person convicted of two or more charges of misdemeanor drug possession within a 36 consecutive-month period is ineligible to purchase or transport a handgun.<sup>132</sup> Similarly, a person who has been convicted of possession of marijuana or who has had such a charge deferred and dismissed is disqualified from obtaining a concealed handgun permit for 3 years.<sup>133</sup>

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## Conclusion

Study findings were presented to the Crime Commission at the October meeting. Crime Commission members were provided with three policy options at the December meeting; however, no motions were made on any of the options.

### **Policy Option 1:** Maintain the status quo.

Virginia currently punishes possession of marijuana as a criminal offense and authorizes incarceration for a violation of this law.<sup>134</sup> As such, an indigent defendant charged with this offense must be provided with court-appointed counsel, unless the potential jail sentence is waived.<sup>135</sup> Virginia law also currently includes a mechanism for first time drug offenders to have their criminal drug charge deferred and dismissed so that a conviction will not appear on their criminal record.<sup>136</sup>

Data demonstrated that males, young adults, and Blacks/African Americans are overrepresented in the total number of arrests for first and subsequent possession of marijuana as compared to their overall general population in Virginia. Data further revealed that the majority of possession of marijuana charges were filed and concluded in the general district courts. The vast majority of these charges are for first offense possession of marijuana and there appears to be a large attrition rate between the total first offense charges filed and total convictions obtained. Staff also found that an extremely low number of offenders serve jail time solely for possession of marijuana offenses.

### **Policy Option 2:** Remove the jail sentence as punishment for possession of marijuana.

Virginia law includes criminal offenses which authorize a fine but not incarceration.<sup>137</sup> The jail sentence could be removed as a punishment under Virginia's possession of marijuana statute; however, concerns have been raised that jail time is rarely imposed in current practice and that indigent defendants would be most impacted because they would no longer be entitled to court-appointed counsel.

**Policy Option 3:** Decriminalize possession of small amounts of personal use marijuana.

The Code of Virginia could be amended to decriminalize possession of small amounts of marijuana for personal use. Staff was unable to identify any specific effects other states experienced solely as the result of decriminalizing possession of personal use quantities of marijuana. Eleven states have decriminalized possession of marijuana in some manner using varying penalty structures, punishments, and quantity limits.<sup>138</sup> The laws of these eleven states could serve as models to guide policy decisions relating to decriminalization in Virginia. Any legislation that decriminalizes possession of marijuana should consider implications to current possession laws and enforcement practices, as well as other areas of the Code that may be impacted. Even if Virginia were to decriminalize possession of marijuana, such possession would remain a criminal offense under current federal law.<sup>139</sup>

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## Acknowledgements

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

AAA Mid-Atlantic and Tidewater Region

Brunswick County Sheriff's Office

Chesterfield County Police Department

Colorado Springs Police Department

Commonwealth's Attorneys' Services Council

Commonwealth of Virginia Compensation Board

Department of Alcoholic Beverage Control

Fairfax County Police Department

Joint Commission on Health Care

Maryland State's Attorneys' Association

Maryland State Police

Office of the Attorney General of Virginia

Office of the Chief Medical Examiner of Virginia

Office of the Executive Secretary of the Supreme Court of Virginia

State Council of Higher Education for Virginia

Virginia Alcohol Safety Action Program

Virginia Commonwealth University, Division of Strategic Enrollment  
Management

Virginia Community Criminal Justice Association

Virginia Criminal Sentencing Commission

Virginia Department of Forensic Science

Virginia Department of Motor Vehicles

Virginia Department of Transportation

Virginia Division of Capitol Police

Virginia Indigent Defense Commission

Virginia Sheriffs' Association

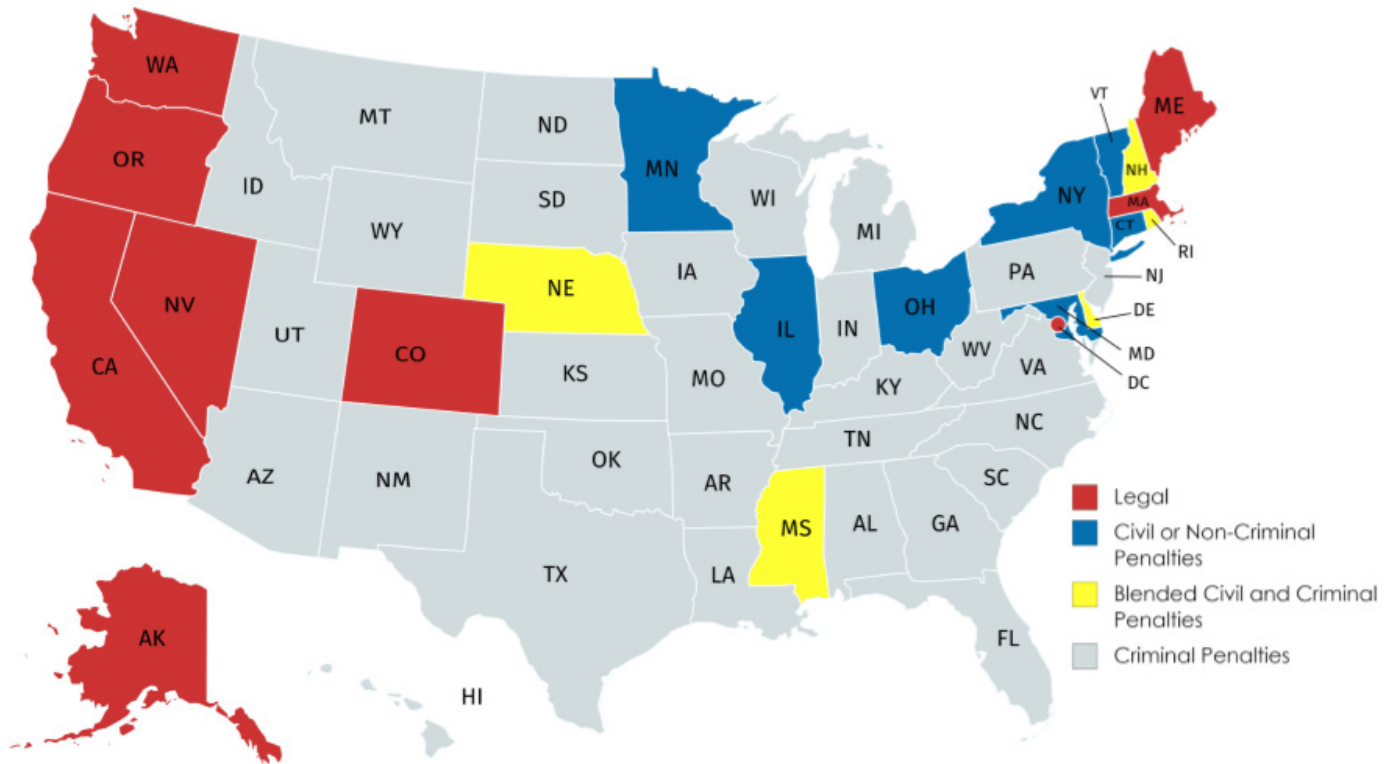
Virginia State Police

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**The Crime Commission would also like to thank all individuals, agencies, and entities that provided either written or public comment and/or completed informal surveys during this study.**

## APPENDIX A

### Possession of Marijuana Laws by State (Including the District of Columbia)



Legal	Blended Civil and Criminal	Civil
Alaska	Delaware	Connecticut
California	Mississippi	Illinois
Colorado	Nebraska	Maryland
District of Columbia	New Hampshire	Minnesota
Maine	Rhode Island	New York
Massachusetts		Ohio
Nevada		
Oregon		
Vermont		
Washington		

Source: Virginia State Crime Commission staff analysis.

## APPENDIX B

### Possession of Marijuana Penalties by State (Including the District of Columbia and Federal Law)

Jurisdiction	Penalty	Primary Statute(s)
Alabama	Criminal	ALA. CODE § 13A-12-214 (2018) ALA. CODE § 13A-12-213(c) (2018)
Alaska	Legal	ALASKA STAT. § 17.38.020 (2018)
Arizona	Criminal	ARIZ. REV. STAT. § 13-3405 (2018)
Arkansas	Criminal	ARK. CODE ANN. § 5-64-419(b)(5) (2018)
California	Legal	CAL. HEALTH & SAFETY CODE § 11362.1 (West 2018)
Colorado	Legal	COLO. CONST. ART. XVIII, § 16(3) (West 2018)
Connecticut	Civil	CONN. GEN. STAT. ANN. § 21a-279a (2018)
Delaware	Blended Civil & Criminal	DEL. CODE ANN. tit. 16, § 4764(c) (2018) DEL. CODE ANN. tit. 16, § 4701(34) (2018)
District of Columbia	Legal	D.C. CODE ANN. § 48-904.01(a)(1) (2018)
Federal Law	Criminal	21 U.S.C. § 844(a) (2018)
Florida	Criminal	FLA. STAT. ANN. § 893.13(6)(b) (West 2018)
Georgia	Criminal	GA. CODE ANN. § 16-13-2(b) (2018)
Hawaii	Criminal	HAW. REV. STAT. § 712-1249 (2018) HAW. REV. STAT. § 712-1248(1)(c) (2018)
Idaho	Criminal	IDAHO CODE § 37-2732(c)(3) (Michie 2018) IDAHO CODE § 37-2732(e) (Michie 2018)
Illinois	Civil	720 ILL. COMP. STAT. 550/4 (2018)
Indiana	Criminal	IND. CODE ANN. § 35-48-4-11 (Michie 2018)
Iowa	Criminal	IOWA CODE § 124.401(5) (2018)
Kansas	Criminal	KAN. STAT. ANN. § 21-5706(c)(3) (2018)
Kentucky	Criminal	KY. REV. STAT. ANN. § 218A.1422 (Michie 2018)
Louisiana	Criminal	LA. REV. STAT. ANN. § 40:966(C)(2) (West 2018)
Maine	Legal	ME. REV. STAT. ANN. Tit. 7, § 2452 (West 2018)
Maryland	Civil	MD. CODE ANN., CRIM. LAW § 5-601.1(b)(1) (2018)
Massachusetts	Legal	MASS. ANN. LAWS ch. 94G, § 7 (Law. Co-op. 2018)
Michigan	Criminal	MICH. COMP. LAWS § 333.7403(2)(d) (2018)

Jurisdiction	Penalty	Primary Statute(s)
Minnesota	Civil	MINN. STAT. § 152.027(4)(a) (2018) MINN. STAT. § 152.01(16) (2018) MINN. STAT. § 609.02(4a) (2018)
Mississippi	Blended Civil & Criminal	MISS. CODE ANN. § 41-29-139(c)(2)(A)(1) (2018)
Missouri	Criminal	MO. ANN. STAT. § 579.015 (West 2018)
Montana	Criminal	MONT. CODE ANN. § 45-9-102(2) (2018)
Nebraska	Blended Civil & Criminal	NEB. REV. STAT. § 28-416(13) (2018)
Nevada	Legal	NEV. REV. STAT. § 453D.110 (2018)
New Hampshire	Blended Civil & Criminal	N.H. REV. STAT. ANN. § 318-B:26(II)(d) (2018) N.H. REV. STAT. ANN. § 318-B:2-C(II) (2018) N.H. REV. STAT. ANN. § 318-B:2-C(V) (2018)
New Jersey	Criminal	N.J. STAT. ANN. § 2C:35-10(a)(4) (West 2018) N.J. STAT. ANN. § 2C:43-8 (West 2018)
New Mexico	Criminal	N.M. STAT. ANN. § 30-31-23(B) (Michie 2018)
New York	Civil	N.Y. PENAL LAW § 221.05 (McKinney 2018) N.Y. PENAL LAW § 221.10(2) (McKinney 2018)
North Carolina	Criminal	N.C. GEN. STAT. § 90-95(d)(4) (2018)
North Dakota	Criminal	N.D. CENT. CODE § 19-03.1-23(8)(d) (2018)
Ohio	Civil	OHIO REV. CODE ANN. § 2925.11(C)(3)(a) (West 2018) OHIO REV. CODE ANN. § 2925.11(D) (West 2018)
Oklahoma	Criminal	OKLA. STAT. tit. 63, § 2-402 (2018)
Oregon	Legal	OR. REV. STAT. § 475B.337 (2018) <i>See</i> 2017 Or. Laws 21
Pennsylvania	Criminal	35 PA. STAT. ANN. § 780-113(g) (West 2018)
Rhode Island	Blended Civil & Criminal	R.I. GEN. LAWS § 21-28-4.01(c)(2) (2018)
South Carolina	Criminal	S.C. CODE ANN. § 44-53-370(d)(4) (Law. Co-op. 2018)
South Dakota	Criminal	S.D. CODIFIED LAWS § 22-42-6 (Michie 2018)
Tennessee	Criminal	TENN. CODE ANN. § 39-17-418(a) (2018) TENN. CODE ANN. § 39-17-418(c)(1) (2018)
Texas	Criminal	TEX. HEALTH & SAFETY CODE ANN. § 481.121 (Vernon 2018)
Utah	Criminal	UTAH CODE ANN. § 58-37-8(2)(d) (2018)

<b>Jurisdiction</b>	<b>Penalty</b>	<b>Primary Statute(s)</b>
Vermont	Legal	VT. STAT. ANN. tit. 18, § 4230a(a)(1) (2018)
Virginia	Criminal	VA. CODE § 18.2-250.1(A) (2018)
Washington	Legal	WASH. REV. CODE § 69.50.4013(3) (2018)
West Virginia	Criminal	W. VA. CODE § 60A-4-401(c) (2018)
Wisconsin	Criminal	WIS. STAT. § 961.41(3g)(e) (2018)
Wyoming	Criminal	WYO. STAT. ANN. § 35-7-1031(c) (Michie 2018)

Source: Virginia State Crime Commission staff analysis.

## APPENDIX C

### Court Costs and Fees for Possession of Marijuana in Virginia

#### General Costs and Fees for Possession of Marijuana:

• Fixed drug misdemeanor: <sup>140</sup>	\$136
• Court-appointed counsel: <sup>141</sup>	\$120
• Internet Crimes Against Children Fund: <sup>142</sup>	\$15
• Electronic summons: <sup>143</sup>	\$5
• DMV license reinstatement: <sup>144</sup>	\$145

#### Other Potential Costs and Fees for Possession of Marijuana:

• Local probation or ASAP: <sup>145</sup>	\$0-\$400
• Regional Criminal Justice Academy: <sup>146</sup>	\$5
• Courthouse security renovation: <sup>147</sup>	\$3
• Courthouse security: <sup>148</sup>	\$10
• Jail admissions (if jail imposed): <sup>149</sup>	\$25
• Payment plan fee (if plan established): <sup>150</sup>	\$10
• Lab witness fee (if summonsed): <sup>151</sup>	\$50
• Drug testing fee per test (ASAP): <sup>152</sup>	\$25/test

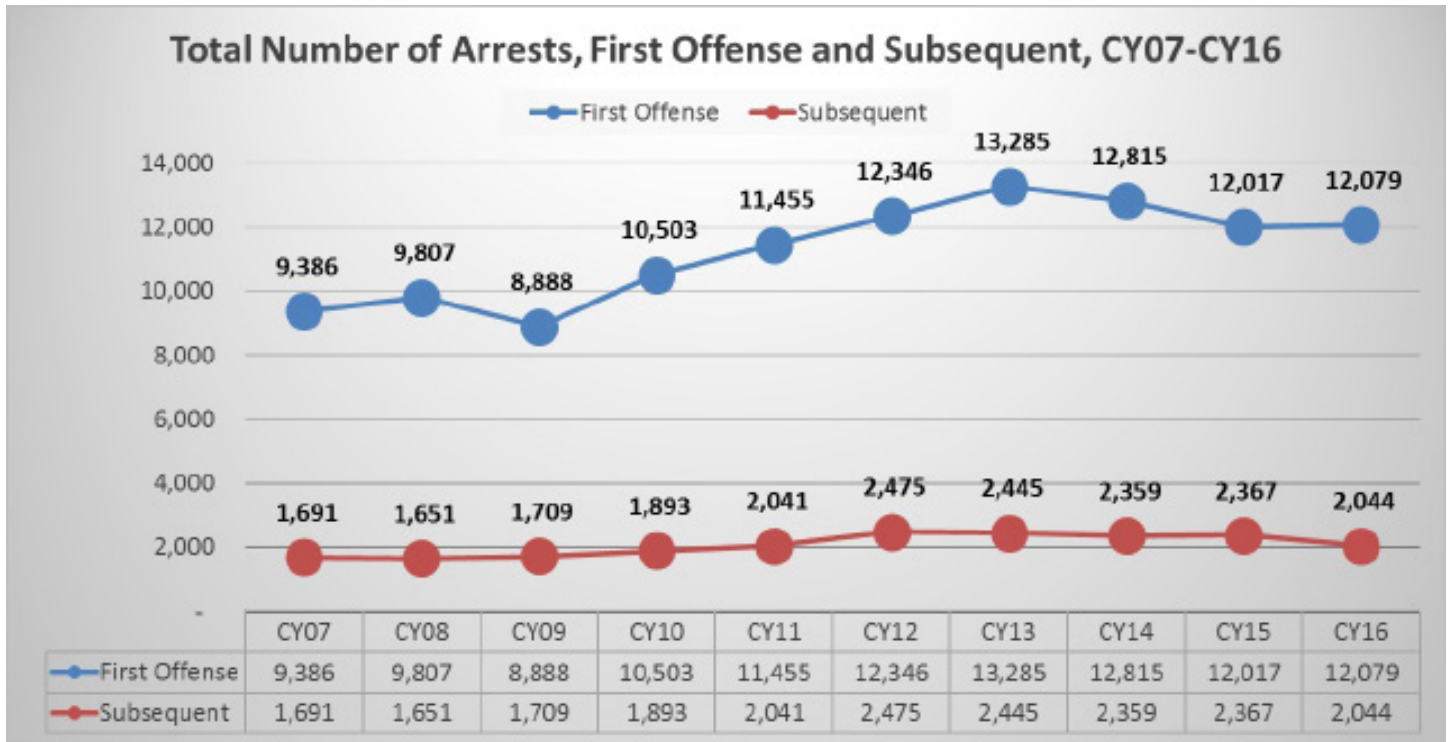
Source: Virginia State Crime Commission staff analysis.

Note: This lists the potential costs and fees that a defendant may incur as a result of being convicted or placed into the first offender program on a possession of marijuana charge. The actual costs and fees will vary based on the particular circumstances of each individual case.



## APPENDIX D

### Total Number of Arrests for Possession of Marijuana, First Offense and Subsequent, CY07-CY16



Source: Virginia State Police, Computerized Criminal History (CCH) Database. Virginia State Crime Commission staff analysis. Chart prepared by Virginia State Crime Commission staff.

Note: The number of first offense arrests may be overrepresented because a law enforcement officer may not be aware of prior violations at the time of arrest. If a defendant is charged with first offense possession of marijuana and it is discovered that he has a prior conviction for possession of marijuana, the Commonwealth can request permission from the court to amend the charging document to possession as a subsequent offense. However, if jail time is waived for the offense, the Commonwealth's Attorney may not be involved in the prosecution of the offense.

## APPENDIX E

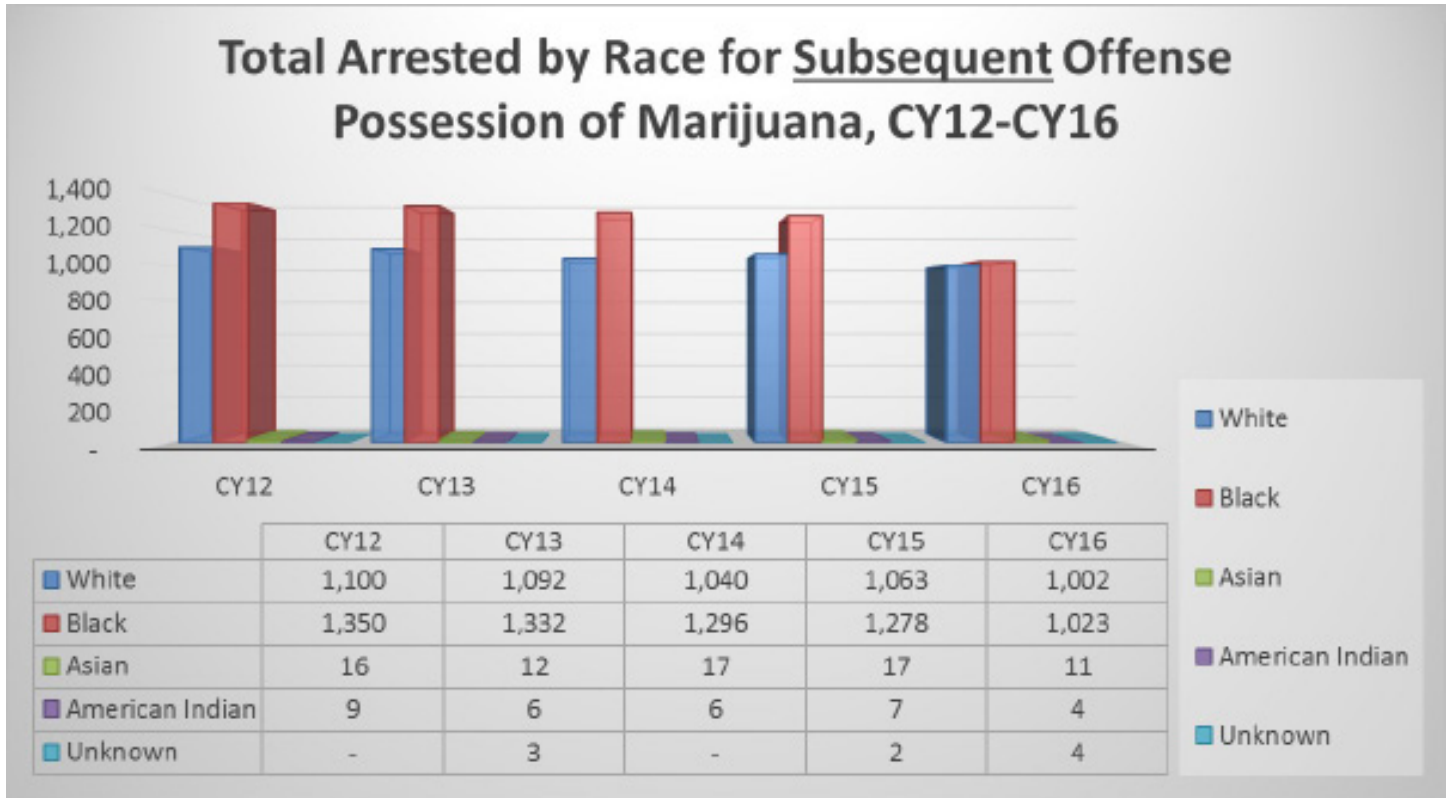
### Age at Arrest for Possession of Marijuana, First Offense and Subsequent, CY07-CY16

Age at Arrest	First Offense Arrests (N=112,581)	%	Subsequent Offense Arrests (N=20,675)	%
Under 18	1,942	2%	250	1%
<b>18-24</b>	<b>60,868</b>	<b>54%</b>	<b>7,628</b>	<b>37%</b>
25-29	19,362	17%	4,870	24%
30-34	10,749	10%	2,991	14%
35-39	6,438	6%	1,667	8%
40 and over	13,222	12%	3,269	16%

Source: Virginia State Police, Computerized Criminal History (CCH) Database. Virginia State Crime Commission staff analysis. Chart prepared by Virginia State Crime Commission staff.

## APPENDIX F

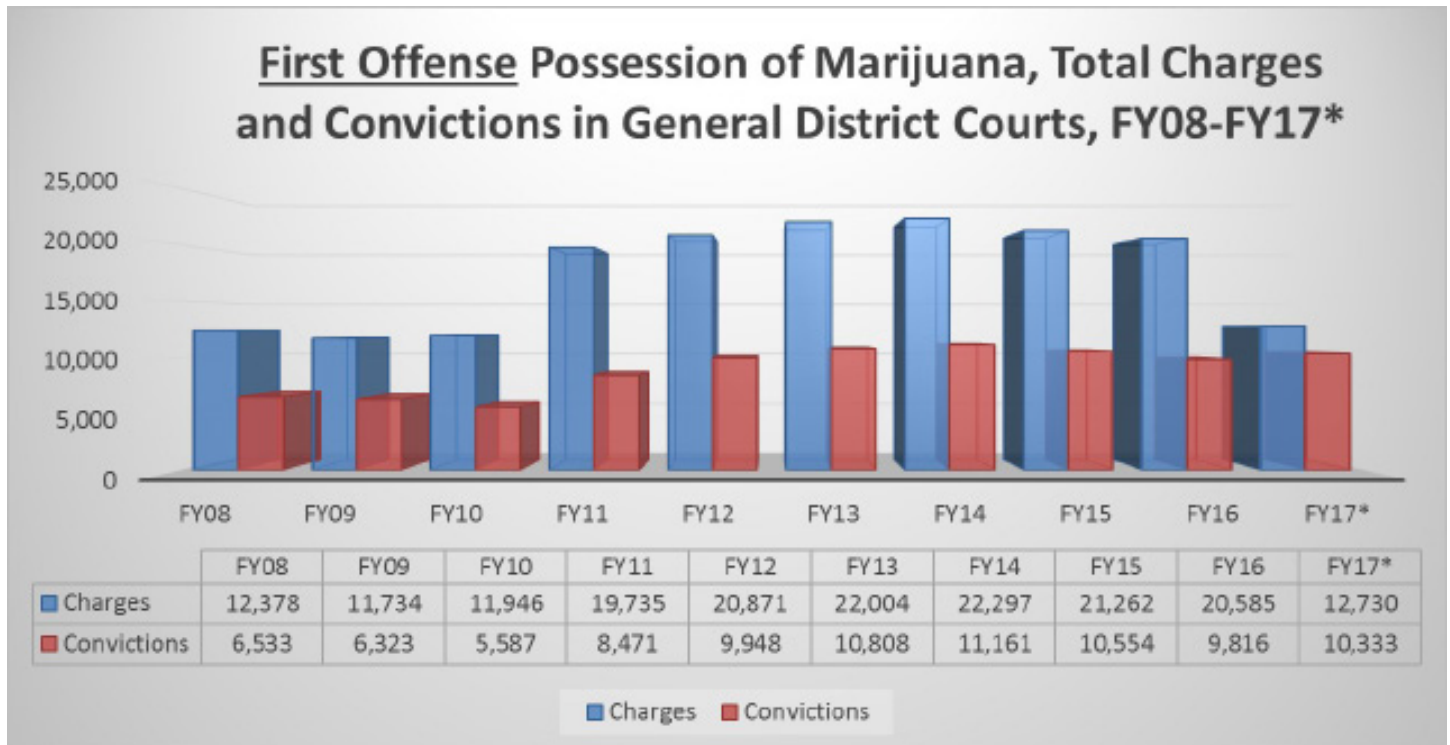
### Total Arrested by Race for Subsequent Offense Possession of Marijuana, CY12-CY16



Source: Virginia State Police, Computerized Criminal History (CCH) Database. Virginia State Crime Commission staff analysis. Chart prepared by Virginia State Crime Commission staff.

## APPENDIX G

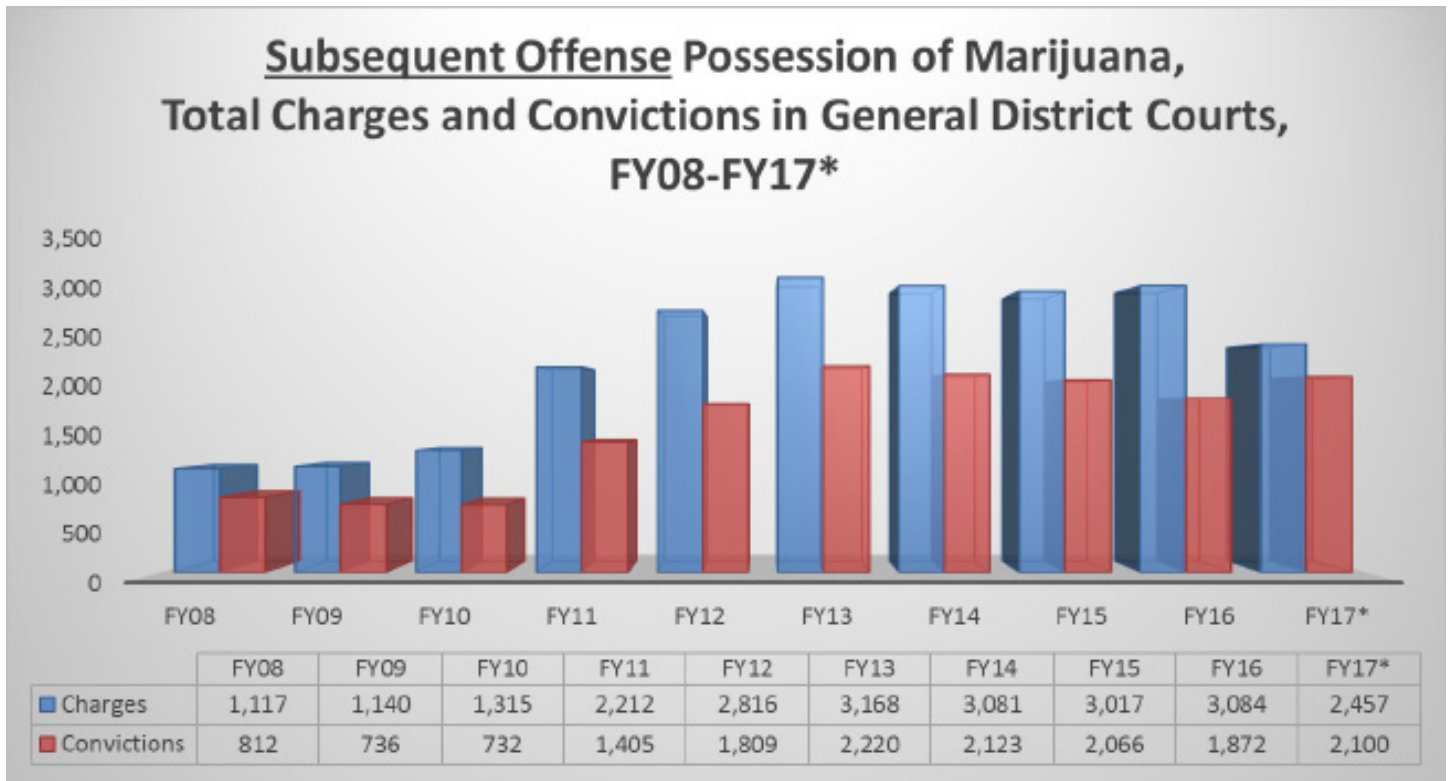
### First Offense Possession of Marijuana Total Charges and Convictions in General District Courts, FY08-FY17



Source: Supreme Court of Virginia - General District Court Case Management System (CMS). Data provided by Virginia Criminal Sentencing Commission. \* Fiscal year in which the charge was filed. Note: FY17 is preliminary and only includes charges that were both filed and concluded in FY17. Virginia State Crime Commission staff analysis. Chart prepared by Virginia State Crime Commission staff.

## APPENDIX H

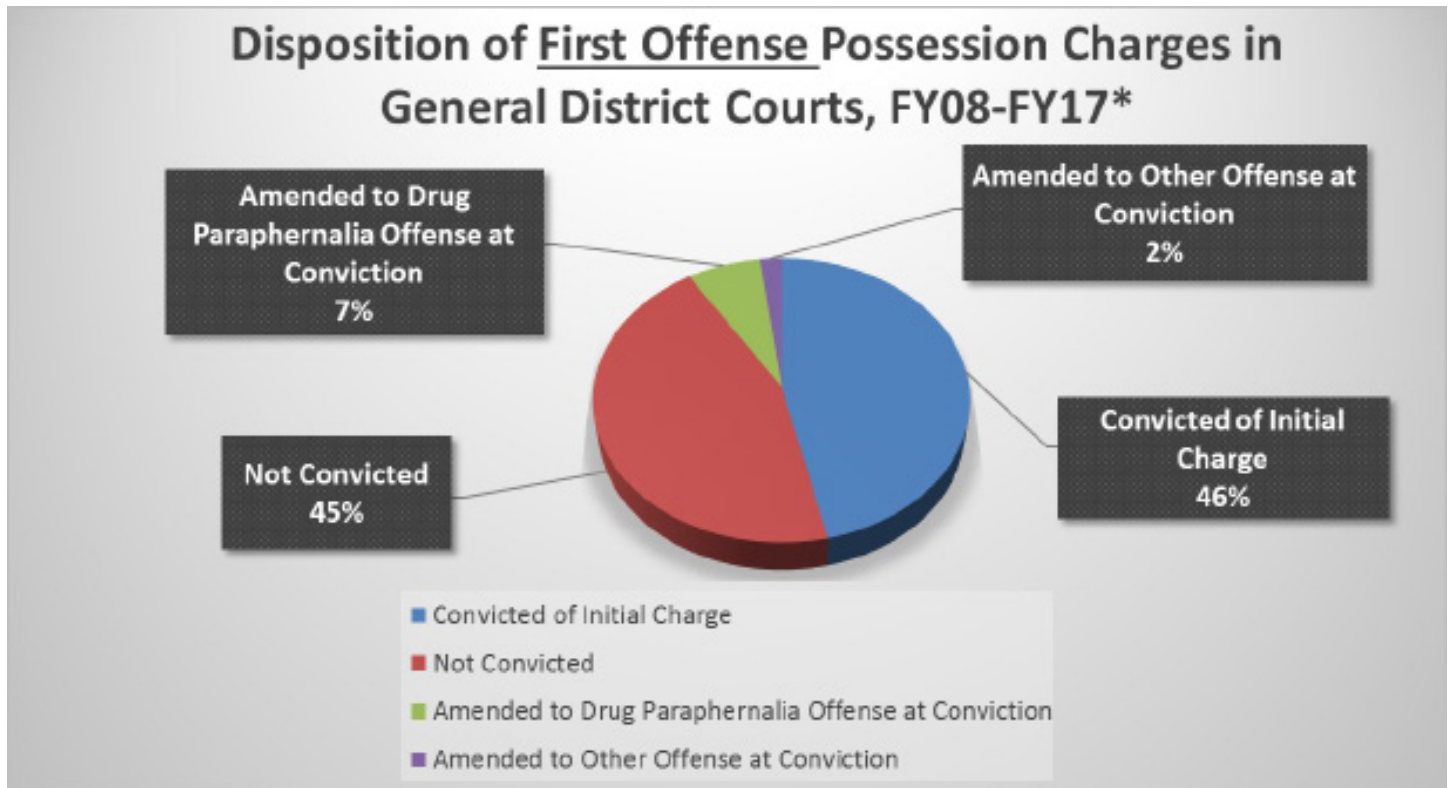
### Subsequent Offense Possession of Marijuana Total Charges and Convictions in General District Courts, FY08-FY17



Source: Supreme Court of Virginia - General District Court Case Management System (CMS). Data provided by Virginia Criminal Sentencing Commission. \* Fiscal year in which the charge was filed. Note: FY17 is preliminary and only includes charges that were both filed and concluded in FY17. Virginia State Crime Commission staff analysis. Chart prepared by Virginia State Crime Commission staff.

## APPENDIX I

### Disposition of First Offense Possession of Marijuana Charges in General District Courts, FY08-FY17 (N=175,542 charges)



Source: Supreme Court of Virginia - General District Court Case Management System (CMS). Data provided by Virginia Criminal Sentencing Commission. \*Fiscal year in which the charge was filed. Note: FY17 is preliminary and only includes charges that were both filed and concluded in FY17. Virginia State Crime Commission staff analysis. Chart prepared by Virginia State Crime Commission staff.

## APPENDIX J

### Civil Possession of Marijuana - Weight Limit By State

State	Quantity of Marijuana	Statutes
Illinois	10 grams (~0.35 ounce)	720 ILL. COMP. STAT. 550/4(a) (2018).
Maryland	10 grams (~0.35 ounce)	MD. CODE ANN., CRIM. LAW § 5-601.1(b)(1) (2018).
Connecticut	1/2 ounce	CONN. GEN. STAT. ANN. § 21a-279a(a) (2018).
New Hampshire	3/4 ounce	N.H. REV. STAT. ANN. § 318-B:26(II)(d) (2018). <i>See also</i> N.H. REV. STAT. ANN. § 318-B:2-C(II) (2018).
New York	25 grams (~0.88 ounce)	N.Y. PENAL LAW §§ 221.05 and 221.10(2) (McKinney 2018).
Delaware	1 ounce	DEL. CODE ANN. tit. 16, §§ 4764(c) and 4701(34) (2018).
Nebraska	1 ounce	NEB. REV. STAT. § 28-416(13) (2018).
Rhode Island	1 ounce	R.I. GEN. LAWS § 21-28-4.01(c)(2)(III) (2018).
Mississippi	30 grams (~1.06 ounces)	MISS. CODE ANN. § 41-29-139(c)(2)(A)(1) (2018).
Minnesota	42.5 grams (~1.5 ounces)	MINN. STAT. §§ 152.01(16) and 152.027(4)(a) (2018).
Ohio West	100 grams (~3.53 ounces)	OHIO REV. CODE ANN. §§ 2925.11(C)(3)(a) and 2925.11(D) (West 2018).

Source: Virginia State Crime Commission staff analysis.

## Endnotes

- <sup>1</sup> This letter was sent to the Crime Commission by Senator Thomas K. Norment, Jr., on November 30, 2016.
- <sup>2</sup> The two bills referred to the Crime Commission were Senate Bill 908 (Senator L. Louise Lucas) and Senate Bill 1269 (Senator Adam P. Ebbin).
- <sup>3</sup> Staff did not extensively examine other issues relating to marijuana as part of this study, such as legalization, medical usage, cannabidiol or THC-A oils, health effects, or industrial hemp.
- <sup>4</sup> See Appendix A for a map and Appendix B for a list of possession of marijuana penalties by state, including the District of Columbia and federal law.
- <sup>5</sup> See Martin, S. & Capital News Service. (2017, May 15). The numbers behind racial disparities in marijuana arrests across Va. *CBS 6 News Richmond*. Available at <https://wtvr.com/2017/05/15/racial-disparities-in-marijuana-arrests-seen-across-virginia/>. See also Gettman, J. Racial Disparities in Marijuana Arrests in Virginia (2003-2013). *Drug Policy Alliance*. Available at [https://www.drugpolicy.org/sites/default/files/Racial\\_Disparities\\_in\\_Marijuana\\_Arrests\\_in\\_Virginia\\_2003-2013.pdf](https://www.drugpolicy.org/sites/default/files/Racial_Disparities_in_Marijuana_Arrests_in_Virginia_2003-2013.pdf).
- <sup>6</sup> VA. CODE § 18.2-250.1(A) (2018).
- <sup>7</sup> VA. CODE §§ 19.2-159 and 19.2-160 (2018).
- <sup>8</sup> VA. CODE § 18.2-251 (2018).
- <sup>9</sup> VA. CODE § 18.2-11 (2018). A Class 3 misdemeanor is punishable by up to a \$500 fine and a Class 4 misdemeanor by up to a \$250 fine.
- <sup>10</sup> The eleven states include the following: Connecticut, Delaware, Illinois, Maryland, Minnesota, Mississippi, Nebraska, New Hampshire, New York, Ohio, and Rhode Island.
- <sup>11</sup> 21 U.S.C. § 844(a) (2018).
- <sup>12</sup> See Joint Commission on Health Care. (2017, October 17). *Medical Use and Health Effects of Cannabis*. Available at <http://jchc.virginia.gov/4.%20Cannabis%20Study.pdf>.
- <sup>13</sup> VA. CODE § 18.2-250.1(A) (2018).
- <sup>14</sup> VA. CODE §§ 19.2-159 and 19.2-160 (2018).
- <sup>15</sup> See Appendix A for a map and Appendix B for a list of possession of marijuana penalties by state, including the District of Columbia.
- <sup>16</sup> VA. CODE § 18.2-251 (2018).
- <sup>17</sup> *Id.*
- <sup>18</sup> *Id.*
- <sup>19</sup> *Id.*
- <sup>20</sup> These figures represent a breakdown of the comments received by Crime Commission staff. The numbers should not be interpreted as a scientific poll. Staff did not conduct any public opinion polls as part of this study.
- <sup>21</sup> See Knaack, F. (2015, January 13). Why Virginia should decriminalize marijuana. *ACLU of Virginia*. Available at <https://acluva.org/en/news/why-virginia-should-decriminalize-marijuana>.
- <sup>22</sup> See Appendix C for a list of court costs and fees that may be imposed for possession of marijuana in Virginia.
- <sup>23</sup> VA. CODE §§ 18.2-251, 18.2-259.1(A) and 46.2-390.1(A) (2018).
- <sup>24</sup> VA. CODE §§ 18.2-259.1(C) and 18.2-271.1(E) (2018).
- <sup>25</sup> VA. CODE § 18.2-251 (2018).
- <sup>26</sup> See, e.g., Shortell, D. (2017, June 5). Secret Service relaxes marijuana policy in bid to swell ranks. *CNN*. Available at <https://www.cnn.com/2017/06/01/politics/secret-service-new-marijuana-policy/index.html>. The U.S. Secret Service recently modified its prior marijuana use policy in an attempt to increase its pool of applicants.



- <sup>27</sup> 10 C.F.R. Part 710 Appendix A (H)(25) (2018).
- <sup>28</sup> 10 C.F.R. Part 710 Appendix A (H)(26) (2018).
- <sup>29</sup> 20 U.S.C. § 1091(r)(1) (2018).
- <sup>30</sup> 20 U.S.C. § 1091(r)(2) (2018).
- <sup>31</sup> Various criteria for Virginia state financial aid on the State Council of Higher Education for Virginia website, available at <http://www.schev.edu/index/tuition-aid/financialaid/state-student-aid>. See also Virginia Commonwealth University, Division of Strategic Enrollment Management, personal communication, January 26, 2018.
- <sup>32</sup> 42 U.S.C. § 3601 *et al.* (2018).
- <sup>33</sup> Office of General Counsel. (2016, April 4). Application of Fair Housing Act standards to the use of criminal records by providers of housing and real estate-related transactions. *U.S. Department of Housing and Urban Development*. Available at [https://www.hud.gov/sites/documents/HUD\\_OGCGUIDAPPFHASTANDCR.PDF](https://www.hud.gov/sites/documents/HUD_OGCGUIDAPPFHASTANDCR.PDF).
- <sup>34</sup> 8 U.S.C. § 1227(a)(2)(B)(i) (2018).
- <sup>35</sup> 8 U.S.C. § 1182(a)(2)(A)(i)(II) (2018).
- <sup>36</sup> 8 U.S.C. § 1101(a)(48)(A) (2018).
- <sup>37</sup> 18 U.S.C. § 922(d)(3) (2018).
- <sup>38</sup> 18 U.S.C. § 922(g)(3) (2018).
- <sup>39</sup> Additional examples of persons deemed to be unlawful drug users or addicts can be found on the Federal Bureau of Investigations website, available at <https://www.fbi.gov/services/cjis/nics/about-nics>.
- <sup>40</sup> VA. CODE § 18.2-308.1:5 (2018).
- <sup>41</sup> *Id.*
- <sup>42</sup> VA. CODE §§ 18.2-308.09(19) and 18.2-308.09(20) (2018).
- <sup>43</sup> VA. CODE § 18.2-308.09(8) (2018).
- <sup>44</sup> VA. CODE § 18.2-247(D) (2018). Note that marijuana “shall not include any oily extract containing one or more cannabinoids unless such extract contains less than 12 percent of tetrahydrocannabinol by weight, or the mature stalks of such plant, fiber produced from such stalk, oil or cake made from the seed of such plant, unless such stalks, fiber, oil or cake is combined with other parts of plants of the genus *Cannabis*.”
- <sup>45</sup> VA. CODE § 54.1-3446(3) (2018).
- <sup>46</sup> VA. CODE § 54.1-3445 (2018).
- <sup>47</sup> 1979 Va. Acts. Ch. 435.
- <sup>48</sup> VA. CODE § 18.2-250.1(A) (2018).
- <sup>49</sup> *Id.* See also VA. CODE § 18.2-11(a) (2018).
- <sup>50</sup> VA. CODE §§ 19.2-159 and 19.2-160 (2018).
- <sup>51</sup> Virginia State Police, Computerized Criminal History (CCH) Database. See Appendix D for the total number of arrests for first and subsequent offense marijuana possession over CY07-CY16.
- <sup>52</sup> *Id.* Virginia State Crime Commission staff analysis.
- <sup>53</sup> United States Census Bureau (2017). *QuickFacts: Virginia*. Available at <https://www.census.gov/quickfacts/VA>.
- <sup>54</sup> Virginia State Police, Computerized Criminal History (CCH) Database. Virginia State Crime Commission staff analysis.
- <sup>55</sup> *Id.* See Appendix E for a breakdown of age at arrest for first and subsequent offense possession of marijuana over CY07-CY16.
- <sup>56</sup> United States Census Bureau (2017). *QuickFacts: Virginia*. Available at <https://www.census.gov/quickfacts/VA>.

<sup>57</sup> Virginia State Police, Computerized Criminal History (CCH) Database. Virginia State Crime Commission staff analysis. Figures do not equal 100% due to rounding.

<sup>58</sup> See, e.g., Mitchell, O., & Caudy, M.S. (2013). Examining racial disparities in drug arrests. *Justice Quarterly*, 32(2), 288-313. Available at <https://www.gmuace.org/documents/publications/2013/examining.pdf>. See also Gettman, J. (2015). Racial disparities in marijuana arrests in Virginia (2003-2013). *Drug Policy Alliance*. Available at [https://www.drugpolicy.org/sites/default/files/Racial\\_Disparities\\_in\\_Marijuana\\_Arrests\\_in\\_Virginia\\_2003-2013.pdf](https://www.drugpolicy.org/sites/default/files/Racial_Disparities_in_Marijuana_Arrests_in_Virginia_2003-2013.pdf).

<sup>59</sup> Data from Supreme Court of Virginia-General District Court Case Management System (CMS) data provided by the Virginia Criminal Sentencing Commission. Virginia State Crime Commission staff analysis.

<sup>60</sup> See Appendix G for the total charges and convictions for first offense possession of marijuana in the General District Courts over FY08-FY17. See Appendix H for the total charges and convictions for subsequent offense possession of marijuana in the General District Courts over FY08-FY17.

<sup>61</sup> See Appendix I for the dispositions of first offense possession of marijuana charges in the General District Courts over FY08-FY17.

<sup>62</sup> Supreme Court of Virginia - General District Court Case Management System (CMS) data provided by OES. It is important to note that the figure provided does not include cases where the original charge under VA. CODE § 18.2-250.1 was amended to § 18.2-251. If it is presumed that the cases were originally charged under § 18.2-250.1 and were amended to § 18.2-251 were first offender deferrals, there were an additional 86 cases in 2015 in which the final disposition was “dismissed.”

<sup>63</sup> Supreme Court of Virginia - General District Court Case Management System (CMS). Data provided by OES.

<sup>64</sup> Compensation Board. (2017, November 1). *FY 2016 Jail Cost Report: Annual Jail Revenues and Expenditures Report*. Available at <https://rga.lis.virginia.gov/Published/2017/RD520/PDF>.

<sup>65</sup> Virginia Criminal Sentencing Commission staff analysis of Supreme Court of Virginia - General District Court Case Management System (CMS) data. A “sentencing/conviction event” is defined by the VCSC as “the conviction/sentencing or the delinquent adjudication of an offender in a particular court at a particular time for one or more offenses. If an offender is convicted/sentenced or adjudicated delinquent in different courts, before different judges, or at different times, each court appearance is counted as a separate event.” See Virginia Criminal Sentencing Commission. (2017). *Virginia Sentencing Guidelines*. Available at <http://bycell.mobi/wap/default/item.jsp?entryid=ECMTg20Q==&itemid=42097&t=1528823947339#m>.

<sup>66</sup> VA. CODE § 18.2-11 (2018).

<sup>67</sup> *Id.*

<sup>68</sup> See *Argersinger v. Hamlin*, 407 U.S. 25, 37 (1972), holding “that absent a knowing and intelligent waiver, no person may be imprisoned for any offense, whether classified as petty, misdemeanor, or felony, unless he was represented by counsel at his trial.” See also VA. CODE § 19.2-159 (2018).

<sup>69</sup> MO. ANN. STAT. § 579.015(4) (West 2018). See also MO. ANN. STAT. §§ 557.021(3)(2)(d) and 558.002(1) (5) (West 2018).

<sup>70</sup> MONT. CODE ANN. § 45-9-102(2) (2018).

<sup>71</sup> N.C. GEN. STAT. § 90-95(d)(4) (2018).

<sup>72</sup> See, for overview, Inciardi, J. A. (1981). Marijuana decriminalization research: A perspective and commentary. *Criminology*, 19(1), 145-59; Single, E. W. (1989). The impact of marijuana decriminalization: An update. *Journal of Public Health Policy*, 10(4), 456-66. Suggs, D. L. (1981). A qualitative and quantitative analysis of the impact of Nebraska’s decriminalization of marijuana. *Law and Human Behavior*, 5(1), 45-71;

<sup>73</sup> Miech, R. A., Johnston, L., O'Malley, P. M., Bachman, J. G., Schulenberg, J., Patrick, M. E. (2015). Trends in use of marijuana and attitudes toward marijuana among youth before and after decriminalization: The case of California 2007-2013. *International Journal of Drug Policy*, 26, 336-44. The limitations and caveats noted by the authors were as follows: "First, the results of this study do not establish causation between increases in youth marijuana prevalence and decriminalization and/or its associated publicity. Second, the data are self-reported, and are thus subject to bias. Third, Monitoring the Future [the survey from which data for the study was obtained] is not specifically designed to provide state-level estimates. Instead, the sample is designed to be representative of the four major census areas of the United States." p. 343.

<sup>74</sup> 2011 Conn. Pub. Acts 71.

<sup>75</sup> 2012 R.I. Pub. Laws 221.

<sup>76</sup> 2013 Vt. Acts & Resolves 76.

<sup>77</sup> 2014 Md. Laws 158.

<sup>78</sup> 2015 Del. Laws 38.

<sup>79</sup> 2015 Ill. Laws 697.

<sup>80</sup> 2017 N.H. Laws 248.

<sup>81</sup> The eleven states include the following: Connecticut, Delaware, Illinois, Maryland, Minnesota, Mississippi, Nebraska, New Hampshire, New York, Ohio, and Rhode Island.

<sup>82</sup> 21 U.S.C. § 844(a) (2018).

<sup>83</sup> 720 ILL. COMP. STAT. 550/4(a) (2018).

<sup>84</sup> MD. CODE ANN., CRIM. LAW § 5-601(c)(2)(ii) (2018).

<sup>85</sup> NEB. REV. STAT. § 28-416(13)(a) (2018).

<sup>86</sup> NEB. REV. STAT. § 28-416(13)(b) (2018).

<sup>87</sup> NEB. REV. STAT. § 28-416(13)(c) (2018).

<sup>88</sup> MISS. CODE ANN. § 41-29-139(c)(2)(A)(1) (2018).

<sup>89</sup> R.I. GEN. LAWS § 8-8.2-21 (2018).

<sup>90</sup> VA. CODE § 18.2-371.2(D) (2018).

<sup>91</sup> See Appendix J for the weight limits in the eleven states that have decriminalized possession of marijuana.

<sup>92</sup> VA. CODE § 18.2-250.1(A) (2018).

<sup>93</sup> See, e.g., VIRGINIA DEPARTMENT OF FORENSIC SCIENCE. (2018 Feb. 16). *Controlled Substances Procedures Manual*, pp. 17-18. Available at <http://www.dfs.virginia.gov/wp-content/uploads/2018/03/221-D100-Controlled-Substances-Procedures-Manual.pdf>.

<sup>94</sup> See, VIRGINIA DEPARTMENT OF FORENSIC SCIENCE. (2017 Jan. 1). *Weighing Event Uncertainty of Measurement Calculation*. Available at <http://www.dfs.virginia.gov/wp-content/uploads/2017/01/221-F126-Controlled-Substances-Weighing-Worksheet-2017.pdf>.

<sup>95</sup> CONN. GEN. STAT. ANN. §§ 21a-279(a)(1), 53a-36, and 53a-42 (2018).

<sup>96</sup> DEL. CODE ANN. tit. 16 §§ 4701(34) and 4764(b) (2018).

<sup>97</sup> MINN. STAT. §§ 152.027(3) and 609.02(3) (2018).

<sup>98</sup> N.Y. PENAL LAW § 221.10 (McKinney 2018). See also N.Y. PENAL LAW §§ 70.15(2) and 80.05(2) (McKinney 2018).

<sup>99</sup> MD. CODE ANN., CRIM. LAW § 5-601(c)(4) (2018).

<sup>100</sup> DEL. CODE ANN. tit. 16 § 4701(34) (2018).

<sup>101</sup> N.H. REV. STAT. ANN. § 318-B:26(II)(d) (2018). Note that N.H. REV. STAT. ANN. § 318-B:2-c(I)(a) (2018) provides that marijuana shall not include the resin extracted from the cannabis plant or any compound prepared with that resin. Further note that N.H. REV. STAT. ANN. § 318-B:2-c(I)(b) (2018) defines

“personal-use amount of a regulated marijuana-infused product” as a product comprised of marijuana, marijuana extracts, or resins and other ingredients intended for consumption which contains no more than 300 milligrams of tetrahydrocannabinol.

<sup>102</sup> See, for overview, ElSohly, M.A., *et al.* (2016). Changes in cannabis potency over the past 2 decades (1995-2014): Analysis of the current data in the United States. *Biological Psychiatry*, 79, 613-619.

<sup>103</sup> VA. CODE § 18.2-247(D) (2018). See VA. CODE § 54.1-3446. An oily extract containing 12% or over THC by weight is classified as a Schedule I drug.

<sup>104</sup> 720 ILL. COMP. STAT. 600/3.5(c) (2018).

<sup>105</sup> MD. CODE ANN., CRIM. LAW § 5-619(c)(1) (2018).

<sup>106</sup> See, e.g., *U.S. v. Humphries*, 372 F.3d 653 (4th Cir. 2004); *U.S. v. White*, 836 F.3d 437 (4th Cir. 2016); *Evans v. Commonwealth*, 290 Va. 277, 776 S.E.2d 760 (2015).

<sup>107</sup> *People v. Waxler*, 224 Cal. App. 4th 712, 168 Cal. Rptr. 3d 822 (Cal. App. 1st Dist. 2014).

<sup>108</sup> *People v. Zuniga*, 372 P.3d 1052 (Colo. 2016).

<sup>109</sup> *State v. Barclay*, 398 A.2d 794 (Me. 1979).

<sup>110</sup> *Robinson v. State*, 451 Md. 94, 152 A.3d 661 (Md. 2017).

<sup>111</sup> *State v. Ortega*, 749 N.W.2d 851 (Minn. Ct. App. 2008).

<sup>112</sup> *State v. Smalley*, 225 P.3d 844, 233 Ore. App. 263 (Or. Ct. App. 2010).

<sup>113</sup> *Commonwealth v. Overmyer*, 469 Mass. 16, 23, 11 N.E.3d 1054, 1059 (2014).

<sup>114</sup> MD. CODE ANN., CRIM. LAW 5-601.1(i)(1) (2018).

<sup>115</sup> CONN. GEN. STAT. ANN. § 51-164n(h) (2018).

<sup>116</sup> VA. CODE § 18.2-268.4(B) (2018).

<sup>117</sup> Maryland State’s Attorneys’ Association, personal communication, August 9, 2017.

<sup>118</sup> *Id.*

<sup>119</sup> VA. SUP. CT. R. 3A:11 and 7C:5.

<sup>120</sup> See, e.g., VA. SUP. CT. R. 4:1.

<sup>121</sup> VA. CODE §§ 18.2-251, 18.2-259.1(A) and 46.2-390.1(A) (2018).

<sup>122</sup> 23 U.S.C. § 159 (2018).

<sup>123</sup> 23 U.S.C. § 159(a)(2) (2018). For an analysis of the potential impact to Virginia, see the fiscal impact statement for Senate Bill 1444 introduced during the Regular Session of the 2015 General Assembly, which estimated that a non-compliance ruling could result in a \$68 million dollar loss in highway funding to Virginia. Available at <https://lis.virginia.gov/cgi-bin/legp604.exe?151+oth+SB1444F122+PDF>.

<sup>124</sup> 23 U.S.C. § 159(c)(3) (2018).

<sup>125</sup> House Bill 2051 and Senate Bill 1091 from the Regular Session of the 2017 General Assembly.

<sup>126</sup> See Freedman, E. (2017, Nov. 21). Law removing mandatory license suspension with marijuana charges goes into effect. *NBC29.com*. Available at <http://www.nbc29.com/story/36787104/law-removing-mandatory-license-suspension-with-marijuana-charge-goes-into-effect>.

<sup>127</sup> VA. CODE § 18.2-266 (2018).

<sup>128</sup> VA. CODE § 18.2-269 (2018).

<sup>129</sup> See, for overview, Compton, R. (2017, July). Marijuana-Impaired Driving: A Report to Congress. (DOT HS 812 440). *Washington, D.C.: National Highway Traffic Safety Administration*, p. 20; 26-27. Available at <https://www.nhtsa.gov/sites/nhtsa.dot.gov/files/documents/812440-marijuana-impaired-driving-report-to-congress.pdf>. See also AAA (2016, May). An evaluation of data from drivers arrested for driving under the influence in relation to per se limits for cannabis. Available at <https://www.aaafoundation.org/sites/default/files/EvaluationOfDriversInRelationToPerSeReport.pdf>.

<sup>130</sup> VA. CODE § 18.2-251 (2018).

<sup>131</sup> *Id.*

<sup>132</sup> VA. CODE § 18.2-308.1:5 (2018).

<sup>133</sup> VA. CODE §§ 18.2-308.09(19) and 18.2-308.09(20) (2018).

<sup>134</sup> VA. CODE § 18.2-250.1(A) (2018).

<sup>135</sup> VA. CODE §§ 19.2-159 and 19.2-160 (2018).

<sup>136</sup> VA. CODE § 18.2-251 (2018).

<sup>137</sup> VA. CODE § 18.2-11 (2018). A Class 3 misdemeanor is punishable by up to a \$500 fine and a Class 4 misdemeanor by up to a \$250 fine.

<sup>138</sup> The eleven states include the following: Connecticut, Delaware, Illinois, Maryland, Minnesota, Mississippi, Nebraska, New Hampshire, New York, Ohio, and Rhode Island.

<sup>139</sup> 21 U.S.C. § 844(a) (2018).

<sup>140</sup> VA. CODE § 16.1-69.48:1(C) (2018).

<sup>141</sup> VA. CODE § 19.2-163(1) (2018).

<sup>142</sup> VA. CODE § 17.1-275.12 (2018).

<sup>143</sup> VA. CODE § 17.1-279.1 (2018).

<sup>144</sup> VA. CODE § 46.2-411 (2018).

<sup>145</sup> VA. CODE § 18.2-251 (2018). A person convicted of possession of marijuana or placed into the first offender program can be supervised by a local community corrections program, an ASAP office, or a program licensed by the Department of Behavioral Health and Development Services. Pursuant to VA. CODE § 18.2-271.1(B) (2018), ASAP charges a \$400 fee for supervision; however, per an ASAP representative, the supervision fee for offenders ages 18-21 for a non-driving offense is \$200. An informal survey of local community corrections agencies found that the supervision fee for those programs generally varied from no fee up to \$150.

<sup>146</sup> VA. CODE § 9.1-906 (2018).

<sup>147</sup> VA. CODE § 17.1-281(C) (2018).

<sup>148</sup> VA. CODE § 53.1-120(D) (2018).

<sup>149</sup> VA. CODE § 15.2-1613.1 (2018).

<sup>150</sup> VA. CODE § 19.2-354(A) (2018).

<sup>151</sup> VA. CODE § 19.2-187.1(F) (2018).

<sup>152</sup> The ASAP drug testing fee was based on a personal communication with an ASAP representative on June 29, 2017. An informal survey of local community corrections agencies found that generally no drug testing fees were charged, or the fees were minimal, unless the sample needed to be sent to a laboratory for testing.

# DNA Databank: Expansion of Misdemeanor Crimes

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## Executive Summary

In February 2017, Speaker William J. Howell and Delegates David J. Toscano and R. Steven Landes sent a letter to the Crime Commission requesting that the agency examine whether additional misdemeanors should be added to the list of offenses requiring submission of a DNA sample upon conviction.<sup>1</sup> Virginia law currently requires that a DNA sample be submitted by adult offenders upon conviction for 14 misdemeanor offenses.<sup>2</sup>

Two types of data analyses were performed as part of this study. The purpose of these analyses was to determine if an association exists between other misdemeanors and violent felonies. First, a prospective analysis was completed to determine how many offenders convicted of certain misdemeanors were subsequently convicted of a felony offense within the following 10 years. Second, a retrospective analysis was completed to determine which misdemeanor convictions are frequently found in the criminal histories of individuals convicted of violent felonies. Both data analyses were generalizable only to misdemeanor and felony convictions in the stated time periods, rather than actual rates of offending, arrests, or charges.

Based on findings from both analyses, it appeared that there was an association between certain misdemeanors and violent felonies/certain burglary offenses for a subset of offenders,<sup>3</sup> including the following:

- Misdemeanor assault and battery<sup>4</sup> convictions appeared to have a compelling relationship with all the violent felony and certain burglary offenses focused upon in both analyses.
- Domestic assault and battery,<sup>5</sup> trespassing,<sup>6</sup> petit larceny,<sup>7</sup> and destruction of property<sup>8</sup> also appeared to be strongly associated with the violent felony and certain burglary offenses focused upon in both analyses.
- Trespassing<sup>9</sup> had a strong association in the prospective analysis with the violent felony and certain burglary offenses focused upon. Any decision on trespassing should only be based on findings from the prospective analysis since this offense was not fully captured on criminal histories, which the retrospective analysis relied upon.<sup>10</sup>

- Obstruction of justice<sup>11</sup> and concealing merchandise/altering price tags<sup>12</sup> did not show as strong of an association with the violent felony and certain burglary offenses focused upon in the retrospective analysis as seen in the prospective analysis.

In addition to these analyses, staff was asked to provide information on the 14 misdemeanors currently requiring a DNA sample submission upon conviction under Virginia law.<sup>13</sup> Staff found that as of October 13, 2017, a total of 3,330 misdemeanor samples had been entered into the DNA Sample Tracking Database (DNA Web) maintained by the Virginia Department of Forensic Science (DFS). Of that total, 84% (2,797 of 3,330) were the direct result of a misdemeanor charge that resulted in a conviction and 16% (533 of 2,797) were the result of a defendant who was initially charged with a felony offense but was ultimately convicted of a misdemeanor. As of November 27, 2017, there were 26 hits resulting from misdemeanor conviction samples in DFS DNA Web Database.<sup>14</sup>

Staff was also asked to examine privacy concerns relating to the DNA Databank and to provide an overview of DNA sample collection upon conviction for misdemeanors in other states. Staff found that several important safeguards are currently in place to protect the privacy of the DNA databank. Staff also determined that there have been no charges or convictions for unauthorized use of Virginia's DNA Databank over the past 10 years. A review of the DNA collection laws for all 50 states, the District of Columbia, and federal government revealed that at least 26 states collect DNA upon conviction for some non-sexual misdemeanor convictions, while only 3 states collect DNA upon conviction for large classes of misdemeanor offenses (New York, Utah, and Wisconsin).

The Crime Commission reviewed the findings of this study at the November meeting. Crime Commission members unanimously endorsed the following policy option and two staff recommendations at the December meeting.

**Policy Option 1:** Amend Va. Code § 19.2-310.2 to include a DNA sample submission from adults for the following seven misdemeanors upon conviction:

- Assault and battery;<sup>15</sup>
- Domestic assault and battery;<sup>16</sup>
- Trespassing;<sup>17</sup>
- Petit larceny;<sup>18</sup>
- Destruction of property;<sup>19</sup>
- Obstruction of justice;<sup>20</sup> and,
- Conceal merchandise/alter price tags.<sup>21</sup>

**Recommendation 1:** The Department of Forensic Science should update their DNA sample submission training materials for sheriffs' deputies and jail intake officers to reflect current law.

**Recommendation 2:** Amend Va. Code § 19.2-390 to require fingerprinting upon conviction for trespassing and disorderly conduct.

Legislation was introduced and enacted for Policy Option 1 and Recommendation 2 during the Regular Session of the 2018 General Assembly. Bills introduced by Delegate David J. Toscano (House Bill 1249) and Senator Mark D. Obenshain (Senate Bill 565) ultimately added two new crimes - assault and battery and trespassing - to the list of misdemeanor offenses requiring submission of a DNA sample from adults upon conviction.<sup>22</sup> Delegate Toscano (House Bill 1266) and Senator Obenshain (Senate Bill 566) also patroned legislation requiring that fingerprints be taken upon conviction for trespassing and disorderly conduct.<sup>23</sup>

On December 14, 2017, the Crime Commission sent a letter requesting that DFS update their DNA sample submission training materials as endorsed in Recommendation 1.

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## Background

This study was conducted as a result of the tragic circumstances in the Charlottesville, Virginia area involving the murder of Hannah Graham by Jesse Matthew.<sup>24</sup> In 2010, Jesse Matthew was convicted of trespassing.<sup>25</sup> If his DNA sample had been taken following that trespassing conviction, he would likely have been linked to a 2005 rape case in Fairfax, as well as the murder of Morgan Harrington in 2009.<sup>26</sup>

DNA databanks help law enforcement solve crimes and exonerate innocent individuals. The DNA Identification Act of 1994 authorized the establishment of the National DNA Index System.<sup>27</sup> The system is structured so that Local DNA Index Systems and State DNA Index Systems can feed into the National DNA Index System.<sup>28</sup> All 50 states, the District of Columbia, the federal government, the U.S. Army Criminal Investigation lab, and Puerto Rico participate in National DNA Index System.<sup>29</sup> Virginia ranked 8th nationwide in total offender profiles in the National DNA Index System in July 2017.<sup>30</sup>

In 1989, Virginia was the first state to require certain offenders to submit DNA samples for inclusion in a DNA Databank.<sup>31</sup> DNA samples are required from adults for all felonies upon conviction,<sup>32</sup> for all violent felony and certain burglary offenses upon arrest,<sup>33</sup> and for certain misdemeanor convictions upon conviction.<sup>34</sup> DNA samples from juveniles are only required for offenders 14 years of age or older who



were either convicted of a felony or adjudicated delinquent of a crime that would be considered a felony if committed by an adult.<sup>35</sup> Virginia does not collect DNA samples for any misdemeanors upon arrest.<sup>36</sup>

The main focus of this study was whether the current list of misdemeanors requiring a DNA sample from adults upon conviction should be expanded. Prior to FY12, only a handful of misdemeanor sex offenses required a DNA sample submission as part of the Sex Offender Registry requirements.<sup>37</sup> Five misdemeanors were added in FY12,<sup>38</sup> including the following:

- Sexual battery;<sup>39</sup>
- Sexual abuse of a child under 15 years of age;<sup>40</sup>
- Attempt to commit sexual battery;<sup>41</sup>
- Peeping or spying into dwelling or enclosure;<sup>42</sup> and,
- Penetration of the mouth of a child with lascivious intent.<sup>43</sup>

A second expansion in FY16 added nine additional misdemeanors to the list of offenses requiring a DNA sample submission upon conviction,<sup>44</sup> including the following:

- Violation of a domestic protective order;<sup>45</sup>
- Stalking;<sup>46</sup>
- Violation of a protective order;<sup>47</sup>
- Infected sexual battery;<sup>48</sup>
- Unauthorized use of a vehicle;<sup>49</sup>
- Unlawful entry;<sup>50</sup>
- Indecent exposure;<sup>51</sup>
- Obscene sexual display;<sup>52</sup> and,
- Resisting arrest.<sup>53</sup>

As the total number of offenses requiring a DNA sample has grown over the past 25 years in Virginia, so have the number of DNA samples in the Databank.<sup>54</sup> The large majority of DNA samples received by DFS each year are for felony convictions. The next largest category is violent felony arrests and the smallest category is misdemeanor convictions.<sup>55</sup>

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## Methodology and Data Analyses

The primary purpose of this study was to determine whether additional misdemeanors should be added to the list of offenses requiring a DNA sample submission from adults upon conviction. In addressing this policy question, prospective and retrospective data analyses were performed to determine if an association existed between certain misdemeanors and violent felonies/certain burglary offenses.<sup>56</sup>

## Prospective Analysis

A prospective analysis was completed to determine how many offenders convicted of certain misdemeanors were subsequently convicted of a felony offense within the following 10 years. During the 2015 General Assembly Session, the Virginia Criminal Sentencing Commission (VCSC) analyzed a list of approximately 350 misdemeanor offenses for which a defendant must submit fingerprints to the CCRE, plus trespassing.<sup>57</sup> Specifically, they calculated how many individuals convicted of these misdemeanors in FY08-FY09 had subsequent felony sentencing events between FY08-FY14.<sup>58</sup> As part of the current study, Crime Commission staff reviewed that existing list and requested that 64 of the misdemeanors be recalculated by the VCSC.<sup>59</sup> Sentencing Commission staff then updated how many individuals convicted of these 64 misdemeanors in FY08-FY09 had subsequent felony sentencing events between FY08-FY17.<sup>60</sup>

Specific emphasis was placed on the following eight violent felony and burglary conviction outcome categories: murder, kidnapping, rape, sexual assault, felony assault, robbery, burglary and larceny.<sup>61</sup>

The following seven misdemeanors were identified as having an association with the eight violent felony and burglary outcome categories:

- Assault and battery;<sup>62</sup>
- Domestic assault and battery;<sup>63</sup>
- Trespassing;<sup>64</sup>
- Petit larceny;<sup>65</sup>
- Destruction of property;<sup>66</sup>
- Obstruction of justice;<sup>67</sup> and,
- Concealing merchandise/altering price tags.<sup>68</sup>

See Appendix D for a detailed chart on the association between the first four misdemeanor convictions listed above and the eight felony conviction outcomes. As an example of this association, there were 13,071 individuals convicted of misdemeanor assault and battery in FY08-FY09. Of that number, 18% (2,326 of 13,071) were subsequently convicted of a felony between FY08-FY17. The 18%, as a whole, had a total of 4,466 subsequent felony sentencing events, including 32 murders, 55 kidnappings, 46 rapes, 16 sexual assaults, 640 felony assaults, 123 robberies, 236 burglaries, and 1,020 larcenies.

It is very important to note that these offenses were not identified solely because they are common misdemeanor crimes. By comparison, there were approximately 54,000 individuals convicted of misdemeanor DUI<sup>69</sup> in the FY08-FY09 cohort, but only 8% were subsequently convicted of a felony within 10 years; whereas, approximately 12,000 individuals were convicted of misdemeanor trespassing in FY08-FY09, yet 21% were subsequently convicted of a felony within 10 years. The analysis demonstrated that there is a much larger subset of individuals convicted of the selected misdemeanor offenses who are subsequently convicted of a felony within ten years as compared to other common misdemeanors, such as DUI. Further, the subset of offenders for the selected misdemeanor offenses had a larger proportion of felony convictions that were violent in nature (murder, kidnapping, rape, sexual assault, felony assault, and robbery).

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### **Retrospective Analysis**

A retrospective analysis was completed to determine which prior misdemeanor convictions were frequently found in the criminal histories of violent felons. Crime Commission staff requested that the VCSC obtain the total number of individuals convicted of any felony offense in FY16 from their *Sentencing Guidelines Database*. According to this data source, there were 22,301 total individuals convicted of a felony in FY16. Sentencing Commission staff then extracted the individuals who were convicted of a violent felony or certain burglary offense in FY16.<sup>70</sup> Of the 22,301 individuals convicted of a felony, 14% (3,091 of 22,301) were convicted of a violent felony or certain burglary offense in FY16.<sup>71</sup> Sentencing Commission staff prepared the syntax required by the Virginia State Police to query the criminal histories for the 3,091 individuals. Once provided with this information, the Virginia State Police delivered hard copies of the 3,091 individual criminal histories to Crime Commission staff for analysis.

After examining the 3,091 criminal histories, it was determined that 89% (2,753 of 3,091) were valid for inclusion in the final analysis.<sup>72</sup> Thus, the population (N-size), of this analysis was 2,753 adults convicted of a violent felony or certain burglary offense in FY16. The findings reported below are only generalizable to individuals convicted of a violent felony or certain burglary offense in FY16.

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### ***Description of Population***

When examining the population of 2,753 valid records of adults convicted of a violent felony or certain burglary offense in FY16, staff

found the following information:

- Sex: 90% (2,467 of 2,753) of individuals were male; 10% (286 of 2,753) were female.
- Race: 50% (1,380 of 2,753) were white; 49% (1,356 of 2,753) were black; <1% (14 of 2,753) were Asian; and, <1% (3 of 2,753) were Native American.<sup>73</sup>
- Age: The ages ranged from 18 years to 79 years old. The average was 32 years old and the median was 29 years old.
- Address Reported at Time of Arrest: 93% (2,565 of 2,753) reported that they resided in Virginia; 6% (181 of 2,753) reported that they did not reside in Virginia; 7 residence statuses were uncertain.<sup>74</sup>
- Total Felony Convictions Including the Target FY16 Felony Sentencing Event: The number of felony convictions on each individual criminal history varied greatly, with the least being 1 and the greatest being 66.<sup>75</sup> Individuals had an average of 5 total felony convictions including the FY16 target offense, as well as any felony convictions occurring after that point.<sup>76</sup> The median was 3 felony convictions.
- Total Felony Convictions PRIOR to the Target FY16 Felony Sentencing Event: In an attempt to fairly and accurately report total felony convictions, VSCC staff counted the total number of felony convictions occurring prior to the target FY16 sentencing event. Individuals had anywhere from 0 to 64 prior felony convictions. The average was 2 prior felony convictions; the median was 0. It was interesting to note that 60% (1,639 of 2,753) had no prior felony convictions and 40% (1,114 of 2,753) had one or more prior felony convictions. Of those with one or more prior felony convictions, the range was 1 to 64, with an average of 5 and a median of 3.
- Prior Felony and Misdemeanor Charges: Recognizing that many offenses do not result in a conviction, staff attempted to determine the total number of individuals that had either a previous felony charge, misdemeanor charge, or both.
  - 48% (1,329 of 2,753) had prior felony and misdemeanor charges;
  - 21% (566 of 2,753) had no prior felony OR misdemeanor charges;
  - 16% (446 of 2,753) had at least one prior misdemeanor charge, but no felony charges;
  - 15% (412 of 2,753) had at least one prior felony charge, but no misdemeanor charges.

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### ***Prior Misdemeanor Convictions***

The primary focus of the retrospective analysis was upon the individuals who had at least one prior misdemeanor conviction on their criminal history. Staff noted the number and type of prior misdemeanor convictions on each criminal history occurring before the FY16 felony sentencing event. It was found that 69% (1,898 of 2,753) had at least one prior misdemeanor conviction; whereas, 31% (855 of 2,753) did not have a previous misdemeanor conviction.<sup>77</sup> The average age of individuals at the time of their first misdemeanor conviction was 23 years old. The time between an individual's first misdemeanor conviction and the FY16 target sentencing event varied greatly. For some, both convictions occurred within the same fiscal year while others had a 40-year gap. When examining the group as a whole, the average time was 10 years between an individual's first misdemeanor conviction and the FY16 target felony sentencing event.

Within these 1,898 criminal histories, there were five misdemeanor convictions that appeared to be the most associated with the felony crimes of murder, kidnapping, rape, felony assault, robbery, and burglary:

- Assault and battery;<sup>78</sup>
- Domestic assault and battery;<sup>79</sup>
- Petit larceny;<sup>80</sup>
- Trespassing;<sup>81</sup> and,
- Destruction of property.<sup>82</sup>

See Appendix D for an illustration of the association between the first four misdemeanor convictions listed above and the select felony conviction outcomes. As an example of this association, out of the 104 convicted murderers in FY16, 32 had a prior misdemeanor assault and battery conviction.

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### ***Summary of Data Findings***

The prospective analysis revealed that most individuals convicted of misdemeanors are not convicted of felonies in the future; whereas, the retrospective analysis demonstrated that nearly 70% of offenders convicted of a violent felony or certain burglary offense in FY16 had at least one prior misdemeanor conviction on their criminal history. Both analyses revealed multiple offender typologies, such as career misdemeanants and felons, as well as general and specific offending profiles and patterns.

Both analyses demonstrated a clear association between certain misdemeanors and violent felonies/certain burglary offenses for a subset of offenders.

- Misdemeanor assault and battery<sup>83</sup> convictions appeared to have a compelling relationship with all the violent felony and certain burglary offenses focused upon in both analyses.
- Domestic assault and battery,<sup>84</sup> trespassing,<sup>85</sup> petit larceny,<sup>86</sup> and destruction of property<sup>87</sup> also appeared to be strongly associated with the violent felony and certain burglary offenses focused upon in both analyses.
- Trespassing<sup>88</sup> had a strong association in the prospective analysis with the violent felony and certain burglary offenses focused upon. Any decision on trespassing should only be based on findings from the prospective analysis since this offense was not fully captured on criminal histories, which the retrospective analysis relied upon.<sup>89</sup>
- Obstruction of justice<sup>90</sup> and concealing merchandise/altering price tags<sup>91</sup> did not show as strong of an association with the violent felony and certain burglary offenses focused upon in the retrospective analysis as seen in the prospective analysis.

It must be emphasized that both data analyses could only be generalized to misdemeanor and felony convictions in the stated time periods, rather than actual rates of offending, arrests, or charges. Appendix D provides an illustration of the associations based on raw data for both the prospective and retrospective analyses.

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## Misdemeanor DNA Sample Data

Crime Commission staff was requested to provide information on data relating to the existing 14 misdemeanors under Virginia law that require a DNA sample upon conviction.<sup>92</sup> Staff requested a detailed list of all misdemeanor samples received by DFS for convictions for these 14 offenses. There were a total of 3,330 misdemeanor samples entered into DFS' DNA Sample Tracking Database (DNA Web) as of October 17, 2017.<sup>93</sup>

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## Misdemeanor Conviction Type

Staff requested a breakdown by offense type for the 3,330 misdemeanor conviction DNA samples submitted to DFS. The largest number of misdemeanor samples stemmed from three offense categories. Specifically, 30% (1,011 of 3,330) were for a protective order violation,

20% (670 of 3,330) were for sexual battery, and 16% were for unlawful entry (528 of 3,330) convictions.<sup>94</sup> Of the 3,330, 84% (2,797 of 3,330) were the direct result of a misdemeanor charge resulting in a conviction and 16% (533 of 2,797) were the result of a defendant who was initially charged with a felony offense but subsequently convicted of a misdemeanor offense (i.e., felony sex charge reduced to misdemeanor sexual battery conviction).

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## DNA Sample Hits

A “hit” occurs when there is an association between an unsolved profile and a convicted offender/arrestee, or between two or more cases that were previously unknown to be linked.<sup>95</sup> A hit is an investigative lead that is provided to law enforcement in a case, but it does not necessarily solve the case. When a hit occurs, the investigating agency is notified of the lead in the case. Since there is no tracking requirement, it is unknown what occurred with this information after the investigating agency receives the hit.

There were a total of 11,427 hits (investigations aided) resulting from both felony and misdemeanor samples in the Virginia DNA Databank as of FY17. These DNA hits have identified a perpetrator other than the person convicted in 9 of the 16 exonerations in Virginia as listed by the Innocence Project’s database.<sup>96</sup>

There have been 26 hits resulting from misdemeanor conviction samples as of November 27, 2017.<sup>97</sup> The first misdemeanor DNA sample hit was in FY16 to a sex offense case dating back to October 1997.

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## Privacy Considerations

There are several important safeguards in place to protect the information contained in the Virginia DNA Databank. The Virginia DNA Databank is comprised of two separate databases with restricted access:

- DNA Sample Tracking Database (DNA Web); and
- Virginia Combined DNA Index System (CODIS).

The DNA Web Database maintains the personally identifiable information of each DNA sample and is kept separate from the DNA profiles maintained in CODIS, where the searches take place.<sup>98</sup> CODIS organizes the DNA profiles into the following indices: offender index, arrestee index, forensic index, missing person index, and unidentified human remains index.<sup>99</sup>

All labs participating in the National DNA Index System must adhere to federal quality assurance and privacy standards.<sup>100</sup> External audits are performed every two years. Access to the National DNA Index System is denied if these quality control and privacy standards are not met by participants. The Virginia Department of Forensic Science must also meet accreditation standards set forth by the ANSI-ASQ National Accreditation Board (ANAB), which was formerly the American Society of Crime Laboratory Directors/Laboratory Accreditation Board (ASCLD/LAB) through its International program. If these standards are not met, DFS could lose accreditation status (a requirement of participation in the National DNA Index System). The Virginia Department of Forensic Science also performs annual internal audits.

Crime Commission staff found that all states<sup>101</sup> and the federal government<sup>102</sup> have statutes addressing the unauthorized use of DNA databanks. The Code of Virginia criminalizes unauthorized use of the databank and imposes three different penalties, including the following:

- Disseminating information without authorization (Class 3 misdemeanor);<sup>103</sup>
- Using for any purpose other than authorized by law (Class 1 misdemeanor); and,
- Obtaining any sample submitted to DFS (Class 5 felony).

Staff requested the total number of charges and convictions for offenses under this statute over the past 10 years from the VCSC. According to VCSC staff analysis, there have been no charges or convictions for any of these offenses in Virginia over the past 10 years.<sup>104</sup>

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## Other States

Staff completed a review of statutes relating to the collection of DNA samples for all 50 states, the District of Columbia, and the federal government. All 50 states, the District of Columbia, and the federal government collect DNA samples for all or nearly all felony convictions.<sup>105</sup> As of June 2018, 36 states, the District of Columbia, and the federal government collect DNA for certain sexual misdemeanor convictions.<sup>106</sup> At least 26 states and the federal government collect for some non-sexual misdemeanor convictions.<sup>107</sup> Only 3 states collect for a large classes of misdemeanor offenses upon conviction: New York, Utah, and Wisconsin.

Staff was asked to examine these three states in more detail to assess the impact of requiring DNA samples for broad classes of misdemeanors, with specific attention placed upon misdemeanor trespassing laws. It is important to note that crimes classified as misdemeanors in Virginia may or may not be classified in the same manner in these other states.



## New York

New York collects DNA upon conviction for all Class A, B, and unclassified misdemeanors, but not for violations.<sup>108</sup> In terms of trespassing, DNA is collected for trespassing misdemeanors on enclosed land,<sup>109</sup> certain school property,<sup>110</sup> public housing,<sup>111</sup> railroad yards,<sup>112</sup> and dwellings;<sup>113</sup> however, DNA is not collected for trespassing violations.<sup>114</sup>

New York initially required DNA collection upon conviction for 36 specified misdemeanors in 2006.<sup>115</sup> All remaining penal law misdemeanors were added effective August 1, 2012.<sup>116</sup> As of August 2017, there were 22,914 offender profile hits/investigative leads from all DNA-eligible felony and misdemeanor offense samples. Of these hits, 23% (5,666 of 22,914) stemmed from misdemeanor conviction samples. The breakdown of the 5,666 hits for the top three misdemeanor conviction samples was as follows:

- 37% (2,089 of 5,666) were from petit larceny convictions;
- 16% (912 of 5,666) were from assault, third degree convictions; and,
- 11% (627 of 5,666) were from trespassing, second degree convictions.<sup>117</sup>

The data from New York demonstrated that petit larceny and the certain assault and trespassing offenses provided a clear benefit in terms of aiding investigations.

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## Utah

Utah collects DNA upon conviction for all Class A misdemeanors, but not for Class B or Class C misdemeanors.<sup>118</sup> Trespassing into a dwelling is a Class A misdemeanor and requires the submission of a DNA sample upon conviction;<sup>119</sup> however, other forms of trespassing onto property are punished as Class B misdemeanors.<sup>120</sup> Therefore, DNA samples are not collected for all types of trespassing in Utah.

Staff attempted to obtain detailed information relating to the number and types of hits stemming from Utah's DNA Databank, but data was not readily available to capture this specific request.<sup>121</sup>

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## Wisconsin

Wisconsin collects DNA upon conviction for all misdemeanors, but does not collect for forfeiture offenses.<sup>122</sup> Trespass is generally punished as a Class B forfeiture and therefore DNA is not collected;<sup>123</sup> however, some criminal forms of trespass require collection upon conviction.<sup>124</sup>

Wisconsin provided information to Crime Commission staff on hits stemming from misdemeanor convictions. In FY17, misdemeanor DNA hits accounted for 26% of overall investigative leads, with the majority of those leads assisting felony casework.<sup>125</sup>

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## Findings and Recommendations

The Crime Commission reviewed the findings of this study at its November meeting. Crime Commission members unanimously endorsed the policy option and two staff recommendations at the December meeting.

**Policy Option 1:** Amend Va. Code § 19.2-310.2 to include a DNA sample submission from adults for the following seven misdemeanors upon conviction:

- Assault and battery;<sup>126</sup>
- Domestic assault and battery;<sup>127</sup>
- Trespassing;<sup>128</sup>
- Petit larceny;<sup>129</sup>
- Destruction of property;<sup>130</sup>
- Obstruction of justice;<sup>131</sup> and,
- Conceal merchandise/alter price tags.<sup>132</sup>

Ultimately, as a result of the legislative process, only two offenses were added to the list of misdemeanors requiring a DNA sample submission from adults upon conviction - assault and battery<sup>133</sup> and trespassing.<sup>134</sup>

During the Regular Session of the 2018 General Assembly, identical legislation was introduced in both chambers that included all seven misdemeanors listed in Policy Option 1 - Delegate David J. Toscano (House Bill 1264) and Senator Mark D. Obenshain (Senate Bill 565). Delegate Toscano also introduced a substantially similar bill (House Bill 1249), which only included the first four misdemeanors listed in Policy Option 1. House Bill 1264 was left in House Courts of Justice and Crime Commission staff continued to provide assistance with House Bill 1249 as it moved through the legislative process. House Bill 1249 and Senate Bill 565 passed each chamber of the General Assembly in varying forms. Both bills were sent to conference and ultimately legislation requiring a

DNA sample submission upon conviction for two of the misdemeanors listed in Policy Option 1 (assault and battery and trespassing) was signed into law by the Governor.<sup>135</sup>

**Recommendation 1:** The Department of Forensic Science should update their DNA sample submission training materials for sheriffs' deputies and jail intake officers to reflect current law.

Based upon informal survey findings and discussions with the field, numerous stakeholders noted a desire for updated training.<sup>136</sup> The DNA sample submission training video currently used by DFS was produced in 2003. Updated training materials will prepare stakeholders for what to expect in the DNA sample submission process, the specific steps that must be undertaken, the difficulties they may experience, and the various resources available to them. Stakeholders also requested that they receive adequate notice of any additional changes to DNA collection laws before they become effective.

On December 14, 2017, the Crime Commission sent a letter requesting that DFS update their DNA sample submission training materials as endorsed in Recommendation 1.

**Recommendation 2:** Amend Va. Code § 19.2-390 to require fingerprinting upon conviction for trespassing and disorderly conduct.

Fingerprints are currently required upon conviction for any misdemeanor punishable by confinement in jail under Titles 18.2 and 19.2 of the Code of Virginia, except for trespassing and disorderly conduct.<sup>137</sup> Because fingerprints are required for inclusion of a conviction in the Central Criminal Records Exchange (CCRE), these convictions do not consistently appear on defendants' criminal histories.<sup>138</sup> The Virginia State Police advised that fingerprints for trespassing and disorderly conduct convictions could be included in the existing CCRE.

During the Regular Session of the 2018 General Assembly, identical legislation was introduced in both chambers for Recommendation 2 by Delegate Toscano (House Bill 1266) and Senator Obenshain (Senate Bill 566). Both bills passed the General Assembly and were signed into law by the Governor.<sup>139</sup>

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## Acknowledgements

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

New York State Division of Criminal Justice Services

State of Wisconsin Department of Justice-State Crime Laboratory

Bureau

Utah Bureau of Forensic Services

Virginia Criminal Sentencing Commission

Virginia Department of Forensic Science

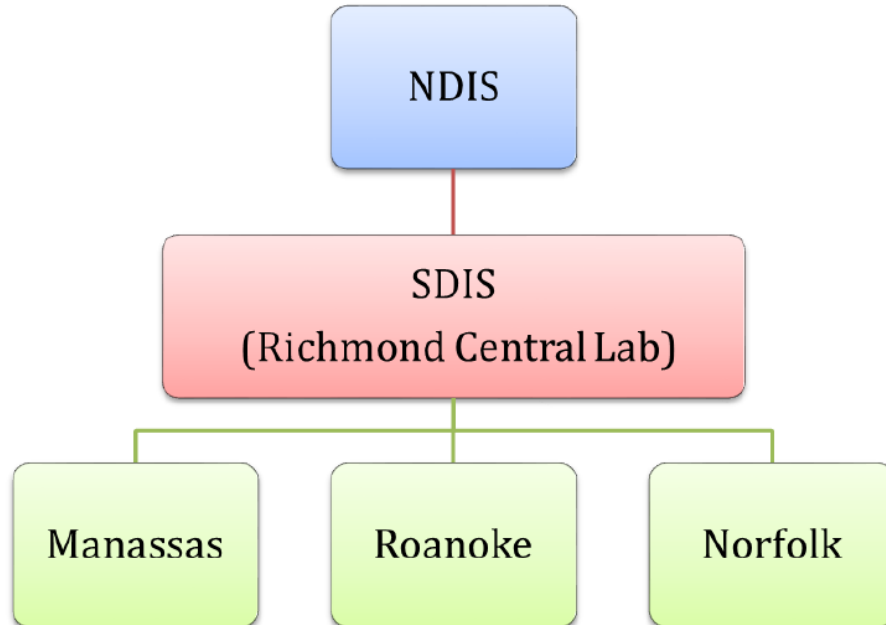
Virginia State Police

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**The Crime Commission also wishes to thank all Sheriffs, regional jail administrators, local community corrections officers, and chief probation officers who met with staff or provided survey responses.**

## APPENDIX A

### Overall Structure of DNA Index System in Virginia



Source: Chart prepared by Virginia State Crime Commission staff.

Virginia has a DNA index system housed in each of its four local laboratories: Manassas, Roanoke, Norfolk, and Richmond. Each of these laboratories upload their information into Virginia's State DNA Index System (S-DIS) at Richmond's Central Lab. S-DIS allows for searches within the state. Once a week, qualifying samples that meet stricter criteria are uploaded to the National DNA Index System (N-DIS), which is housed at FBI headquarters and allows for searches between states. The Combined DNA Index System (CODIS) is the software that is used to run searches between the local, state and national index systems. Each state has a CODIS administrator.

## APPENDIX B

### Current Virginia Requirements for DNA Sample Submission

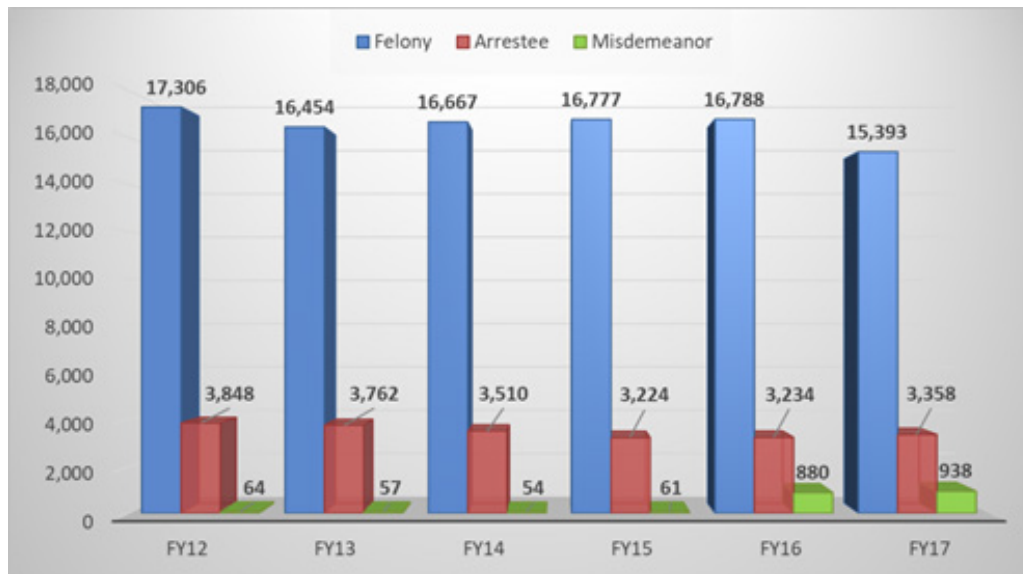
Offense Type	Adults	Juveniles
Felony Convictions* (§19.2-310.2 and §16.1-299.1)	Yes.	Yes. If 14 or older at time of offense; Includes convictions and adjudications.
Felony Arrests (§19.2-310.2:1)	Yes. Violent felonies and certain burglary offenses.	No.
<b>Misdemeanor Convictions*</b> (§19.2-310.2)	<b>Yes. For 14 specific misdemeanors.</b>	No.
Misdemeanor Arrests	No.	No.

Source: Virginia State Crime Commission staff analysis. \*Virginia Code § 9.1-903 provides that all persons required to register on the Sex Offender and Crimes Against Minors Registry, which includes certain felonies and misdemeanors shall provide a sample.

Note: Effective July 1, 2018, the total number of misdemeanors requiring a DNA sample from adults upon conviction will increase to 16 when assault and battery (§ 18.2-57) and trespassing (§ 18.2-119) are added to the statute.

## APPENDIX C

### Total Samples Received by Type in Virginia's DNA Databank, FY12-FY17



Source: DNA Sample Tracking Database (DNA Web), Virginia Department of Forensic Science. Chart prepared by Virginia State Crime Commission staff.

# APPENDIX D

## Prospective Misdemeanor Analysis

How many offenders convicted of certain misdemeanors were subsequently convicted of a felony offense within the following 10 years?

For example, 18% (2,326 of 13,071) of offenders convicted of assault and battery over a 2 year period were subsequently convicted of a FELONY within the following 10 years.

Total Individuals Convicted of Select Misdemeanors in FY08-09 and Number of Individuals Convicted of a Subsequent Felony between FY08-FY17\*

Misdemeanor Offense (Code Section)	Total Individuals Convicted of Misdemeanor over 2 Years, FY08-09	Total Individuals Convicted of Subsequent Felony, FY08-FY17	Percentage Convicted of Subsequent Felony, FY08-FY17	Number of Felony Sentencing Events by Type, FY08-FY17*										Total Sentencing Events for ALL Subsequent Felonies, FY08-FY17*
				Murder	Kidnapping	Rape	Sexual Assault	Assault	Robbery	Burglary	Larceny			
Assault and battery (\$18.2-57)	13,071	2,326	18%	32	55	46	16	640	123	236	1,020	4,466		
Domestic A&B (\$18.2-57.2)	12,895	2,363	18%	32	52	32	16	806	83	207	775	4,298		
Trespassing (\$18.2-119)	12,814	2,729	21%	29	40	52	10	512	171	364	1,454	5,511		
Petit larceny (\$18.2-96)	19,474	4,041	21%	28	42	51	13	428	221	552	3,742	8,608		

Source: Table prepared by Virginia State Crime Commission staff based upon the Virginia Criminal Sentencing Commission staff analysis of Supreme Court of Virginia - Circuit Court Case Management System (CMS); Supreme Court of Virginia - General District Court Case Management System (CMS); Supreme Court of Virginia - Juvenile and Domestic Relations Court Case Management System (Adults only) data. The Circuit Court Case Management System does not include cases from Fairfax or Alexandria. Although Virginia Beach left the system in FY2009, it rejoined the system in October 2014. \*FY17 data was preliminary at time of analysis.



## APPENDIX D

### Retrospective Misdemeanor Analysis

Which prior misdemeanor convictions are frequently found on the criminal histories of violent felons?

- Nearly 70% of individuals convicted of a VIOLENT felony or certain burglary offense in 2016 had at least one prior misdemeanor conviction.
  - 31% (590 of 1,885) had at least one prior assault and battery conviction.
- For example, of the 104 convicted murderers in FY16, 32 had a prior assault and battery conviction.

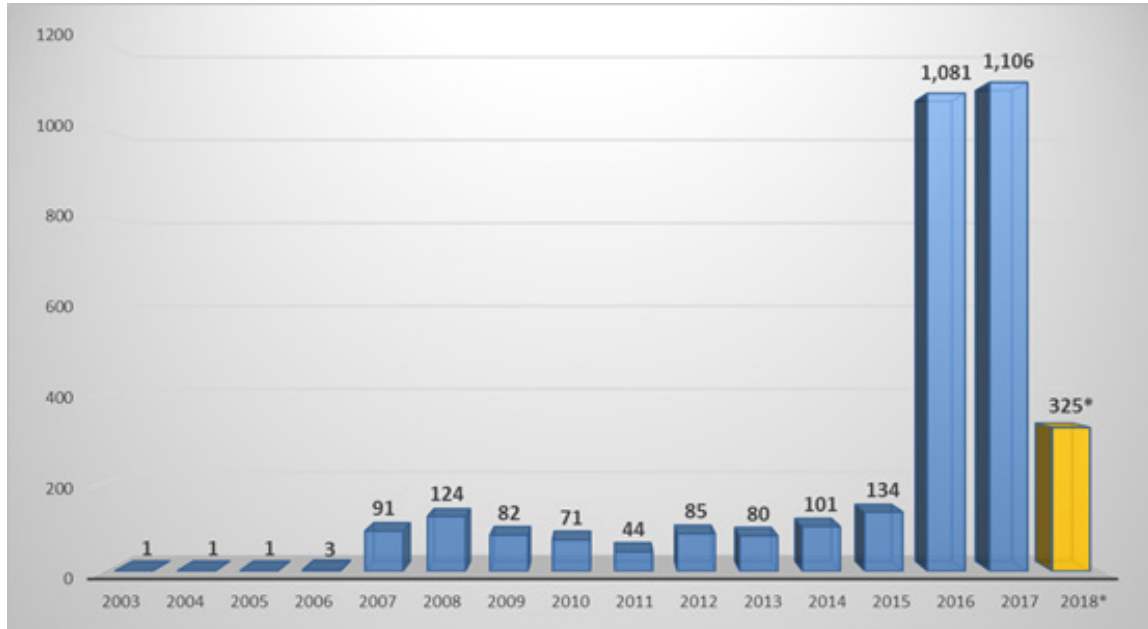
Total Individuals Convicted of FY16 Violent Felony/Certain Burglary Offense with a Select Prior Misdemeanor Conviction

Most Serious FY16 Violent Felony/Certain Burglary Offense Conviction*	Total Individuals Convicted (n=1,885)	Total FY16 Felony Convictions with Prior SELECT Misdemeanor Convictions			
		# with Prior Assault Conviction (\$ 18.2-57)	# with Prior Domestic Assault Conviction (\$ 18.2-57.2)	# with Prior Larceny Conviction (\$18.2-96)	# with Prior Trespassing Conviction (\$18.2-119)**
Murder	104	32	19	21	12
Kidnapping	122	49	31	23	15
Rape	158	49	33	39	19
Felony Assault	468	194	118	130	59
Robbery	319	89	40	125	44
Burglary	714	177	103	321	98
<b>TOTAL</b>		<b>31% (590)</b>	<b>18% (344)</b>	<b>35% (659)</b>	<b>13% (247)**</b>

Source: Virginia State Crime Commission. \* Staff defined "violent felony or certain burglary offenses" from the list of offenses requiring a DNA sample upon arrest per § 19.2-310.2:1, which includes §§ 19.2-297.1, 18.2-31, 18.2-89, 18.2-90, 18.2-91, and 18.2-92. \*\* Fingerprints were not required for trespassing at the time of this study. As such, the number of convictions were likely undercounted on criminal histories because fingerprints are required for CCRE

## APPENDIX E

### Total Misdemeanor Conviction Samples Received by DFS, FY03-FY18\*



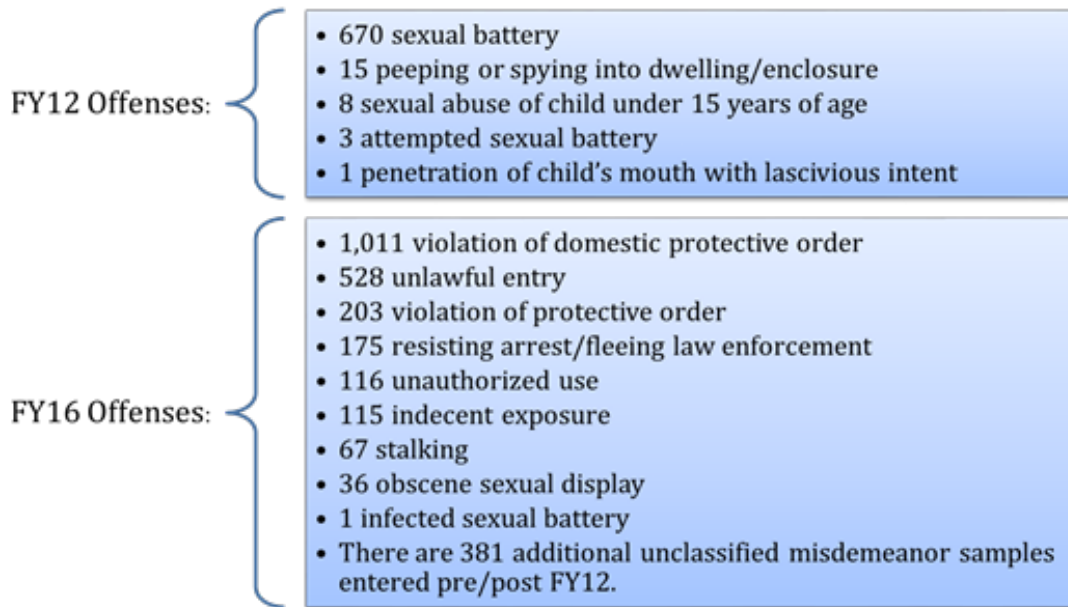
Source: DNA Sample Tracking Database (DNA Web), Virginia Department of Forensic Science. Chart prepared by Virginia State Crime Commission staff. \* FY18 data as of October 13, 2017.

Note: Samples received between FY03-FY06 stemmed from DNA samples collected at arrest for a felony that ultimately resulted in a misdemeanor conviction that required a sample per SOR requirements.

Note: Appendix E figures are larger than those depicted in Appendix C because Appendix E figures also account for all felony arrestee samples that ultimately resulted in a misdemeanor conviction.

## APPENDIX F

### Misdemeanor Conviction Samples Received by DFS by Offense Type

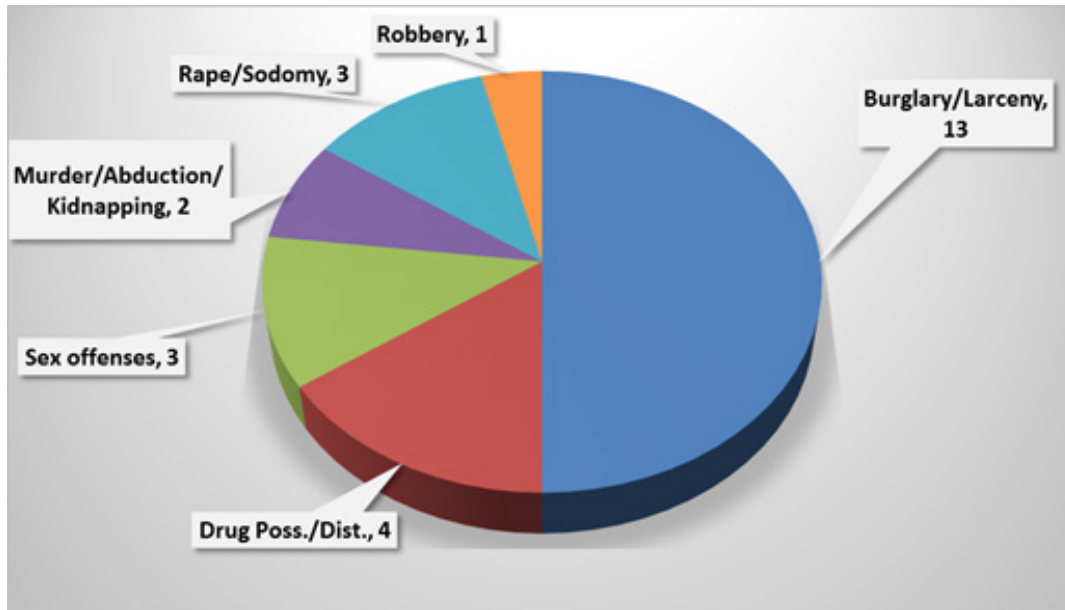


Source: DNA Sample Tracking Database (DNA Web), Virginia Department of Forensic Science. Chart prepared by Virginia State Crime Commission staff.

## APPENDIX G

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### Types of Investigations Aided by the 26 Misdemeanor Sample Hits



Source: Virginia CODIS, Virginia Department of Forensic Science. Chart prepared by Virginia State Crime Commission staff.

Note: Most misdemeanor sample hits have aided in burglary/larceny investigations. This finding is consistent when looking at all DNA sample hits as well.

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## APPENDIX H

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### CODIS Indices for DNA Samples in Virginia

<b>CODIS Index</b>	<b>Total Unique Samples</b>
Offender Index (includes convicted felons and misdemeanants)	414,454
Arrestee Index	4,590
Forensic Index	24,565
Missing Person Index	29
Unidentified Human Remains Index	106
<b>TOTAL</b>	<b>443,744</b>

Source: Virginia Department of Forensic Science, CODIS Database. Data as of July 18, 2017.  
Chart prepared by Virginia State Crime Commission staff.

## APPENDIX I

### Penalties and/or Restrictions by State Relating to Unauthorized Use of DNA Databanks

State	Does the state have any statutes punishing the unlawful collection, retention or dissemination of DNA databank information? If so, what are the penalties?
Alabama	Yes; § 36-18-28 (Confidentiality of records; disclosure; penalty, Class C Felony, 1 year and 1 day to 10 years, not more than \$15,000 fine); § 36-18-29 (Records; falsification; destruction; unlawful possession, etc., Class B Felony, 2 to 20 years, not more than \$30,000 fine).
Alaska	Yes; § 11.56.762 (Unlawful use of DNA samples, Class C Felony, Up to 5 years, no more than \$50,000 fine).
Arizona	No; § 13-610(I) states the following: "Any sample and the result of any test that is obtained pursuant to this section or section 8-238 may be used only as follows: 1. For law enforcement identification purposes. 2. In a proceeding in a criminal prosecution or juvenile adjudication. 3. In a proceeding under title 36, chapter 37." However, there does not appear to be a statute that penalizes unlawful collection, retention or dissemination of DNA databank information.
Arkansas	Yes; § 12-12-1115 (Prohibition against disclosure, Class D Felony, Up to 6 years, no more than \$10,000 fine); § 12-12-1116 (Prohibition against disclosure for pecuniary gain, Class D Felony, up to 6 years, no more than \$10,000 fine).
California	Yes; § 298.2 (Felony to facilitate wrongful collection of, or to tamper with, specimen or sample, Felony, punishable by 2, 3, or 4 years); § 299.5(h)(i)(1)(A) (Unauthorized use or disclosure, up to one year in county jail or 16 months, 2 or 3 years in state prison); § 299.5(h)(i)(1)(B) (Unauthorized use or disclosure for financial gain, same punishment as § 299.5(h)(i)(1)(A) plus fine of greater of 3 times financial gain or \$10,000).
Colorado	Yes; §§ 24-72-305 and 24-72-309 (Public access to results of DNA analysis is prohibited, Misdemeanor, up to 90 days, maximum of \$100 fine).
Connecticut	Yes; § 54-102k (Unauthorized dissemination or use of DNA data bank information. Obtaining blood sample without authority: Class D Felony for obtaining or attempting to obtain DNA sample, term of imprisonment not more than 5 years, not more than \$5,000 fine; Class A Misdemeanor for dissemination, receipt or use of information for unauthorized purpose, term not to exceed 1 year, not more than \$2,000 fine; Class C Misdemeanor for disseminating information without authority, term not to exceed 3 months, not more than \$500 fine).

State	Does the state have any statutes punishing the unlawful collection, retention or dissemination of DNA databank information? If so, what are the penalties?
Delaware	Yes; Tit. 29 § 4713(d) (Tampering or attempting to tamper with biological sample without authority, Class D Felony, up to 8 years, fines as deemed appropriate by court); Tit. 29 § 4713(l) (Disseminating, receiving or otherwise attempting to use information in database for an unauthorized purpose, Class A Misdemeanor, up to 1 year, fine up to \$2,300).
District of Columbia	Yes; 34 U.S.C.S. § 40706 (Privacy protection standards, fine up to \$250,000 or imprisonment up to 1 year).
Florida	Yes; § 943.325(15)(b) (Disclosure to unauthorized person, use or receipt for unauthorized purpose, or tampering or attempting to tamper with DNA analysis or sample, Misdemeanor of the First Degree, not more than 1 year, fine not to exceed \$1,000).
Georgia	Yes; § 35-3-164 (Unlawful dissemination or use of information; obtaining sample without authority: unauthorized dissemination, Misdemeanor, not to exceed 12 months, maximum of \$1,000 fine; dissemination, receipt or use for unauthorized purpose, High and Aggravated Misdemeanor, not to exceed 12 months, maximum of \$5,000 fine; obtaining or attempting to obtain DNA sample, Felony).
Hawaii	Yes; § 844D-112 (Fraudulent use or manipulation of biometric sample or information, Class C Felony, up to 5 years, maximum of \$10,000 fine); § 844D-113 (Unauthorized disclosure of DNA sample or profile, Misdemeanor, up to 1 year, maximum of \$2,000 fine); § 844D-114 (Use of DNA sample or profile for financial gain, Misdemeanor, up to 1 year, maximum of \$2,000 fine (discretionary), plus fine shall be imposed 3 times any financial gain or \$10,000, whichever is greater).
Idaho	Yes; § 19-5514 (Limitations on disclosure of information, Misdemeanor, up to 6 months, maximum of \$1,000 fine).
Illinois	Yes; 730 § 5/5-4-3(f-5) (Unauthorized use of DNA information, Class 4 Felony, fine of not less than \$5,000).
Indiana	Yes; § 10-13-6-21 (Tampering with DNA sample or container, Level 6 Felony, 6 month to 2 1/2 years, up to \$10,000 fine); § 10-13-6-22 (Unauthorized use of information or of DNA samples, Level 6 Felony, 6 months to 2 1/2 years, up to \$10,000 fine).
Iowa	Yes; § 81.6 (Criminal offense: obtains, uses or discloses in unauthorized manner, Aggravated Misdemeanor, maximum of 2 years, \$625 to \$6,250 mandatory fine; tampers or attempts to tamper with DNA, falsifies source of DNA or alters collection container, Class D Felony, maximum of 5 years, \$750 to \$7,500 mandatory fine).

State	Does the state have any statutes punishing the unlawful collection, retention or dissemination of DNA databank information? If so, what are the penalties?
Kansas	Yes; § 21-2511(n) (Unauthorized Dissemination of DNA samples or records, Class A Nonperson Misdemeanor, up to 1 year, maximum \$2,500 fine or double the pecuniary gain derived from the crime); § 21-2511(o) (Obtaining samples without authorization, Class A Nonperson Misdemeanor, up to 1 year, maximum \$2,500 fine or double the pecuniary gain derived from the crime).
Kentucky	Yes; § 17.170(8) (Tampering or attempting to tamper with sample or container, Class D Felony, 1 - 5 years imprisonment; \$1,000 - \$10,000 fine); § 17.175(8) (Penalty for unlawful use of DNA database identification system, Class D Felony, 1 - 5 years imprisonment; \$1,000 - \$10,000 fine).
Louisiana	Yes; § 15-618 (Criminal penalties: unauthorized disclosure, up to 6 months, maximum \$500 fine; obtaining DNA information without authorization, up to 6 months, maximum \$500 fine; tampering or attempting to tamper, up to 6 months, maximum \$500 fine).
Maine	Yes; § 1578 (Unlawful dissemination; Class E Crime, up to 6 months, maximum of \$1,000 fine).
Maryland	Yes; § 2-512 (Prohibited acts; penalty: unauthorized disclosure, obtaining without authorization or unauthorized testing, Misdemeanor, up to 5 years, maximum of \$5,000 fine; willful failure to destroy DNA sample, Misdemeanor, up to 1 year, maximum of \$1,000 fine).
Massachusetts	Yes; ch. 22E, § 12 (DNA Records — Unauthorized Disclosure, up to 6 months, maximum of \$1,000 fine); ch. 22E, § 13 (DNA Records — Unauthorized Acquisition, up to 6 months, maximum of \$1,000 fine); ch. 22E, § 14 (DNA Records — Tampering, state prison up to 5 years, jail or house of correction up to 2 1/2 years, maximum of \$5,000 fine).
Michigan	Yes; § 28.175 (DNA profile or sample; unauthorized dissemination, receipt, or use of information; removal, destruction, or tampering; obtaining, testing, or destroying; violation; penalty, Misdemeanor, up to 1 year, maximum \$1,000 fine).
Minnesota	Yes; § 299C.155(4) states “The results of the bureau’s DNA analysis and related records are private data on individuals, as that term is defined in section 13.02, and may only be used for law enforcement identification purposes. The remedies in section 13.08 apply to a violation of this subdivision.” However, § 13.08 only provides for civil remedies. Nonetheless, § 13.09 seems to apply to willful violations of the protections on private data, and therefore applies to data in the DNA databank. (Misdemeanor, up to 90 days, \$1,000).



State	Does the state have any statutes punishing the unlawful collection, retention or dissemination of DNA databank information? If so, what are the penalties?
Mississippi	Yes; § 45-47-1 (DNA samples to be collected from persons arrested for commission or attempted commission of certain crimes of violence; destruction of sample; penalties for obtaining, receiving or disseminating information in DNA data bank without authority: unauthorized dissemination, Misdemeanor, up to 30 days, maximum of \$500 fine; unauthorized dissemination, receipt, use or attempted use, Misdemeanor, up to 6 months, maximum of \$1,000 fine; obtaining or attempting to obtain sample for purposes of DNA analysis, Felony, up to 2 years, maximum of \$1,000 fine).
Missouri	Yes; § 650.055(5) (Unauthorized use or dissemination, Class A Misdemeanor, up to 1 year, maximum of \$1,000 fine).
Montana	<p>No; § 44-6-106 outlines the process for authorized release of DNA records. It reads as follows:</p> <p>“(1) The DNA records contained in the DNA identification index may be released only for the following purposes:</p> <p>(a) to federal, state, and local law enforcement agencies for law enforcement identification purposes;</p> <p>(b) for criminal defense purposes, to a defendant for whom there is a DNA record, who is also entitled to samples and analyses held as part of the record;</p> <p>(c) to assist in the identification of human remains, including missing persons; and</p> <p>(d) if information allowing a person to be identified is removed, for a population statistics database and for identification, research, and protocol development for forensic DNA analysis and quality control.</p> <p>(2) Requests for DNA records must be in writing, signed by the requesting party, and maintained on file in the DNA identification index in accordance with rules adopted by the department.</p> <p>(3) A defendant in a criminal proceeding is entitled to information in the DNA identification index relating to the number of requests previously made for comparison searches relating to the defendant and the names of the requesting parties.”</p> <p>Additionally, § 44-6-108, which classifies DNA records as “confidential criminal justice information,” falls under the protection of Title 44, Chapter 5, unless the person consents to the use/disclosure. Title 44, Chapter 5 details lawful procedures for disclosing “confidential criminal justice information” via court petition, prosecutor’s determination, between criminal justice agencies, etc... However, Title 44, Chapter 5 does not explicitly penalize the unauthorized dissemination of information. Therefore, it appears the law prohibits disseminating information outside what is explicitly authorized, but does not criminalize unauthorized use or dissemination.</p>

State	Does the state have any statutes punishing the unlawful collection, retention or dissemination of DNA databank information? If so, what are the penalties?
Nebraska	Yes; § 29-4110 (Unlawfully obtaining or possessing DNA samples or records; penalty, Class III misdemeanor, up to 3 months, maximum of \$500 fine); § 29-4111 (Unlawful disclosure for pecuniary gain; penalty; attorney's fees, Class III Misdemeanor, up to 3 months, maximum of \$500 fine, right to action - \$100 for each violation, litigation costs and attorney's fees).
Nevada	Yes; §§ 176.0913(6) and (7) (Unauthorized sharing or disclosure, Category C Felony, 1 to 5 years, up to \$10,000 fine); same crime and penalty also found in §§ 176.09129 and 176.0916.
New Hampshire	Yes; § 651-C:4 (Unauthorized Dissemination or Use of DNA Database Information; Obtaining DNA Samples Without Authority; Penalties: unauthorized dissemination, Class B Misdemeanor, no jail time, up to \$1,200 fine; unauthorized dissemination, receipt, use or attempted use, Class A Misdemeanor, up to 1 year, up to \$2,000 fine; obtaining or attempting to obtain sample for purpose of having DNA analysis done, Class B Felony, 3 1/2 to 7 years, up to \$4,000 fine).
New Jersey	Yes; § 53.1-20.26 (Wrongful disclosure of information, Disorderly Persons Offense, up to 6 months, up to \$1,000 fine)
New Mexico	Yes; § 29-16-12 (Penalty: unauthorized disclosure, Fourth Degree Felony, up to 18 months, maximum of \$5,000 fine; unauthorized use or attempted use, Fourth Degree Felony, up to 18 months, maximum of \$5,000 fine; obtaining or attempting to obtain, Fourth Degree Felony, up to 18 months, maximum of \$5,000 fine).
New York	Yes; § 995-f (Penalties: unauthorized disclosure, use, receipt or tampering/ attempted tampering, Class E Felony, up to 4 years, fine not to exceed \$5,000 or double the amount of defendant's gain from the crime).
North Carolina	Yes; § 15A-266.11(Unauthorized uses of DNA Databank; penalties: unauthorized disclosure, Class H Felony, 4 to 25 months, fine; obtaining without authorization, Class H Felony, 4 to 25 months, fine).
North Dakota	Yes; § 31-13-09 (DNA profiles to be available to law enforcement — Penalty, unauthorized dissemination, receipt, use or attempted use, Class A Misdemeanor, up to 1 year, maximum of \$2,000 fine); § 31-13-10 (Tampering with DNA sample testing — Penalty, tampering or attempt to tamper, Class C Felony, up to 5 years, maximum of \$10,000 fine; possession, distribution, or assisting in use of device, etc. to alter outcome of testing, Class C Felony, up to 5 years, maximum of \$10,000 fine).

State	Does the state have any statutes punishing the unlawful collection, retention or dissemination of DNA databank information? If so, what are the penalties?
Ohio	Yes; § 2953.54 (Disposition and use of specific investigatory work product; divulging confidential information, Misdemeanor of Fourth Degree, up to 30 days, maximum of \$250 fine); § 2953.55 (Inquiry as to sealed records prohibited; divulging confidential information, Misdemeanor of the Fourth Degree, up to 30 days, maximum of \$250 fine); § 2953.59 (Duties of law enforcement officer or agency upon issuance of order; divulging confidential information, Misdemeanor of the Fourth Degree, up to 30 days, maximum of \$250 fine); § 2953.60 (Inquiry as to sealed records prohibited; divulging confidential information, Misdemeanor of the Fourth Degree, up to 30 days, maximum of \$250 fine) § 2927.15 (Unlawful collection of bodily substance, Misdemeanor of First Degree, up to 180 days, maximum of \$1,000 fine, prior conviction makes subsequent offense a Felony of the Fifth Degree, 6 to 12 months, maximum of \$2,500 fine).
Oklahoma	Yes; 74 Okl. St. § 150.27a(D) (Unauthorized dissemination, Misdemeanor, up to 1 year in county jail);
Oregon	Yes; § 192.543 (Criminal penalty, unlawfully obtaining, retaining or disclosing, Class A Misdemeanor, up to 1 year, maximum of \$6,250 fine).
Pennsylvania	Yes; 44 Pa.C.S. § 2332 (Criminal penalties, disclosure or obtaining information, Misdemeanor of First Degree, up to 5 years, maximum of \$10,000 fine).
Rhode Island	Yes; § 12-1.5-15 (Criminal penalties-Civil remedies: unauthorized disclosure, Misdemeanor, up to 1 year, maximum of \$1,000 fine; obtains/attempts to obtain or tampers/attempts to tamper, Felony, up to 5 years, maximum of \$5,000; civil action for damages, injunctive relief, attorneys' fees).
South Carolina	Yes; § 23-3-650 (Confidentiality of DNA record and profile; availability; willful disclosure; penalty: unauthorized disclosure, Misdemeanor, up to 5 years, greater of \$10,000 fine or 3 times financial gain; obtaining without authorization, Misdemeanor, up to 5 years, greater of \$10,000 fine or 3 times financial gain).
South Dakota	Yes; § 23-5A-26 (Intentional disclosure, use or receipt of DNA record — Penalty, Class 5 Felony, up to 5 years, maximum of \$10,000 fine).
Tennessee	Yes; § 40-32-101(c) (Unauthorized release of confidential records, Class A Misdemeanor, 30 days to 11 months 29 days, fine between \$500 and \$1,000).
Texas	Yes; § 411.153 (Confidentiality of DNA Records, State Jail Felony, Official Misconduct, 180 days to 2 years, maximum of \$10,000 fine)
Utah	Yes; § 53-10-406(12) (Unauthorized disclosure, obtaining without authorization, unauthorized analysis, Third Degree Felony, up to 5 years, maximum of \$5,000 fine; failure to destroy when authorized, Class B Misdemeanor, up to 6 months, maximum of \$1,000 fine).

State	Does the state have any statutes punishing the unlawful collection, retention or dissemination of DNA databank information? If so, what are the penalties?
Vermont	Yes; 20 V.S.A. § 1941 (Confidentiality of records, up to 1 year, maximum of \$10,000 fine); 20 V.S.A. § 1945 (Unlawful tampering with DNA samples, up to 3 years, maximum of \$10,000 fine).
Virginia	Yes; § 19.2-310.6 (Unauthorized uses of DNA data bank; forensic samples; penalties: unauthorized dissemination, Class 3 Misdemeanor, maximum of \$500 fine; unauthorized dissemination, receipt or use, Class 1 Misdemeanor, up to 12 months, maximum of \$2,500 fine).
Washington	Yes; § 43.43.810 (Obtaining information by false pretenses — Unauthorized use of information — Falsifying records — Penalty; Misdemeanor, up to 90 days, maximum of \$1,000 fine).
West Virginia	Yes; § 15-2B-12 (Confidentiality; unauthorized uses of DNA databank; penalties; Misdemeanor, up to 1 year, fine of \$50 to \$500); § 15-2B-13 (Neglect of duties; destruction of samples; penalties; neglect of duties, Misdemeanor, up to 60 days, \$50 to \$200 fine; destruction of sample, Misdemeanor, up to 1 year, \$50 to \$500 fine).
Wisconsin	Yes; § 165.77(5) (Unauthorized dissemination, up to 30 days, maximum of \$500 fine).
Wyoming	Yes; § 7-19-404(d) (Access to database; information authorized to be stored; unauthorized disclosure, obtaining or attempting to obtain without authorization, tampering or attempting to tamper, Misdemeanor, up to 6 months, maximum of \$750 fine).

Source: Virginia State Crime Commission staff analysis.

## APPENDIX J

### DNA Sample Collection from Adults Upon Conviction for Sexual and Non-Sexual Misdemeanors by State (Includes District of Columbia)

Jurisdiction	Relevant Statutes	Sexual Misdemeanor Offenses Upon Conviction	Non-Sexual Misdemeanor Offenses Upon Conviction
Alabama	§§ 36-18-25, 36-18-24, 36-18-26, 36-18-28, 36-18-29	DNA is taken at arrest. See § 36-18-25(c)(1).	Yes. Criminally Negligent Homicide (§ 13A-6-4); Assault in the third degree (§ 13A-6-22); Menacing (§ 13A-6-23); Reckless Endangerment (§ 13A-6-24); Criminal Coercion (§ 13A-6-25); Unlawful Imprisonment in the third degree (§ 13A-6-41); Unlawful Imprisonment in the second degree (§ 13A-6-42); Stalking in the second degree (§ 13A-6-90.1); Domestic Violence in the third degree (§ 13A-6-132); Interference with a Domestic Violence Emergency Call (§ 13A-6-137); Violation of a Domestic Violence Protective Order (§ 13A-6-142); Business Engaged in Escort Service Required to Register with the Secretary of State (§ 13A-6-184); Elder Abuse and Neglect in the third degree (§ 13A-6-194); Financial Exploitation of the Elderly in the third degree (§ 13A-6-197); Bestiality (§ 13A-6-221); Attempt, Solicitation, or Conspiracy to commit any of the aforementioned misdemeanors (§ 36-18-24).

Jurisdiction	Relevant Statutes	Sexual Misdemeanor Offenses Upon Conviction	Non-Sexual Misdemeanor Offenses Upon Conviction
Alaska	§§ 44.41.035, 11.56.762	Yes. DNA is statutorily authorized to be taken at both arrest and conviction. <i>See</i> § 44.41.035(b)(1).	Yes. DNA is statutorily authorized to be taken at both arrest and conviction. Assault in the fourth degree (§ 11.41.230); Reckless Endangerment (§ 11.41.250); Stalking in the second degree (§ 11.41.270); Custodial Interference in the second degree (§ 11.41.330); Attempt or Solicitation to commit a crime against person (§ 44.41.035 (s)(2)).
Arizona	§§ 13-610, 8-238	DNA is taken at arrest. <i>See</i> A.R.S. § 13-610(O)(3).	DNA is taken at arrest. <i>See</i> A.R.S. §§ 13-610(O)(3) and 13-610(G).
Arkansas	§§ 12-12-1109, 12-2-1103, 12-12-1006, 9-27-357	Yes. <i>See</i> § 12-12-1103(9).	Yes, if a repeat offense. <i>See</i> §§ 12-12-1103(9) and (10). Any misdemeanor involving violence that meets the definition of a repeat offense requires the taking of a DNA sample.
California	Penal Code §§ 296, 296.1, 299	Yes. <i>See</i> § 296(3).	No.
Colorado	§§ 16-23-103, 16-23-105, 16-11-102.4, 19-2-925.6	Yes. <i>See</i> § 16-11-102.4.	No
Connecticut	§§ 54-102g, 54-102k, 54-102l	Yes. <i>See</i> § 54-102g(b).	Yes. <i>See</i> § 54-102g(b), (c), (e), (f). Any criminal offense where the victim is a minor requires a DNA sample upon conviction.
Delaware	Tit. 29 § 4713	Yes. <i>See</i> Tit. 29 § 4713 (b) (1) and Tit. 11, Chapter 5, subchapter II, subpart D.	Yes. Endangering the Welfare of a Child (11 Del. C. § 1102); Child Abuse in the third degree (11 Del. C. § 1103); Crime Against a Vulnerable Adult (11 Del.C. § 1105); Unlawfully Dealing with a Child (11 Del. C. § 1106); Endangering Children (11 Del. C. § 1107); Criminal Nonsupport (11 Del. C. § 1113); Body Piercing, Tattooing or Branding (11 Del. C. § 1114); Tongue-splitting (11 Del. C. § 1114A).

Jurisdiction	Relevant Statutes	Sexual Misdemeanor Offenses Upon Conviction	Non-Sexual Misdemeanor Offenses Upon Conviction
District of Columbia	§ 22-4151, 34 U.S.C.S. § 40703, 34 USCS § 12592(d)(1)(B)(ii)	Yes. <i>See</i> § 22-4151.	No.
Florida	§ 943.325	Yes. <i>See</i> § 943.325(g). Some of the misdemeanor crimes listed are of a sexual nature, although they may fall under a section of the Florida statutes that is not specifically dedicated to sex crimes. All of the misdemeanors listed in the above section, including those of a sexual nature, are also listed under the non-sexual misdemeanor offenses upon conviction column.	Yes. Stalking (§ 784.048); Voyeurism (§ 810.14); Obscene/Lewd Materials (§ 847.011); Exposing Minors to Harmful Motion Pictures, etc. (§ 847.013); Computer Pornography, etc. (§ 847.0135(6)); Direct Observation/Videotaping of Customers by Merchant in Dressing Room, etc. (§ 877.26); Gang Related Offenses (§ 874.04).
Georgia	§§ 35-3-160, 35-3-164, 35-3-165	No.	No.
Hawaii	§§ 844D-31, 844D-39, 844D-71, 844D-72, 844D-112, 844D-113, 844D-114, 846E-1	Yes. <i>See</i> §§ 844D-39, 846E-1.	No.
Idaho	§§ 19-5506, 19-5513, 19-5514	No. <i>See</i> § 18-8304.	No.
Illinois	730 § 5/5-4-3	Yes. <i>See</i> 730 Ill. Comp. Stat. 5/5-4-3(a) (2018).	No.
Indiana	§§ 10-13-6-10, 10-13-6-18, 10-13-6-21, 10-13-6-22	No.	No.

Jurisdiction	Relevant Statutes	Sexual Misdemeanor Offenses Upon Conviction	Non-Sexual Misdemeanor Offenses Upon Conviction
Iowa	Tit. III §§ 81.2, 81.6, 81.9	Yes.	Yes. Aggravated misdemeanors, which include sexual and non-sexual offenses, <i>see</i> § 81.2. Examples of non-sexual aggravated misdemeanors include Theft in the Third Degree (§ 714.293); Assault Using/Displaying Dangerous Weapon (§ 708.2(3)); Tampering with Records (§ 715A.5); Prostitution (§ 725.1).
Kansas	§ 21-2511	DNA taken at arrest, unless incarcerated on May 2, 1991 for a crime committed prior to that date, <i>see also</i> § 21-2511(d). <i>See</i> § 21-2511(a)(1).	Any person convicted as an adult and who was incarcerated on May 2, 1991, for a crime committed prior to May 2, 1991, shall be required to submit a sample prior to final discharge or conditional release, <i>see</i> § 21-2511(d). Cruelty to animals (§ 21-6412); Criminal restraint (§ 21-5411); Buying Sexual Relations (§ 21-6421); Attempt, Conspiracy, or Solicitation to commit the aforementioned misdemeanors (§ 21-2511(a)(10)).
Kentucky	§§ 17.170, 17.175, 17.510, 635.510	Yes. <i>See</i> §§ 17.170 and 17.510.	No.



Jurisdiction	Relevant Statutes	Sexual Misdemeanor Offenses Upon Conviction	Non-Sexual Misdemeanor Offenses Upon Conviction
Louisiana	§§ 15:603, 15:609, 15:614, 15:618	No. <i>See</i> §§ 15:603(10) and 14:43.1.1.	Yes. <i>See</i> § 15:603(10); Battery of Police Officer (§ 14:34.2); Battery of School Teacher (§ 14:34.3); Battery of Recreation Athletic Contest Official (§ 14:34.4); Battery of Correctional Facility Employee (§ 14:34.5); Simple Battery (§ 14:35); Battery of Child Welfare or Adult Protective Service Worker (§ 14:35.1); Simple Battery of Persons with Infirmities (§ 14:35.2); Domestic Abuse Battery (§ 14:35.3); Unlawful Use of Laser on Police Officer (§ 14:37.3); Simple Assault (§ 14:38); Assault on a School Teacher (§ 14:38.2); Stalking (§ 14:40.2); Identity Theft (§ 14:67.16); Prostitution (§ 14:82); Soliciting for Prostitution (§ 14:83); Inciting Prostitution (§ 14:83.1); Prostitution by Massage (§ 14:83.3); Massage/Sexual Conduct Prohibited (§ 14:83.4); Letting Premises for Prostitution (§ 14:85); Contributing to Delinquency of Juvenile (§ 14:92); Hate Crimes (§ 14:107.2); Peeping Tom (§ 14:284); Inciting to Riot (§ 14:329.2).

Jurisdiction	Relevant Statutes	Sexual Misdemeanor Offenses Upon Conviction	Non-Sexual Misdemeanor Offenses Upon Conviction
Maine	Tit. 25 §§ 1574, 1577, 1578	Yes. Maine has a lesser included offense provision which could cover misdemeanors, <i>see</i> § 1574(4)(N) and (5)(H). Additionally, Unlawful Sexual Contact (§ 255-A) and Criminal Restraint (§ 302) have misdemeanor gradations, although Criminal Restraint specifically stopped applying to adults after October 1, 2001, and only applies to juveniles after 2003. However, after 2003, adults could still be required to give DNA for misdemeanor Criminal Restraint by virtue of the lesser included offense provision.	Possibly. Maine has a lesser included offense provision which could cover misdemeanors, <i>see</i> § 1574(4)(N) and (5)(H).
Maryland	Public Safety §§ 2-504, 2-511, 2-512	No. <i>See</i> Criminal Law § 3-308.	Yes. Burglary in the Fourth Degree (Criminal Law § 6-205); Breaking and Entering Motor Vehicle (Criminal Law § 6-206), <i>see</i> Public Safety § 2-504(a) (1) and (2).
Massachusetts	Ch. 22E, § 3, 12, 13, 14, 15	No.	No.
Michigan	§§ 750.520m, 28.176, 803.307a, 803.225a	Yes. As listed in § 750.520m(1)(b)(i-iv).	Yes. Peeping/Indecent Conduct in Public/Loitering in House of Prostitution (§ 750.167(1)(c), (f) or (i)); Indecent Exposure (§ 750.335a(1)); Prostitution (§ 750.451(1) or (2)); Leasing House for Prostitution (§ 750.454). Note that Indecent Exposure is treated as a sex crime for purposes of Michigan's Sex Offenders Registration Act.

Jurisdiction	Relevant Statutes	Sexual Misdemeanor Offenses Upon Conviction	Non-Sexual Misdemeanor Offenses Upon Conviction
Minnesota	§§ 299C.105, 609.117	Possibly. <i>See</i> § 609.117; “[T]he court sentences a person charged with committing or attempting to commit a felony offense and the person is convicted of that offense <i>or of any offense arising out of the same set of circumstances</i> ” (emphasis added).	Possibly. <i>See</i> § 609.117; “[T]he court sentences a person charged with committing or attempting to commit a felony offense and the person is convicted of that offense <i>or of any offense arising out of the same set of circumstances</i> ” (emphasis added).
Mississippi	§§ 47-5-183, 45-33-23, 45-33-37, 45-47-1	Yes. Obscene Electronic Communications (§ 97-29-45), <i>see</i> §§ 45-33-23(h) and 45-33-37.	No.
Missouri	§ 650.055	Yes. But only if victim is a minor. <i>See</i> § 650.055(1)(4) and § 589.400(1)(1)-(2).	No.
Montana	§§ 44-6-103, 44-6-107	Yes. But only if the offense results in registration as a Sex Offender under § 46-23-502.	No.
Nebraska	§§ 29-4106, 4103, 4109, 4110, 4111	Yes. If specified in § 29-4103(7).	Yes, if specified in § 29-4103(7). Stalking (§ 28-311.02-.05); False Imprisonment in the second degree (§ 28-315); Attempt/Conspiracy/Solicitation to commit Stalking (§ 28-311.02-.05), False Imprisonment in the first degree (§ 28-314), False Imprisonment in the second degree (§ 28-315), or Knowing and Intentional Sexual Abuse of a Vulnerable Adult or Senior Adult (§ 28-386(1)(c)); Sex Offender Registration Act (§ 29-4011).
Nevada	§§ 176.0913, 176.09116, 176.09123, 176.09125, 176.09129	Yes. If specified in NRS § 179D.097.	Yes. False Imprisonment (§ 200.460); Abuse of Older/Vulnerable Person (§ 200.5099); Stalking (§ 200.575); Attempt/Conspiracy to commit the aforementioned crimes.

Jurisdiction	Relevant Statutes	Sexual Misdemeanor Offenses Upon Conviction	Non-Sexual Misdemeanor Offenses Upon Conviction
New Hampshire	§§ 651-C:2, 651-C:4, 651-C:5	Yes. If specified in RSA 651-B:1, V.	Yes. False Imprisonment (§ 633:3); Endangering Welfare of Child or Incompetent (§ 639:3); Attempt/Conspiracy/Solicitation to commit aforementioned; § 651-C:2 indicates “any offense against a child as defined in RSA 651-B:1, VII,” and the only non-sexual offenses appear to be ones listed here.
New Jersey	§§ 53:1-20.20, 53:1-20.25, 53:1-20.26, 2C:1-4	No.	Yes. Domestic Violence Assault (§ C.2C:25-19); Prostitution (§ 2C:34-1); Any Disorderly Persons Offense Relating to Narcotics or Dangerous Drugs which requires person to be fingerprinted (§ C.53:1-18.1, but excludes 50 g. or less of marijuana or 5 g. or less of hashish); Any other disorderly persons offense requiring a person to be fingerprinted, excluding shoplifting (R.S. § 53:1-15).
New Mexico	§§ 29-16-6, 29-16-3, 29-16-10, 29-16-12, 29-3-10	Yes. If specified in § 29-11A-3(I).	No.
New York	Exec. Law §§ 995-c, 995, 995-f	Yes.	Yes, all Class A, B, and unclassified misdemeanors. However, only under certain circumstances for Criminal Possession of Marijuana in the fifth degree (§ 221.10) (“only a person convicted under subdivision two of such section, or a person convicted under subdivision one of such section who stands previously convicted of any crime as defined in subdivision six of section 10.00 of the penal law,” see § 995(7)).
North Carolina	§§ 15A-266.3A, 15A-266.4, 15A-266.11, 7B-2201, 7B-1604	Yes. If specified in § 15A-266.3A(f) and not previously obtained pursuant to § 15A-266.3A. See § 15A-266.4.	Yes. See § 15A-266.4(b) and § 15A-266.3A(f). Assaults on Handicapped Persons (§ 14-32.1); Secretly peeping into room occupied by another person (§ 14-202); Cyberstalking (§ 14-196.3).

Jurisdiction	Relevant Statutes	Sexual Misdemeanor Offenses Upon Conviction	Non-Sexual Misdemeanor Offenses Upon Conviction
North Dakota	§§ 31-13-03, 31-13-07, 31-13-09, 31-13-10	Yes. <i>See</i> § 31-13-03(2).	Generally, no. But possible under certain limited circumstances, although the conviction may have initially been a felony, <i>see</i> § 31-13-03(7).
Ohio	§§ 2901.07, 2151.356, 2151.357, 2151.358, 2152.74, 2953.52, 2953.54, 2953.55, 2953.57, 2953.59, 2953.60, 2927.15	Yes. As specified in § 2901.07(D)(4).	Yes. "A misdemeanor violation of any law that arose out of the same facts and circumstances and same act as did a charge against the person of a violation of [Aggravated Murder (§ 2903.01), Murder (§ 2903.02), Kidnapping (§ 2905.01), Rape (§ 2907.02), Sexual Battery (§ 2907.03), Unlawful Sexual Conduct with a Minor (§ 2907.04), Gross Sexual Imposition (§ 2907.05), or Aggravated Burglary (§ 2911.11)] of the Revised Code that previously was dismissed or amended or as did a charge against the person of a violation of [Felonious Sexual Penetration (§ 2907.12)] of the Revised Code as it existed prior to September 3, 1996, that previously was dismissed or amended," <i>see</i> § 2901.07(D); Interference with Custody 9 (§ 2919.23), formerly Child Stealing (§ 2905.04).

Jurisdiction	Relevant Statutes	Sexual Misdemeanor Offenses Upon Conviction	Non-Sexual Misdemeanor Offenses Upon Conviction
Oklahoma	Tit. 74 Ch. 5 § 150.27a, Tit. 22 Ch. 1 § 18	Yes. If the offense requires registration pursuant to the Sex Offenders Registration Act. <i>See</i> §§ 150.27a and 582(A).	Yes; Subject to Availability of Funds: Assault and Battery (21 Okl. Stat. § 644(A) and (B)); Domestic Abuse (21 Okl. Stat. § 644(C)); Stalking (21 Okl. Stat. § 1173); Possession of a Controlled Substance under Schedule IV (63 Okl. St. § 2-402); Outraging Public Decency (21 Okl. St. § 22); Resisting Arrest (21 Okl. St. § 268); Escaping or Attempting to Escape (21 Okl. St. § 444); Eluding a Police Officer (21 Okl. St. § 540A); Peeping Tom (21 Okl. St. § 1171); Pointing a Firearm (21 Okl. St. § 1279); Threatening an Act of Violence (21 Okl. St. § 1378); Breaking and Entering a Dwelling Place (21 Okl. St. § 1438); Destruction of Property (21 Okl. St. § 1760); Negligent Homicide (47 Okl. St. § 11-903); Causing a Personal Injury Accident while DUI (47 Okl. St. § 11-904). Note that the law covering these misdemeanors will go into effect on November 1, 2017 - the current law covers all of these crimes plus Unlawful Carry of a Firearm (21 Okl. St. § 1272), Illegal Transport of a Firearm (21 Okl. St. § 1289.13) and Discharging of a Firearm (21 Okl. St. § 1364).
Oregon	§§ 137.076, 419C.473, 181A.155, 192.543	Yes. If specified in § 137.07(1).	No.
Pennsylvania	Tit. 44 Ch. 23 §§ 2303, 2316, 2321, 2332	Yes. If specified in Tit. 44 Ch. 23 § 2303.	Yes. Luring Child into Motor Vehicle or Structure (18 Pa.C.S. § 2910) or attempt to commit this offense.
Rhode Island	§§ 12-1.5-8, 12-1.5-13, 12-1.5-15	No.	No.

Jurisdiction	Relevant Statutes	Sexual Misdemeanor Offenses Upon Conviction	Non-Sexual Misdemeanor Offenses Upon Conviction
South Carolina	§§ 23-3-620, 23-3-650, 23-3-660	DNA taken upon arrest if specified in § 23-3-620(A) and if sample was not previously taken at arrest or is otherwise not suitable. Eavesdropping/Peeping (§ 16-17-470) are treated as sex crimes, <i>see</i> § 23-3-430.	DNA taken upon arrest if specified in § 23-3-620(A) and if sample was not previously taken at arrest or is otherwise not suitable.
South Dakota	§§ 23-5A-1 through 23-5A-8, 23-5A-26, 23-5A-28	Yes. If not otherwise previously obtained. <i>See</i> §§ 23-5A-1(8) and 22-22. <i>See also</i> §§ 23-5A-4 through 23-5A-5.1, 23-5A-6, and 23-5A-7.	No. <i>See</i> § 23-5A-1(8).
Tennessee	§§ 40-35-321, 40-32-101	Yes. If required to register as sex offender. <i>See</i> §§ 40-35-321(d)(1) and 40-39-202(20)(A).	No.

Jurisdiction	Relevant Statutes	Sexual Misdemeanor Offenses Upon Conviction	Non-Sexual Misdemeanor Offenses Upon Conviction
Texas	Govt. Code Ann. §§ 411.1471, 411.151, 411.153; Tex. Code Crim. Prod. Art. 55.01, 55.02	Yes. If specified by § 411.1471(a)(3).	Yes. "A) under Title 5, Penal Code, other than an offense described by Subdivision (1), that is punishable as a Class A misdemeanor or any higher category of offense, except for an offense punishable as a Class A misdemeanor under [Unlawful Restraint (§ 20.02), Assault (§ 22.01), or Deadly Conduct (§22.05), Penal Code; OR, (B) Indecent Assault (§ 21.08), Enticing a Child (§ 25.04), Prostitution (§ 43.02(b)), Promotion of Prostitution (§ 43.03), or Sale, Distribution or Display of Harmful Material to Minor (§ 43.24), Penal Code]," <i>see</i> § 411.1471(3)(A) and (B). Title 5 covers Offenses Against the Person.
Utah	§§ 53-10-403, 403.5, 404, 406	Yes. If specified in § 53-10-403(2).	Yes. Any Class A Misdemeanor, <i>see</i> § 53-10-403(1) and (2).
Vermont	Tit. 20 §§ 1932, 1933, 1940, 1941, 1945	Yes. If crime results in requirement to register as sex offender. <i>See</i> Tit. 20 § 1932(12)(C) and Tit. 13 § 5401(10).	Yes. Domestic Assault (13 V.S.A. § 1042); Stalking (13 V.S.A. § 1062); Reckless Endangerment (13 V.S.A. § 1025); Violation of Abuse Prevention Order (13 V.S.A. § 1030, but does not include those issued pursuant to 13 V.S.A. § 1104 or 33 V.S.A. § 6936, both of which are Emergency Relief); Abuse, Neglect, and Exploitation of Vulnerable Adults (any misdemeanor violation of 13 V.S.A. chapter 28); Attempt to commit any of the aforementioned offenses; "any other offense, if, as part of a plea agreement in an action in which the original charge was a crime listed in this subdivision and probable cause was found by the court, there is a requirement that the defendant submit a DNA sample to the DNA data bank," <i>see</i> 20 V.S.A. 1932(12).



Jurisdiction	Relevant Statutes	Sexual Misdemeanor Offenses Upon Conviction	Non-Sexual Misdemeanor Offenses Upon Conviction
Virginia	§§ 19.2-310.2 19.2-310.7	Yes.	Yes. Violation of Protective Order (§ 16.1-253.2); Stalking (§ 18.2-60.3); Violation of Protective Order (§ 18.2-60.4); Sexual Battery (§ 18.2-67.4); Infected Sexual Battery § 18.2-67.4:1); Sexual Abuse of Child Under 15 (§ 18.2-67.4:2); Attempted Sexual Battery (§ 18.2-67.5); Unauthorized Use of Animal, Aircraft, Vehicle or Boat (§ 18.2-102); Entering Property of Another for Purpose of Damaging It (§ 18.2-121); Peeping (§ 18.2-130); Penetration of Mouth of Child with Lascivious Intent (§ 18.2-370.6); Indecent Exposure (§ 18.2-387); Obscene Sexual Display (§ 18.2-387.1); Fleeing from Law Enforcement Officer (§ 18.2-479.1); Effective July 1, 2018 Assault and Battery (§ 18.2-57) and Trespassing (§ 18.2-119) will be added.
Washington	Rev. Code Wash. §§ 43.43.754, 43.43.810, 5.70.020; WAC § 446-75-070	Yes. If specified by § 43.43.754.	Yes. Assault in the Fourth Degree (Domestic Violence) (§ 9A.36.041); Assault in the Fourth Degree (Sexual Motivation) (§ 9A.36.041, <i>see also</i> § 9.94A.835); Communication with Minor for Immoral Purposes (§ 9.68A.090); Custodial Sexual Misconduct in the Second Degree (§ 9A.44.170); Failure to Register (§§ 9A.44.130 and 9A.44.132); Harassment (§ 9A.46.020); Patronizing a Prostitute (§ 9A.88.110); Sexual Misconduct with a Minor in the Second Degree (§ 9A.44.096); Stalking (§ 9A.46.110); Violation of a Sexual Assault Protection Order under chapter 790.

Jurisdiction	Relevant Statutes	Sexual Misdemeanor Offenses Upon Conviction	Non-Sexual Misdemeanor Offenses Upon Conviction
West Virginia	§§ 15-2B-6, 15-2B-11, 15-2b-12, 15-2b-13	Yes. If registration as sex offender is required. <i>See</i> § 15-2B-3(12) and § 15-12-2(b)	Yes. Assault (§ 61-2-10b(e)); Child Abuse with Injury/Risk of Injury (§ 61-8D-3(d)(1) and (2)); Child Neglect with Injury/Risk of Injury (§ 61-8D-4(d)(1) and (2)); Presentation of False Information Regarding Child's Injuries (§ 61-8D-7); Contributing to Delinquency of Child (§ 61-8D-10); Involuntary Manslaughter (§ 61-2-5); Extortion (§ 61-2-13).
Wisconsin	§§ 973.047, 165.76, 165.77, 165.84, 938.34(15)	Yes.	Yes.
Wyoming	§§ 7-19-403, 7-19-404, 7-19-405	No.	No.

Source: Virginia State Crime Commission staff analysis.

## Endnotes

<sup>1</sup> This request stemmed from House Joint Resolution 711, which was introduced by Delegate David J. Toscano during the Regular Session of the 2017 General Assembly and was left in the House Committee on Rules.

<sup>2</sup> VA. CODE § 19.2-310.2(A) (2018). The list of 14 misdemeanors includes: sexual battery (§ 18.2-67.4); sexual abuse of a child under 15 years of age (§ 18.2-67.4:2); attempt to commit sexual battery (§ 18.2-67.5(C)); peeping or spying into dwelling or enclosure (§ 18.2-130); penetration of the mouth of a child with lascivious intent (§ 18.2-370.6); violation of a domestic protective order (§ 16.1-253.2); stalking (§ 18.2-60.3); violation of a protective order (§ 18.2-60.4); infected sexual battery (§ 18.2-67.4:1); unauthorized use (§ 18.2-102); unlawful entry (§ 18.2-121); indecent exposure (§ 18.2-387); obscene sexual display (§ 18.2-387.1); and, resisting arrest (§ 18.2-479.1).

<sup>3</sup> Staff defined “violent felony or certain burglary offenses” from the list of offenses requiring a DNA sample upon arrest per VA. CODE § 19.2-310.2:1 (2017), which includes VA. CODE §§ 19.2-297.1, 18.2-31, 18.2-89, 18.2-90, 18.2-91, and 18.2-92 (2017).

<sup>4</sup> VA. CODE § 18.2-57 (2018).

<sup>5</sup> VA. CODE § 18.2-57.2 (2018).

<sup>6</sup> VA. CODE § 18.2-119 (2018).

<sup>7</sup> VA. CODE § 18.2-96 (2018).

<sup>8</sup> VA. CODE § 18.2-137 (2018).

<sup>9</sup> VA. CODE § 18.2-119 (2018).

<sup>10</sup> See VA. CODE § 19.2-390(A)(1)(d) (2018). Fingerprints were not required for trespassing convictions under VA. CODE § 18.2-119. As such, the accurate number of convictions are likely not reported and, thus, undercounted on criminal histories because fingerprints are required for CCRE inclusion. Fingerprints will be required for trespassing convictions under VA. CODE § 18.2-119 effective July 1, 2018.

<sup>11</sup> VA. CODE § 18.2-460 (2018).

<sup>12</sup> VA. CODE § 18.2-103 (2018).

<sup>13</sup> VA. CODE § 19.2-310.2(A) (2018).

<sup>14</sup> A “hit” occurs when there is an association between an unsolved profile and a convicted offender/arrestee, or between two or more cases that were previously unknown to be linked. See VIRGINIA DEPARTMENT OF FORENSIC SCIENCE, *What does a CODIS hit mean?*, available at [http://www.dfs.virginia.gov/question\\_answer/what-does-a-codis-hit-mean/](http://www.dfs.virginia.gov/question_answer/what-does-a-codis-hit-mean/).

<sup>15</sup> VA. CODE § 18.2-57 (2018).

<sup>16</sup> VA. CODE § 18.2-57.2 (2018).

<sup>17</sup> VA. CODE § 18.2-119 (2018).

<sup>18</sup> VA. CODE § 18.2-96 (2018).

<sup>19</sup> VA. CODE § 18.2-137 (2018).

<sup>20</sup> VA. CODE § 18.2-460 (2018).

<sup>21</sup> VA. CODE § 18.2-103 (2018).

<sup>22</sup> 2018 Va. Acts ch. 543, 544.

<sup>23</sup> 2018 Va. Acts ch. 51, 178.

<sup>24</sup> See, e.g., T. Rees Shapiro and Justin Jouvenal, *Jesse Matthew Pleads Guilty in Slayings of College Students*, The Washington Post, March 2, 2016, available at [https://www.washingtonpost.com/local/public-safety/jesse-matthew-to-appear-in-court-for-plea-agreement-hearing/2016/03/01/f6b7093a-dfd8-11e5-846c-10191d1fc4ec\\_story.html?noredirect=on&utm\\_term=.59c94a7eaed8](https://www.washingtonpost.com/local/public-safety/jesse-matthew-to-appear-in-court-for-plea-agreement-hearing/2016/03/01/f6b7093a-dfd8-11e5-846c-10191d1fc4ec_story.html?noredirect=on&utm_term=.59c94a7eaed8).

<sup>25</sup> VA. CODE § 18.2-119 (2018).

<sup>26</sup> See, e.g., Matt Talhelm, *Grahams Ask Senate Committee to Expand DNA Collecting* (John Early ed.), NBC29.COM, Feb 12, 2018, <http://www.nbc29.com/story/37372205/grahams-speak-to-senate-courts-of-justice-committee-01-29-2018>.

<sup>27</sup> 34 U.S.C. § 12592 (2018). Formerly 42 U.S.C. § 14132.

<sup>28</sup> See Appendix A for the overall structure of the DNA Index System in Virginia.

<sup>29</sup> See FBI, *Frequently Asked Questions on CODIS and NDIS*, <https://www.fbi.gov/services/laboratory/biometric-analysis/codis/codis-and-ndis-fact-sheet>.

<sup>30</sup> See FBI, *CODIS – NDIS Statistics*, <https://www.fbi.gov/services/laboratory/biometric-analysis/codis/ndis-statistics>.

<sup>31</sup> 1990 Va. Acts ch. 669.

<sup>32</sup> VA. CODE § 19.2-310.2(A) (2018).

<sup>33</sup> VA. CODE § 19.2-310.2:1 (2018).

<sup>34</sup> VA. CODE § 19.2-310.2(A) (2018).

<sup>35</sup> VA. CODE § 16.1-299.1 (2018).

<sup>36</sup> See Appendix B for an outline of Virginia's requirements for DNA sample submission. For a general overview of the DNA sample collection process from arrestees and convicted individuals, see COMMONWEALTH OF VIRGINIA COMPENSATION BOARD, *Collecting Buccal DNA Samples for Virginia's DNA Data Bank*, <http://www.scb.virginia.gov/DNA/dnaguidance.pdf>.

<sup>37</sup> Sex offender and crimes against minors registry offenses, which includes some misdemeanor crimes, were added in FY07. 2007 Va. Acts ch. 528.

<sup>38</sup> 2011 Va. Acts ch. 247.

<sup>39</sup> VA. CODE § 18.2-67.4 (2018).

<sup>40</sup> VA. CODE § 18.2-67.4:2 (2018).

<sup>41</sup> VA. CODE § 18.2-67.5(C) (2018).

<sup>42</sup> VA. CODE § 18.2-130 (2018).

<sup>43</sup> VA. CODE § 18.2-370.6 (2018).

<sup>44</sup> 2015 Va. Acts ch. 209, 437.

<sup>45</sup> VA. CODE § 16.1-253.2 (2018).

<sup>46</sup> VA. CODE § 18.2-60.3 (2018).

<sup>47</sup> VA. CODE § 18.2-60.4 (2018).

<sup>48</sup> VA. CODE § 18.2-67.4:1 (2018).

<sup>49</sup> VA. CODE § 18.2-102 (2018).

<sup>50</sup> VA. CODE § 18.2-121 (2018).

<sup>51</sup> VA. CODE § 18.2-387 (2018).

<sup>52</sup> VA. CODE § 18.2-387.1 (2018).

<sup>53</sup> VA. CODE § 18.2-479.1 (2018).

<sup>54</sup> There were 297 samples received by DFS as of FY90, which has now grown to 576,262 total samples received by DFS as of FY17. It should be noted that samples received by DFS is a larger number than what is ultimately reported as the total number of actual samples in the database as reported on their website, see VIRGINIA DEPARTMENT OF FORENSIC SCIENCE, *Databank Statistics*, <http://www.dfs.virginia.gov/about-dfs/dna-databank-statistics/>.

<sup>55</sup> See Appendix C for the total DNA samples received by type in Virginia's Databank for the past six fiscal years.

<sup>56</sup> Note that Crime Commission staff purposefully used the term “association” rather than “correlation” in reporting its findings. While it would not be incorrect to say “correlation,” it was avoided to discourage the direct implication that specific misdemeanor convictions and felony convictions were *statistically* correlated. Correlation, statistically speaking, is defined as a measure of the strength of the linear relationship between two random variables. Initially, staff had planned to conduct a bivariate correlation analysis to determine strengths of relationships between the variables. Unfortunately, many of the assumptions required for this type of bivariate analysis to be performed were not met, including the following: sample size, linearity of data, and data independency. However, this does not preclude an association from existing between the variables.

<sup>57</sup> This analysis played a large role in determining the nine misdemeanors that were ultimately added in FY16.

<sup>58</sup> A “sentencing/conviction event” is defined by the VCSC as “the conviction/sentencing or the delinquent adjudication of an offender in a particular court at a particular time for one or more offenses. If an offender is convicted/sentenced or adjudicated delinquent in different courts, before different judges, or at different times, each court appearance is counted as a separate event.” See VIRGINIA CRIMINAL SENTENCING COMMISSION, *Virginia Sentencing Guidelines* (2017), available at <http://bycell.mobi/wap/default/item.jsp?entryid=ECMTg20Q==&itemid=42097&t=1528823947339#m>.

<sup>59</sup> In order to narrow the list of misdemeanors, Crime Commission staff adhered to the following threshold: at least 5% of the individuals convicted of a misdemeanor had a subsequent felony sentencing event within 10 years of the misdemeanor conviction.

<sup>60</sup> FY17 data was preliminary at the time of the analysis.

<sup>61</sup> Crime Commission staff defined “violent felony or certain burglary offenses” from the list of offenses requiring a DNA sample upon arrest per VA. CODE § 19.2-310.2:1, which includes VA. CODE §§ 19.2-297.1, 18.2-31, 18.2-89, 18.2-90, 18.2-91, and 18.2-92.

<sup>62</sup> VA. CODE § 18.2-57 (2018).

<sup>63</sup> VA. CODE § 18.2-57.2 (2018).

<sup>64</sup> VA. CODE § 18.2-119 (2018).

<sup>65</sup> VA. CODE § 18.2-96 (2018).

<sup>66</sup> VA. CODE § 18.2-137 (2018).

<sup>67</sup> VA. CODE § 18.2-460 (2018).

<sup>68</sup> VA. CODE § 18.2-103 (2018).

<sup>69</sup> VA. CODE § 18.2-266 (2018).

<sup>70</sup> See supra note 61.

<sup>71</sup> 72 of these individuals had more than one sentencing event in FY16 that included a violent felony or certain burglary offense.

<sup>72</sup> 338 records were determined to be invalid due to reasons such as the FY16 target sentencing event not appearing on criminal history, incorrect or nonexistent matches between syntax and query, and if the individual was or likely was a juvenile at the time of the FY16 target sentencing event. There were 10 individuals removed from the analysis because they were or likely were a juvenile at the time of the FY16 target sentencing event.

<sup>73</sup> Racial categories were based on the definitional categories provided within the Virginia State Police’s CCH database.

<sup>74</sup> Of the 181 individuals not residing in Virginia, 34 resided in North Carolina; 33 in Maryland; and, 23 in D.C. The remainder were from other states.

<sup>75</sup> Criminal histories were downloaded by the Virginia State Police over a course of 2-3 weeks in June 2017.

<sup>76</sup> Since criminal histories were queried by the VSP in June 2017, it included criminal history activity occurring after the end of FY16 (June 30, 2016).

<sup>77</sup> It should also be noted that of the 2,753 individuals, 26% (727 of 2,753) had no prior felony or misdemeanor convictions; and, 13% (360 of 2,753) had no prior felony convictions, felony charges, misdemeanor convictions, or misdemeanor charges.

<sup>78</sup> VA. CODE § 18.2-57 (2018).

<sup>79</sup> VA. CODE § 18.2-57.2 (2018).

<sup>80</sup> VA. CODE § 18.2-96 (2018).

<sup>81</sup> VA. CODE § 18.2-119 (2018). Fingerprints were not required for trespassing. As such, the number of convictions are likely undercounted on criminal histories since fingerprints are required for CCRE inclusion. Fingerprints will be required for trespassing convictions under VA. CODE § 18.2-119 effective July 1, 2018.

<sup>82</sup> VA. CODE § 18.2-137 (2018).

<sup>83</sup> VA. CODE § 18.2-57 (2018).

<sup>84</sup> VA. CODE § 18.2-57.2 (2018).

<sup>85</sup> VA. CODE § 18.2-119 (2018).

<sup>86</sup> VA. CODE § 18.2-96 (2018).

<sup>87</sup> VA. CODE § 18.2-137 (2018).

<sup>88</sup> VA. CODE § 18.2-119 (2018).

<sup>89</sup> *See* VA. CODE § 19.2-390(A)(1)(d) (2018). Fingerprints were not required for trespassing convictions under VA. CODE § 18.2-119. As such, the number of convictions are likely undercounted on criminal histories because fingerprints are required for CCRE inclusion. Fingerprints will be required for trespassing convictions under VA. CODE § 18.2-119 effective July 1, 2018.

<sup>90</sup> VA. CODE § 18.2-460 (2018).

<sup>91</sup> VA. CODE § 18.2-103 (2018).

<sup>92</sup> VA. CODE § 19.2-310.2(A) (2018). The list of 14 misdemeanors includes: sexual battery (§ 18.2-67.4); sexual abuse of a child under 15 years of age (§ 18.2-67.4:2); attempt to commit sexual battery (§ 18.2-67.5(C)); peeping or spying into dwelling or enclosure (§ 18.2-130); penetration of the mouth of a child with lascivious intent (§ 18.2-370.6); violation of a domestic protective order (§ 16.1-253.2); stalking (§ 18.2-60.3); violation of a protective order (§ 18.2-60.4); infected sexual battery (§ 18.2-67.4:1); unauthorized use (§ 18.2-102); unlawful entry (§ 18.2-121); indecent exposure (§ 18.2-387); obscene sexual display (§ 18.2-387.1); and, resisting arrest (§ 18.2-479.1).

<sup>93</sup> *See* Appendix E for a breakdown of the total misdemeanor conviction samples received by DFS between FY03-FY18.

<sup>94</sup> *See* Appendix F for a breakdown of misdemeanor conviction samples received by DFS by offense type.

<sup>95</sup> *See supra* note 14.

<sup>96</sup> Personal correspondence with Mid-Atlantic Innocence Project, October 30, 2017. *See also* <https://www.innocenceproject.org/>.

<sup>97</sup> *See* Appendix G for an illustration of the types of investigations aided by the 26 misdemeanor sample hits.

<sup>98</sup> DNA Web accounts for all samples received by DFS. Each sample receives a unique DNA sample number and contains personally identifiable information. CODIS accounts for all unique samples (no double counts). CODIS does not contain any personally identifiable information, rather the only reference is a DNA sample number that links with the DNA Web.

<sup>99</sup> *See* Appendix H for a breakdown of CODIS indices for DNA samples in Virginia as of July 18, 2017.

<sup>100</sup> 34 U.S.C. § 12592 (2018).

- <sup>101</sup> See Appendix I for a breakdown of relevant statutes by state.
- <sup>102</sup> 34 U.S.C. § 12593 (2018).
- <sup>103</sup> VA. CODE § 19.2-310.6 (2018).
- <sup>104</sup> For the misdemeanor offenses, there were no cases concluded in General District Courts between CY05-FY16. For the felony offense, there were no cases concluded in Circuit Courts between FY00-FY16 nor in Pre-Sentence Investigation (PSI) data for felonies since 1985 for charges that resulted in a conviction.
- <sup>105</sup> See National Conference of State Legislatures, *Convicted Offenders Required to Submit DNA Samples*, <http://www.ncsl.org/Documents/cj/ConvictedOffendersDNALaws.pdf>.
- <sup>106</sup> See Appendix J for a Crime Commission staff analysis of whether DNA samples are collected upon conviction for sexual misdemeanor offenses by state. Note that four states collect DNA upon arrest for such offenses.
- <sup>107</sup> See Appendix J for a Crime Commission staff analysis of whether DNA samples are collected upon conviction for non-sexual misdemeanors by state. Note that an additional two states collect DNA upon arrest for such offenses.
- <sup>108</sup> N.Y. EXEC. LAW §§ 995 and 995-c (McKinney 2018). See also N.Y. PENAL LAW §§ 70.15 and 80.05 (McKinney 2018) for the maximum sentences of imprisonment and fines for Class A, B, and unclassified misdemeanors and for violations.
- <sup>109</sup> N.Y. PENAL LAW § 140.10(a) (McKinney 2018).
- <sup>110</sup> N.Y. PENAL LAW §§ 140.10(b), (c), and (d), and 140.15(2) (McKinney 2018).
- <sup>111</sup> N.Y. PENAL LAW §§ 140.10(e) and (f) (McKinney 2018).
- <sup>112</sup> N.Y. PENAL LAW § 140.10(g) (McKinney 2018).
- <sup>113</sup> N.Y. PENAL LAW § 140.15(1) (McKinney 2018).
- <sup>114</sup> N.Y. PENAL LAW § 140.05 (McKinney 2018).
- <sup>115</sup> 2005 N.Y. S.N. 8446.
- <sup>116</sup> 2011 N.Y. S.N. 6733.
- <sup>117</sup> Personal correspondence with the New York State Division of Criminal Justice Services and data provided on August 31, 2017.
- <sup>118</sup> See UTAH CODE ANN. § 53-10-403 (2018). See also UTAH CODE ANN. §§ 76-3-204 and 76-3-301 (2018) for the maximum sentences of imprisonment and fines for Class A, B, and C misdemeanors.
- <sup>119</sup> UTAH CODE ANN. § 76-6-206(3)(a) (2018).
- <sup>120</sup> See UTAH CODE ANN. §§ 76-6-206, 76-6-206.1, 76-6-206.2, 76-6-206.3, and 76-6-206.4 (2018).
- <sup>121</sup> Personal correspondence with the Utah Bureau of Forensic Services, July 2017. See also <https://forensicservices.utah.gov/testing-services/biology>.
- <sup>122</sup> WIS. STAT. § 165.76 (2018). See also WIS. STAT. §§ 939.51 and 939.52 (2018) for the classification and punishment of misdemeanor and forfeiture offenses.
- <sup>123</sup> WIS. STAT. § 943.13 (2018).
- <sup>124</sup> See WIS. STAT. §§ 943.14, 943.143, 943.145, and 943.15 (2018).
- <sup>125</sup> Personal correspondence with the State of Wisconsin Department of Justice-State Crime Laboratory Bureau and data provided on June 22, 2017.
- <sup>126</sup> VA. CODE § 18.2-57 (2018).
- <sup>127</sup> VA. CODE § 18.2-57.2 (2018).
- <sup>128</sup> VA. CODE § 18.2-119 (2018).
- <sup>129</sup> VA. CODE § 18.2-96 (2018).
- <sup>130</sup> VA. CODE § 18.2-137 (2018).
- <sup>131</sup> VA. CODE § 18.2-460 (2018).

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<sup>132</sup> VA. CODE § 18.2-103 (2018).

<sup>133</sup> VA. CODE § 18.2-57 (2018).

<sup>134</sup> VA. CODE § 18.2-119 (2018).

<sup>135</sup> 2018 Va. Acts ch. 543, 544.

<sup>136</sup> Informal surveys were sent to all regional jail administrators, Sheriffs, local community corrections agencies, and state probation offices.

<sup>137</sup> VA. CODE § 19.2-390(A)(1)(d) (2018).

<sup>138</sup> For additional information on the CCRE, *see*, VIRGINIA STATE POLICE, *Central Criminal Records Exchange*, [http://www.vsp.state.va.us/CJIS\\_CCRE.shtm](http://www.vsp.state.va.us/CJIS_CCRE.shtm).

<sup>139</sup> 2018 Va. Acts ch. 51, 178.



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# Pretrial Services Agencies

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## Executive Summary

In 2016, the Executive Committee of the Crime Commission requested staff to conduct a broad review of pretrial services agencies in Virginia.<sup>1</sup> The study was extended an additional year due to the extensive amount of information available on the topic. During the course of the study, staff attempted to answer many questions related to pretrial services agencies that had been raised by Crime Commission members and stakeholders, including the following:

- Who is responsible for the administration of pretrial services agencies?
- Are pretrial services agencies successful at ensuring public safety and appearance at court hearings and trial?
- Are statewide public safety and appearance rates available for defendants not under the supervision of a pretrial services agency?
- How does the presence of a pretrial services agency impact jail populations?
- How are pretrial services agencies funded?
- Do pretrial services agencies provide a recommendation to the court in regard to bond?
- What is the difference between the VPRAI-Revised and the checklist for bail determinations used by magistrates?
- How is a person placed on supervision with a pretrial services agency?
- Are pretrial services agencies being overused to supervise defendants for low-level offenses?
- How are risk levels disbursed across pretrial services placements?
- Is supervision by a pretrial services agency the same as probation?
- Are defendants charged any fees for pretrial services supervision?
- Are defendants charged for any other forms of supervision before trial?
- Are defendants being ordered to post bail and be supervised by a pretrial services agency?
- Are pretrial services agencies supervising indigent defendants?
- Do pretrial services agencies regularly monitor local jail populations?

While seeking to answer these specific questions, staff made various findings and observations related to the administration of pretrial services agencies. Based upon numerous meetings, field visits, and informal surveys, staff found that broad support exists amongst stakeholders for the use of pretrial services agencies. Staff also found that a number of steps were taken throughout 2017 to improve the administration of pretrial services agencies across the Commonwealth.

Despite the broad support for pretrial services agencies, staff identified multiple concerns related to the functioning and operation of these agencies that need to be addressed. Staff was unable to assess the overall status and success of pretrial services agencies across Virginia for three reasons. First, such agencies are locality-based and therefore practices and resources vary greatly by agency.<sup>2</sup> Second, the Virginia Department of Criminal Justice Services (DCJS) has not published a report on pretrial services agencies since 2014.<sup>3</sup> Third, although the Code of Virginia requires DCJS to review each pretrial services agency's compliance with Minimum Standards for Pretrial Services, no formal process exists for conducting these reviews.<sup>4</sup>

Study findings were presented to the Crime Commission at its November meeting. Crime Commission members were provided with seven recommendations at the December meeting. All seven recommendations were unanimously endorsed.

**Recommendation 1:** Va. Code § 19.2-152.7 should be amended to require DCJS to report annually on the status of each pretrial services agency, such as:

- Amount of funding (local, state, federal, etc.);
- Number of investigations and placements;
- Average daily caseload;
- Success rates;
- Whether each pretrial services agency is in compliance with standards set forth by DCJS; and,
- Plans to address any issues within non-compliant agencies.

Legislation was introduced and enacted during the Regular Session of the 2018 General Assembly for Recommendation 1 to require an annual report by DCJS on the status of all pretrial services agencies across the Commonwealth.<sup>5</sup>

The following six recommendations did not require legislation, therefore the Crime Commission sent a letter to DCJS requesting that they take administrative actions in regard to Recommendations 2 through 7. Crime Commission members requested that DCJS provide a report on

the status of all the recommendations to the Crime Commission by November 1, 2018.

**Recommendation 2:** DCJS should conduct a formal needs assessment of stakeholders to identify the strengths and weaknesses of pretrial services agencies, including:

- Priorities and expectations of stakeholders;
- Areas in need of improvement;
- Integrity of data and reports;
- Strategic use of resources; and,
- Future program planning.

**Recommendation 3:** DCJS should convene a work group of stakeholders, including local pretrial services directors, pretrial services officers, representatives from the Virginia Community Criminal Justice Association, Office of the Executive Secretary of the Supreme Court of Virginia, Magistrate Services, Commonwealth's Attorneys' Services Council, Indigent Defense Commission, Virginia Criminal Sentencing Commission, Compensation Board, Virginia Sheriffs' Association, Virginia Association of Regional Jails, Virginia State Police, and any other relevant parties, to develop specific recommendations to improve the administration of pretrial services agencies. This work group will be organized and managed by DCJS with oversight provided by Crime Commission staff.

Of particular importance to Crime Commission members is the need for the work group to compare pretrial outcomes in jurisdictions with pretrial services agencies and jurisdictions without pretrial services agencies.

The work group shall also complete the following activities:

- Review the findings of the needs assessment;
- Provide information to assist with bond determinations at the magistrate level;
- Implement or develop a static risk assessment instrument to be used in assisting with bond determinations at the magistrate level;
- Develop strategies to ensure that investigations of all detained defendants who are eligible for pretrial services supervision are completed and information is provided to the courts;
- Identify staffing and resource needs of local pretrial services agencies, as well as what is required from DCJS to provide adequate support to those local pretrial services agencies;

- Analyze the impact of pretrial services agencies on local jail populations;
- Ascertain methods to better define and track statewide appearance, public safety, and success rates;
- Continue to educate stakeholders on the role, duties, and appropriate uses of pretrial services agencies;
- Determine guidelines for the use of the UNCOPE substance use screening tool;<sup>6</sup>
- Establish uniform vocabulary and definitions for data entry and tracking; and,
- Identify any other improvements to pretrial services agencies.

**Recommendation 4:** DCJS should monitor the implementation of the VPRAI-Revised and Praxis over the next year to examine the effectiveness of these instruments and identify any issues or unintended consequences in the application of these tools.

**Recommendation 5:** DCJS should work with localities, pretrial services agency directors, and any other stakeholders to determine a funding formula for grant disbursements to pretrial services agencies.

**Recommendation 6:** DCJS should explore options for improving or replacing the case management system used by pretrial services agencies (PTCC).

**Recommendation 7:** DCJS should monitor the use of the case management system (PTCC) by pretrial services agencies to ensure that comprehensive definitions are developed and utilized. DCJS should also examine PTCC to verify that necessary data is entered consistently and uniformly.

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## Background and Methodology

Delegate C. Todd Gilbert introduced House Bills 774 and 776 during the Regular Session of the 2016 General Assembly. Both bills were referred to the Crime Commission by the House Courts of Justice Committee. In 2016, the Executive Committee requested staff to conduct a broad review of pretrial services agencies in Virginia. The study was extended an additional year due to the voluminous amount of information available on this topic.

The purpose of a pretrial services agency is to “provide information to assist the court in making release/detention decisions [and to] provide monitoring and supervisory services in cases involving released defendants.”<sup>7</sup> Pretrial services agencies in Virginia are currently governed by the Pretrial Services Act.<sup>8</sup> This Act was passed in 1994 as

part of legislation that abolished parole and created numerous other agencies and programs.<sup>9</sup> As of January 2018, there were 33 pretrial agencies serving 100 counties and cities across the Commonwealth.<sup>10</sup>

Pretrial services agencies are intended to provide information and services to judicial officers in determining risk to public safety and the assurance of appearance at trial for criminal defendants.<sup>11</sup> Some duties and responsibilities of local pretrial services officers are mandatory.<sup>12</sup> Pretrial services officers must investigate and interview defendants detained in jails prior to certain court proceedings,<sup>13</sup> present a pretrial investigation report and release recommendations to the court,<sup>14</sup> and monitor defendants placed on pretrial services supervision to ensure compliance with the bond conditions set by a judicial officer.<sup>15</sup> Other duties imposed on pretrial services officers are discretionary based upon the availability of resources.<sup>16</sup> Pretrial services officers may assist with the placement of defendants in substance abuse education or treatment programs,<sup>17</sup> supervise defendants placed on home electronic monitoring,<sup>18</sup> or prepare financial eligibility determination forms for indigent defendants.<sup>19</sup>

During the course of this study, staff sought to answer specific questions raised regarding pretrial services agencies and to provide Crime Commission members with a broad overview of how pretrial services agencies are performing across Virginia. Staff engaged in various activities to address these matters, including the following:

- Collected relevant literature and data related to the pretrial process, pretrial services agencies, and risk assessment instruments;
- Reviewed Virginia's Pretrial Services Act;
- Examined pretrial laws and systems in other states;
- Consulted with numerous stakeholders;
- Conducted informal surveys of judges, regional jails, Sheriffs, Commonwealth's Attorneys, and defense counsel;
- Surveyed pretrial services agency directors;<sup>20</sup>
- Visited Virginia's pretrial services agencies;
- Observed pretrial proceedings in magistrate offices and district courts; and,
- Attended various local, state, and national trainings.

This study was initially proposed because of concerns relating to the role of pretrial services agencies in the criminal justice system and how criminal defendants were being placed on pretrial services supervision. Therefore, staff focused primarily on the statutory mission of pretrial services agencies and the process by which defendants are investigated, assessed, and placed on pretrial services supervision.

Staff did not extensively examine the supervision practices utilized by pretrial services agencies when monitoring defendants released on such supervision. Further, the study did not address policies surrounding bail reform or the use of monetary bail.

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## **Questions Addressed**

Staff addressed a number of questions about pretrial services agencies in Virginia that were raised by Crime Commission members and other stakeholders. Staff answered many of the questions; however, some questions remain unanswered due to a variety of limiting factors.

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### **Who is responsible for the administration of pretrial services agencies?**

Both localities and DCJS have a role in the administration of pretrial services agencies. Any city, county, or combination thereof may establish a pretrial services agency.<sup>21</sup> If any locality establishes a pretrial services agency, it must submit a plan every two years to DCJS for review and approval.<sup>22</sup> DCJS provides funding for the administration of pretrial services agencies through grants to localities.<sup>23</sup> Any locality may stop providing pretrial services by notifying DCJS of its intent to withdraw from providing such services.<sup>24</sup>

DCJS must review and approve any plan submitted by a locality to establish a pretrial services agency.<sup>25</sup> DCJS is also required to prescribe statewide standards for the development, implementation, operation, and evaluation of pretrial services agencies.<sup>26</sup> Additionally, DCJS is mandated to periodically review each pretrial services agency and may suspend all or any portion of funding if the local agency is not in compliance with its approved plan or DCJS operating standards.<sup>27</sup>

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### **Are pretrial services agencies successful at ensuring public safety and appearance at trial?**

Staff found that while DCJS tracks the public safety, appearance, and compliance rates of defendants on pretrial services supervision, the limited definitions utilized for these measures fail to provide a complete picture of the statewide success rates of these agencies. Therefore, staff could not accurately assess the success rate of pretrial services agencies in the Commonwealth. For example, some of the limitations identified in the current DCJS pretrial services placement closure definitions include the following:

- New Arrest: “applies when a defendant is arrested for an offense which was allegedly committed while under pretrial supervision and, as a result, the Court revokes the defendant’s release on pretrial supervision.”<sup>28</sup>
  - This definition does not capture instances where a defendant is charged with a new offense while on pretrial services supervision and the Court takes no action. Additionally, this definition does not clearly capture instances where a defendant is detained on a new charge, but no court action is taken in regard to his pretrial supervision status (i.e. bail revocation, contempt of court, or *capias*).
- Failure to Appear (FTA): “applies when a defendant fails to appear in court and a *capias* is issued.”<sup>29</sup>
  - This definition does not include other means by which failure to appear can be charged, such as with a show cause,<sup>30</sup> contempt of court,<sup>31</sup> or a warrant.<sup>32</sup>

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### **Are statewide public safety and appearance rates available for defendants not under the supervision of a pretrial services agency?**

Staff found that there was no reliable source of statewide aggregate data to determine comprehensive appearance rates for defendants not placed on pretrial services supervision. Tracking failure to appear rates is complicated by several factors. The primary issue is that there are multiple means by which failure to appear may be charged (*capias*/show cause;<sup>33</sup> contempt of court;<sup>34</sup> or, failure to appear statute<sup>35</sup>). Further, courts may dismiss such charges when a defendant ultimately appears for trial.

The public safety rate for these individuals could be determined by analyzing criminal history records maintained by the Virginia State Police. However, this analysis would be limited to qualifying offenses for which fingerprinting is required and fingerprints are actually obtained.<sup>36</sup>

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## **How does the presence of a pretrial services agency impact jail populations?**

Staff was unable to assess the independent impact of pretrial services agencies on jail populations because a variety of factors can affect such levels, including the following:

- Population, demographics, and arrest trends of the locality and surrounding localities;
- Closure or opening of prisons and jails;
- Average length of stay and admission rates;
- Socioeconomic conditions/unemployment rates; and,
- Seasonal trends.<sup>37</sup>

Staff examined jail populations generally and found that over the past five years the total statewide jail population had remained fairly steady while the total number of defendants detained prior to trial had gradually increased.<sup>38</sup> Staff also noted that the populations of defendants detained prior to trial varied greatly amongst individual jails. For example, during May 2017 the total number of defendants detained prior to trial ranged widely by jail from 11%-50%.<sup>39</sup>

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## **How are pretrial services agencies funded?**

DCJS disbursed the following amount of grant funding over the past three fiscal years for the administration of pretrial services agencies:

- FY17: \$10,122,834;
- FY16: \$9,193,817; and,
- FY15: \$9,794,374.<sup>40</sup>

In FY17, the \$10,122,834 was distributed across 32 pretrial services agencies. The amount of funding provided to each individual agency that fiscal year varied greatly, ranging from approximately \$73,000 to approximately \$673,000.<sup>41</sup>

In addition to funds from DCJS, pretrial services agencies may also receive funding or other forms of financial assistance from local, federal, or other sources. Based on staff's 2017 survey of pretrial services agency directors, 64% (18 of 28) of respondents reported receiving local funding.



## **Do pretrial services agencies provide a recommendation to the court in regard to bond?**

Pretrial services agencies are required by the Code of Virginia to provide the court with a pretrial investigation report that includes a release recommendation to assist judges with bail determinations.<sup>42</sup> The Code does not contain any requirement that the court follow the recommendation from the pretrial services officer. The pretrial investigation report “includes a face-to-face interview with the defendant, full criminal history, verification with community contacts, administration of the Virginia Pretrial Risk Assessment Instrument (VPRAI), and a bond recommendation.”<sup>43</sup>

The VPRAI is a pretrial risk assessment instrument “used to identify a defendant’s risk of failure (failure to appear for a scheduled court appearance or arrest for a new offense) if released pending trial.”<sup>44</sup> DCJS was required to develop this instrument as part of the Pretrial Services Act.<sup>45</sup> In September 2017, the Virginia Pretrial Risk Assessment Instrument – Revised (VPRAI-Revised) and a newly created supervision tool (Praxis)<sup>46</sup> were implemented statewide.<sup>47</sup> The intent of the VPRAI-Revised is to provide more objective scoring of risk factors than the previous version of the VPRAI.<sup>48</sup> The Praxis is a tool that uses the VPRAI-Revised risk score and the defendant’s current charge(s) to determine a release/detain recommendation and, if the recommendation is for release, a supervision level for those defendants placed on pretrial services supervision.<sup>49</sup> The recommendation of the Praxis can be overridden by the pretrial services officer performing the pretrial investigation.<sup>50</sup> The Praxis also allows for the use of differential supervision, with weekly, bi-weekly, or monthly meetings recommended for defendants placed on pretrial services supervision.

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## **What is the difference between the VPRAI-Revised and the checklist for bail determinations used by magistrates?**

The VPRAI-Revised, like the preceding VPRAI, is a validated pretrial risk assessment instrument “used to identify a defendant’s risk of failure (failure to appear for a scheduled court appearance or arrest for a new offense) if released pending trial.”<sup>51</sup> The following risk factors are scored on the VPRAI-Revised:

- Active community criminal justice supervision;
- Current charge is felony drug, felony theft or felony fraud;
- Pending charge at time of arrest;

- One or more adult criminal convictions;
- Two or more failures to appear;
- Two or more violent convictions;
- Unemployed at the time of arrest; and,
- History of drug abuse.

The “Checklist for Bail Determinations” is a court form (DC-327) developed to assist magistrates with bail determinations as required by statute.<sup>52</sup> The Code of Virginia specifies that a judicial officer must consider certain information when fixing the terms of bail.<sup>53</sup> The bail checklist serves to capture the information required by statute, including the following:

- Nature and circumstances of the offense;
- Whether a firearm is alleged to have been used in the offense;
- Weight of the evidence;
- Financial resources and ability to pay bond;
- Character of the accused, including his family ties, employment or involvement in education;
- Length of residence in the community;
- Record of convictions;
- Appearance at court proceedings or flight to avoid prosecution or failure to appear at court proceedings;
- Whether the person is likely to obstruct or attempt to obstruct justice, or threaten, injure, or intimidate, or attempt to threaten, injure, or intimidate a prospective witness, juror, or victim; and,
- Any other information available which the court considers relevant to the determination of whether the accused is unlikely to appear for court proceedings.<sup>54</sup>

When comparing these two tools, staff found that the checklist for bail determinations requires consideration of far more factors than the VPRAI-Revised.<sup>55</sup> The only piece of information considered by the VPRAI-Revised that is not specifically contained in the bail checklist is the defendant’s history of drug abuse (excluding alcohol); however, any prior drug charges or convictions should appear on the criminal record reviewed by the judicial officer.

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### **How is a person placed on supervision with a pretrial services agency?**

Only a judicial officer can place a defendant on pretrial services supervision.<sup>56</sup> The judicial officer also sets the terms and conditions of bail.<sup>57</sup> A judicial officer includes any judge or magistrate in the

Commonwealth.<sup>58</sup> The clerk or deputy clerk of any district or Circuit Court is also deemed to be a judicial officer under the Code.<sup>59</sup> Placement on pretrial services supervision can occur in two manners, including the following:

- Direct placement: the defendant is placed on pretrial services supervision by a judicial officer without the benefit of a pretrial services investigation;<sup>60</sup> or,
- Placement made with benefit of VPRAI-Revised: the defendant is placed on pretrial services supervision by a judicial officer, typically a judge, following a pretrial services investigation.<sup>61</sup>

Staff obtained and analyzed data from the Pretrial and Community Corrections case management system (PTCC) maintained by DCJS in regard to pretrial services placements. The data showed that over the past three fiscal years (FY15-FY17) the number of pretrial services investigations have slightly decreased, while the number of pretrial services placements have steadily increased. Many pretrial services investigations do not result in a placement on pretrial services supervision. Most of the defendants placed on pretrial services supervision are direct placements by judges or magistrates without the benefit of a pretrial services investigation.<sup>62</sup>

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### **Are pretrial services agencies being overused to supervise defendants for low-level offenses?**

PTCC data indicated that very few defendants were on pretrial services supervision for common, seemingly minor misdemeanor offenses. Further, the number of defendants on pretrial services supervision for such offenses has decreased over the past three fiscal years.<sup>63</sup>

A specific question was raised during the study about the number of defendants placed on pretrial services supervision who were charged with underage possession of alcohol. A detailed PTCC case review indicated that less than 1% (150 of 74,740) of statewide pretrial services placements between FY15-FY17 were for defendants charged solely with underage possession of alcohol. Certain localities were responsible for a higher number of these placements, including the following: Virginia Beach (25), Rockingham County (22), Charlottesville (18), and Chesterfield County (14).

These findings were significant because research has consistently cited the detrimental impacts of over-supervising low-risk defendants.<sup>64</sup> In analyzing this information, it is important to note that a minor offense does not necessarily equate to a low-risk level for the defendant. For example, multiple aggravating factors can be present for an individual charged with a seemingly minor offense, such as prior criminal history, previous failures to appear, or issues with substance abuse. These factors indicate that the defendant poses a higher risk of failure even though the current charge is relatively minor.

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### **How are risk levels disbursed across pretrial services placements?**

The disbursement of the total pretrial services placements by risk level could not be fully assessed due to missing information in PTCC. Of the 26,875 pretrial services placements made in FY17, 17% (4,463 of 26,875) did not have a risk level recorded.<sup>65</sup>

Staff sought to determine the number of individuals placed on pretrial services supervision by risk level for underage possession of alcohol charges. Staff found that similar to overall placement data, 35% (53 of 150) of risk levels for individuals who were placed on pretrial services supervision for underage possession of alcohol were not recorded in PTCC (FY15-FY17).<sup>66</sup>

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### **Is supervision by a pretrial services agency the same as probation?**

Pretrial services and probation are two different forms of supervision. Pretrial services agencies assist judicial officers with bail determinations and supervision before trial.<sup>67</sup> Probation agencies monitor defendants after trial as a condition of a suspended sentence or deferred disposition imposed by the court.<sup>68</sup> Defendants convicted of misdemeanors and certain felonies can be placed on local community-based probation by the court.<sup>69</sup> Some confusion may exist over the distinction between pretrial services supervision and probation because 76% (23 of 32) of pretrial services agencies shared an office location with a local community-based probation agency in 2017.<sup>70</sup>

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### **Are defendants charged any fees for pretrial services supervision?**

Defendants should not be charged a fee by pretrial services agencies. The DCJS Minimum Standards for Pretrial Services explicitly prohibit the collection of fees from defendants for providing pretrial services such as supervision or drug testing.<sup>71</sup> However, some pretrial services agencies do assess a fee if laboratory testing is requested by a defendant who is disputing a positive drug screen.

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### **Are defendants charged for any other forms of supervision before trial?**

Defendants may be responsible for paying the costs of other monitoring conditions ordered by the court before trial. The Code of Virginia allows a defendant to be charged for the use of a GPS tracking device, or any similar device, imposed as a condition of release by a judicial officer.<sup>72</sup> An informal survey found that the availability and vendors of such monitoring services varied across the Commonwealth. Similarly, the informal survey revealed that the costs of these monitoring services, can range from \$3-\$15 per day where available across Virginia. Staff noted that no statewide regulations exist for the use of these electronic devices before trial.

During the course of the study, staff also identified certain localities without pretrial services agencies that were charging defendants for drug and alcohol testing as a condition of release prior to trial. Each drug and alcohol test costs \$25 and defendants may be required to take multiple tests per week until their pending charge is finalized.

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### **Are defendants being ordered to post bail and be supervised by a pretrial services agency?**

A review of PTCC data showed that most defendants placed on pretrial services supervision were also ordered to post secured bail in FY17. Specifically, 62% (16,514 of 26,634) of the defendants placed on pretrial services supervision were also on secured bail.<sup>73</sup>

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### **Are pretrial services agencies supervising indigent defendants?**

The percentage of defendants on pretrial services supervision who are indigent could not be determined because pretrial services agencies did not capture this information. However, during courtroom observations staff noted that many defendants placed on pretrial services supervision were found to be indigent and provided with court-appointed counsel.<sup>74</sup>

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### **Do pretrial services agencies regularly monitor local jail populations?**

Staff found that there were no routine reviews of jail inmates awaiting trial by pretrial services agencies. DCJS minimum standards require each pretrial services agency to develop policies and procedures from the initial appearance through adjudication for defendants who remain in jail.<sup>75</sup> However, based upon survey responses from pretrial services agencies and field visits to such agencies, staff determined that the frequency of these reviews vary greatly by agency.

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## **Findings and Recommendations**

While addressing the specific questions posed by Crime Commission members and stakeholders, staff made various findings and observations related to the administration of pretrial services agencies. Based upon numerous meetings, field visits, and informal surveys, staff found that broad support exists amongst stakeholders for the use of pretrial services agencies. Staff also found that a number of steps were taken throughout 2017 to improve the administration of pretrial services agencies across the Commonwealth, including the following:

- January: DCJS released revised Minimum Standards for Pretrial Services;<sup>76</sup>
- May: DCJS hosted a Pretrial Justice Summit in Chesterfield;
- June: Pretrial services was included as part of the regional trainings for magistrates;
- August: District Court Judges were given a presentation on pretrial services at their judicial conference; and,
- September: Revised risk assessment instrument (VPRAI-Revised) and a newly created supervision tool (Praxis) were implemented statewide across pretrial services agencies.

Despite this broad support for pretrial services agencies, staff identified multiple concerns related to the functioning and operation of these agencies that need to be addressed. Staff was unable to assess the overall

status and success of pretrial services agencies across Virginia for three reasons. First, such agencies are locality-based and therefore practices and resources vary greatly by agency.<sup>77</sup> Second, DCJS has not published a report on pretrial services agencies since 2014.<sup>78</sup> Third, although the Code of Virginia requires DCJS to review each pretrial services agency's compliance with Minimum Standards for Pretrial Services, no formal process exists for conducting these reviews.<sup>79</sup>

Study findings were presented to the Crime Commission at its November meeting. Crime Commission members were provided with seven recommendations at the December meeting. All seven recommendations were unanimously endorsed.

During the Regular Session of the 2018 General Assembly, legislation for Recommendation 1 was introduced in both chambers. Delegate C. Todd Gilbert (House Bill 996) and Senator Mark J. Peake (Senate Bill 783) introduced identical bills that passed the General Assembly and were enacted into law.<sup>80</sup>

**Recommendation 1:** Va. Code § 19.2-152.7 should be amended to require DCJS to report annually on the status of each pretrial services agency, such as:

- Amount of funding (local, state, federal, etc.);
- Number of investigations and placements;
- Average daily caseload;
- Success rates;
- Whether each pretrial services agency is in compliance with standards set forth by DCJS; and,
- Plans to address any issues within non-compliant agencies.

Amending Va. Code § 19.2-152.7 to require DCJS to report annually on the status of each pretrial services agency will serve a variety of functions. This report will provide an annual picture of the statewide status of pretrial services agencies. DCJS will be required to assess pretrial services agencies each year. Likewise, each agency will need to assess its own compliance with DCJS minimum standards. These reviews will provide transparency on the performance of each agency to the public, as well as to local and state officials. The report can be used by pretrial services agencies to compare their performance to other agencies and to generate ideas and procedures to improve their own practices.

The following six recommendations did not require legislation, therefore the Crime Commission sent a letter to DCJS requesting that they take administrative actions in regard to Recommendations 2 through 7.

Crime Commission members requested that DCJS provide a report on the status of all the recommendations to the Crime Commission by November 1, 2018.

**Recommendation 2:** DCJS should conduct a formal needs assessment of stakeholders to identify the strengths and weaknesses of pretrial services agencies, including:

- Priorities and expectations of stakeholders;
- Areas in need of improvement;
- Integrity of data and reports;
- Strategic use of resources; and,
- Future program planning.

Pretrial services agencies have been in existence for over 20 years in Virginia, yet confusion remains about what they are and what role they serve in the criminal justice system. This assessment will provide guidance to DCJS on the perceptions and needs of stakeholders as it works to improve the administration of pretrial services agencies.

**Recommendation 3:** DCJS should convene a work group of stakeholders, including local pretrial services directors, pretrial services officers, representatives from the Virginia Community Criminal Justice Association, Office of the Executive Secretary of the Supreme Court of Virginia, Magistrate Services, Commonwealth's Attorneys' Services Council, Indigent Defense Commission, Virginia Criminal Sentencing Commission, Compensation Board, Virginia Sheriffs' Association, Virginia Association of Regional Jails, Virginia State Police, and any other relevant parties, to develop specific recommendations to improve the administration of pretrial services agencies. This work group will be organized and managed by DCJS with oversight provided by Crime Commission staff.

Of particular importance to Crime Commission members is the need for the work group to compare pretrial outcomes in jurisdictions with pretrial services agencies and jurisdictions without pretrial services agencies.

The work group shall also complete the following activities:

- Review the findings of the needs assessment;
- Provide information to assist with bond determinations at the magistrate level;
- Implement or develop a static risk assessment instrument to be used in assisting with bond determinations at the magistrate level;



- Develop strategies to ensure that investigations of all detained defendants who are eligible for pretrial services supervision are completed and information is provided to the courts;
- Identify staffing and resource needs of local pretrial services agencies, as well as what is required from DCJS to provide adequate support to those local pretrial services agencies;
- Analyze the impact of pretrial services agencies on local jail populations;
- Ascertain methods to better define and track statewide appearance, public safety, and success rates;
- Continue to educate stakeholders on the role, duties, and appropriate uses of pretrial services agencies;
- Determine guidelines for the use of the UNCOPE substance use screening tool;<sup>81</sup>
- Establish uniform vocabulary and definitions for data entry and tracking; and,
- Identify any other improvements to pretrial services agencies.

Staff was unable to determine whether a difference exists in public safety rates, appearance rates, or jail populations in localities with pretrial services agencies as opposed to localities without such agencies. It is extremely difficult to isolate the independent impact of a pretrial services agency between similarly situated localities due to wide variances in local practices. This work group will bring together numerous stakeholders and subject matter experts in an attempt to answer these difficult questions. The group will also develop recommendations to address the areas of concern identified by staff in order to improve the administration of pretrial services agencies.

**Recommendation 4:** DCJS should monitor the implementation of the VPRAI-Revised and Praxis over the next year to examine the effectiveness of these instruments and identify any issues or unintended consequences in the application of these tools.

This revised risk assessment instrument (Virginia Pretrial Risk Assessment Instrument – Revised) and a newly created supervision tool (Praxis) were implemented statewide by pretrial services agencies in September 2017. Staff was unable to assess the impact and effectiveness of these instruments during the short time period between the implementation and the Crime Commission meeting in November. DCJS should monitor the use of the VPRAI-Revised and Praxis to identify any successes and address any complications caused by these new tools.

**Recommendation 5:** DCJS should work with localities, pretrial services agency directors, and any other stakeholders to determine a funding formula for grant disbursements to pretrial services agencies.

DCJS does not currently use a funding formula to determine disbursement amounts of grant funds to pretrial services agencies. Multiple pretrial services agencies expressed frustration that funding is not allocated based upon need. The practices of each pretrial services agency vary in part due to the availability of resources. Agencies consistently noted that staffing issues greatly impact their ability to conduct investigations and manage caseloads.

**Recommendation 6:** DCJS should explore options for improving or replacing the case management system used by pretrial services agencies (PTCC).

There was universal agreement amongst stakeholders that PTCC is antiquated and difficult to use. Certain data within that system is not readily accessible to individual pretrial services agencies without the assistance of DCJS. Ideally the system should be replaced; however, if the finances are not available, PTCC must at a minimum be upgraded to meet the needs of its users.

**Recommendation 7:** DCJS should monitor the use of the case management system (PTCC) by pretrial services agencies to ensure that comprehensive definitions are developed and utilized. DCJS should also examine PTCC to verify that necessary data is entered consistently and uniformly.

Staff identified several areas of concern during analysis of statewide data within the PTCC system. Numerous fields within PTCC were not completed or were left blank. Definitions of terminology were not consistently applied across or within pretrial services agencies. There was no regular compliance monitoring to readily identify and correct data entry errors or omissions. All of these factors impacted the integrity of the data within PTCC and must be addressed.

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## **Acknowledgements**

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

Commonwealth's Attorneys' Services Council

Compensation Board

Indigent Defense Commission

Office of the Executive Secretary of the Supreme Court of Virginia

Virginia Community Criminal Justice Association

Virginia Department of Criminal Justice Services

Virginia Sheriffs' Association

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**The Crime Commission wishes to thank all judges, Commonwealth's Attorneys, Public Defenders, court-appointed counsel, Sheriffs, regional jail administrators, magistrates, and pretrial services agencies directors and officers who took time to meet with staff and/or provide survey responses.**

## APPENDIX A

### Total Statewide Jail Population and Pre-Trial Population Average Monthly Population, 2013-2017

Average Monthly Population	Total Statewide Jail Population	Total Pre-Trial Population	Percentage Pre-Trial Population
May 2017	28,646.87	8,596.17	30.0%
May 2016	28,259.42	7,861.67	27.8%
May 2015	28,646.82	7,490.04	26.1%
May 2014	29,428.36	7,704.47	26.2%
July 2013	29,558.68	7,973.60	27.0%

Source: Compensation Board, LIDS- Average Monthly Population Reports. Pre-trial population figures exclude pretrial probation, parole and ordinance violators. For purposes of this table, the term "pre-trial" refers to defendants being detained in jail while awaiting trial on a pending criminal charge. Chart prepared by Virginia State Crime Commission staff.

# APPENDIX B

## Manual Scoring Sheet for the VPRAI-Revised and Praxis

### Virginia Pretrial Risk Assessment Instrument (Manual Scoring Sheet)

Instrument completion Date: \_\_\_\_\_ Court Date: \_\_\_\_\_  
 First Name: \_\_\_\_\_ Last Name: \_\_\_\_\_  
 SSN: \_\_\_\_\_ DOB: \_\_\_\_\_ Race: \_\_\_\_\_ Sex: \_\_\_\_\_

Charge(s): \_\_\_\_\_  
 \_\_\_\_\_

**Research Factors:**

1. Prior Adult Misdemeanor Conviction:  Yes  No
2. Prior Adult Felony Conviction:  Yes  No
3. Prior Violent Conviction:  0  1  2  3 or More
4. Prior Failure to Appear Pretrial in Past 2 Years:  0  1  2 or More
5. Prior Failure to Appear Pretrial Older than 2 Years:  Yes  No
6. Prior Sentence to Incarceration:  Yes  No

**Risk Factors:**

#	Risk Factors	# Points	Yes <input type="checkbox"/>	No <input type="checkbox"/>	Score	
1	Active Community Criminal Justice Supervision	2 points				
2	Current Charge is Felony Drug, Felony Theft or Felony Fraud	3 points				
3	Pending Charge at Time of Arrest	2 points				
4	One or More Adult Criminal Convictions	2 points				
5	Two or more Failures to Appear	1 point				
6	Two or more Violent Convictions	1 point				
7	Unemployed at the Time of Arrest	1 point				
8	History of Drug Abuse	2 points				
<b>Total Score</b>						
<b>Score</b>	0 - 2	3 - 4	5 - 6	7 - 8	9 - 10	11 - 14
<b>Risk Level</b>	Level 1	Level 2	Level 3	Level 4	Level 5	Level 6

The pretrial risk assessment identifies the defendant's risk level as \_\_\_\_\_

**Praxis Recommendation:**

1. Does the Praxis apply:  Yes  No
2. If yes, determine the most serious charge category:
  - Violent Felony / Firearm
  - Violent Misdemeanor
  - Non-Violent Felony
  - Driving Under the Influence
  - Non-Violent Misdemeanor
  - Failure to Appear (If selected, choose the primary charge category for the underlying charge.)
    - Violent Felony / Firearm (If selected, Risk Level = Current Risk Level + 1)
    - Violent Misdemeanor (If selected, Risk Level = Current Risk Level + 1)
    - Non-Violent Felony (If selected, Risk Level = Current Risk Level + 1)
    - Driving under the Influence (If selected, Risk Level = Current Risk Level + 1)
    - Non-Violent Misdemeanor (If selected, Risk Level = Current Risk Level + 1)

## APPENDIX B

### Manual Scoring Sheet for the VPRAI-Revised and Praxis

Risk Level	Recommendation	VPRAI: Charge Category				
		Non-Violent Misd.	Driving Under the Influence	Non-Violent Felony	Violent Misd.	Violent Felony or Firearm
Level 1	Bail Status	Release	Release	Release	Release	Release
	Pretrial Supervision	No	No	No	No	Level II
	Special Conditions	No	No	No	No	As Needed
Level 2	Bail Status	Release	Release	Release	Release	Release
	Pretrial Supervision	No	Monitor	Monitor	Monitor	Level III
	Special Conditions	No	No	No	No	As Needed
Level 3	Bail Status	Release	Release	Release	Release	Detain
	Pretrial Supervision	Monitor	Monitor	Level I	Level I	No
	Special Conditions	No	No	No	As Needed	N/A
Level 4	Bail Status	Release	Release	Release	Release	Detain
	Pretrial Supervision	Level I	Level I	Level II	Level II	No
	Special Conditions	No	As Needed	As Needed	As Needed	N/A
Level 5	Bail Status	Release	Release	Release	Detain	Detain
	Pretrial Supervision	Level II	Level II	Level III	No	No
	Special Conditions	As Needed	As Needed	As Needed	N/A	N/A
Level 6	Bail Status	Detain	Detain	Detain	Detain	Detain
	Pretrial Supervision	No	No	No	No	No
	Special Conditions	N/A	N/A	N/A	N/A	N/A

**Recommendation:** ✓ the box below to indicate your recommendation

<input type="checkbox"/> Release without Pretrial Supervision	<input type="checkbox"/> Release with Pretrial Supervision	<input type="checkbox"/> Detain	<input type="checkbox"/> No Recommendation
---------------------------------------------------------------	------------------------------------------------------------	---------------------------------	--------------------------------------------

*Conditions of Release:*

- \_\_\_\_\_
- \_\_\_\_\_

*Mitigating / Aggravating Considerations:*

\_\_\_\_\_

\_\_\_\_\_

# APPENDIX C

## Checklist for Bail Determinations

**CHECKLIST FOR BAIL DETERMINATIONS**

Commonwealth of Virginia

Name of the Accused ..... 1 .....

Nature and Circumstances of the Offense ..... 2 .....

.....

Weight of the Evidence ..... 3 .....

Length of Time in Community ..... 4 .....

Place of Employment ..... 5 ..... How Long .....

Family Ties ..... 6 .....

Involvement in Education ..... 7 .....

Financial Resources ..... 8 .....

Pending Charges ..... 9 .....

.....

10 Was a firearm allegedly used in the offense?  No  Yes

11 Currently on probation or parole?  No  Yes .....

Prior criminal record ..... 12 .....

.....

- 13  The presumption set forth in Virginia Code § 19.2-120 (B) or (C) applies and has not been rebutted.
- 14  Bail was not set by a judge, the presumption set forth in Virginia Code § 19.2-120 (B) or (C) applies and has been rebutted, and an attorney for the Commonwealth concurs in the accused being admitted to bail. (For magistrate determinations only.)
- 15  The secured bond provision in Virginia Code § 19.2-123 applies  and is waived with the concurrence of the attorney of the Commonwealth or the attorney for the county, city or town.

Prior charges of failing to appear ..... 16 .....

Is this person likely to obstruct or attempt to obstruct justice or threaten, injure or intimidate or attempt to threaten, injure or intimidate a prospective witness, juror or victim?  No  Yes .....

..... 17 .....

Other information considered ..... 18 .....

.....

.....

.....

Bail Set ..... 19 .....

Special instructions or conditions ..... 20 .....

.....

21  Check if more information is on reverse

..... 22 ..... 23

DATE  MAGISTRATE  JUDGE

---

## APPENDIX C

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### Checklist for Bail Determinations

**Form DC-327****CHECKLIST FOR BAIL DETERMINATIONS****Form DC-327**

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**Data Elements** *front*

1. Name of defendant.
2. Nature and circumstances of the offense.
3. Weight of the evidence.
4. Length of time in community.
5. Place of employment and length of time employed there.
6. Family ties to the community.
7. Involvement in education.
8. Financial resources.
9. Any pending charges.
10. Check whether a firearm was allegedly used in the offense.
11. Check whether the accused is currently on probation or parole. Space is provided for comment if desired.
12. Describe prior criminal record.
13. Check if applicable.
14. Check if applicable.
15. Check if applicable.
16. Describe prior charges of failing to appear.
17. Check the applicable box. Space is provided for comment if desired.
18. Describe other information considered.
19. State amount of bail.
20. Describe special instructions or conditions.
21. Check box if additional information is contained on the reverse.
22. Date of signature.
23. Signature of judge or magistrate.



# APPENDIX C

## Checklist for Bail Determinations

The judicial officer shall presume, subject to rebuttal, that no condition or combination of conditions will reasonably assure the appearance of the person or the safety of the public if the person is currently charged with:

1. An act of violence as defined in § 19.2-297.1;
2. An offense for which the maximum sentence is life imprisonment or death;
3. A violation of §§ 18.2-248, 18.2-248.01, 18.2-255 or § 18.2-255.2 involving a Schedule I or II controlled substance if (i) the maximum term of imprisonment is 10 years or more and the person was previously convicted of a like offense or (ii) the person was previously convicted as a "drug kingpin" as defined in § 18.2-248;
4. A violation of §§ 18.2-308.1, 18.2-308.2, or § 18.2-308.4 and which relates to a firearm and provides for a minimum, mandatory sentence;
5. Any felony, if the person has been convicted of two or more offenses described in subdivision 1 or 2, whether under the laws of this Commonwealth or substantially similar laws of the United States;
6. Any felony committed while the person is on release pending trial for a prior felony under federal or state law or on release pending imposition or execution of sentence or appeal of sentence or conviction;
7. An offense listed in subsection B of § 18.2-67.5:2 and the person had previously been convicted of an offense listed in § 18.2-67.5:2 or a substantially similar offense under the laws of any state or the United States and the judicial officer finds probable cause to believe that the person who is currently charged with one of these offenses committed the offense charged;
8. A violation of § 18.2-374.1 or § 18.2-374.3 where the offender has reason to believe that the solicited person is under 15 years of age and that the offender is at least 5 years older than the solicited person.
9. A violation of §§ 18.2-46.2, 18.2-46.3, 18.2-46.5 or § 18.2-46.7;
10. A violation of §§ 18.2-36.1, 18.2-51.4, 18.2-266 or § 46.2-341.24 and the person has, within the past five years of the instant offense, been convicted three times on different dates of a violation of any combination of these Code sections, or any ordinance of any county, city, or town or the laws of any other state or of the United States substantially similar thereto, and has been at liberty between each conviction; or
11. A second or subsequent violation of § 16.1-253.2 or § 18.2-60.4 or a substantially similar offense under the laws of any state or the United States; or
12. A violation of subsection B of § 18.2-57.2.
13. A violation of subsection C of § 18.2-460 charging the use of threats of bodily harm or force to knowingly attempt to intimidate or impede a witness.

The judicial officer shall presume, subject to rebuttal, that no condition or combination of conditions will reasonably assure the appearance of the person or the safety of the public if the person is being arrested pursuant to § 19.2-81.6.

A judicial officer who is a magistrate, clerk or deputy clerk of a district court or a circuit court may not admit to bail, that is not set by a judge, any person who is charged with an offense listed in 1 through 13 above or who is being arrested pursuant to § 19.2-81.6, without the concurrence of any attorney for the Commonwealth.

Virginia Code § 19.2-120

The judicial officer shall presume, subject to rebuttal, that no condition or combination of conditions will reasonably assure the appearance of a person identified by U.S. Immigration and Customs Enforcement (ICE) as illegally present in the United States if such person is charged with one of the offenses enumerated below. However, for misdemeanor offenses under the provisions of law referred to in paragraphs a, b, c and e, and for felony offenses referred to in paragraph d, this presumption applies ONLY IF ICE has guaranteed that, in all such cases in the Commonwealth, it will issue a detainer for the initiation of removal proceedings and reimburse for the costs of incarceration from the time of issuance of the detainer.

- a. An offense listed under subsection C of § 17.1-805 (acts of violence);
- b. An offense listed under subsection A of § 19.2-297.1 (acts of violence);
- c. An offense listed under Chapter 4 (§ 18.2-30 et seq.) of Title 18.2 (crimes against the person) except any offense listed under subsection A of § 18.2-57.2;
- d. A felony offense under Article 1 (§ 18.2-247 et seq.) of Chapter 7 of Title 18.2 (drug offenses); or
- e. An offense under Article 2 (§ 18.2-266 et seq.) or any local ordinance substantially similar thereto, Article 4 (§ 18.2-279 et seq.), Article 5 (§ 18.2-288 et seq.), Article 6 (§ 18.2-299 et seq.), Article 6.1 (§ 18.2-307.1 et seq.) or Article 7 (§ 18.2-308.1 et seq.) of Chapter 7 of Title 18.2 (crimes involving safety).

Virginia Code § 19.2-120.1.

Additional information:

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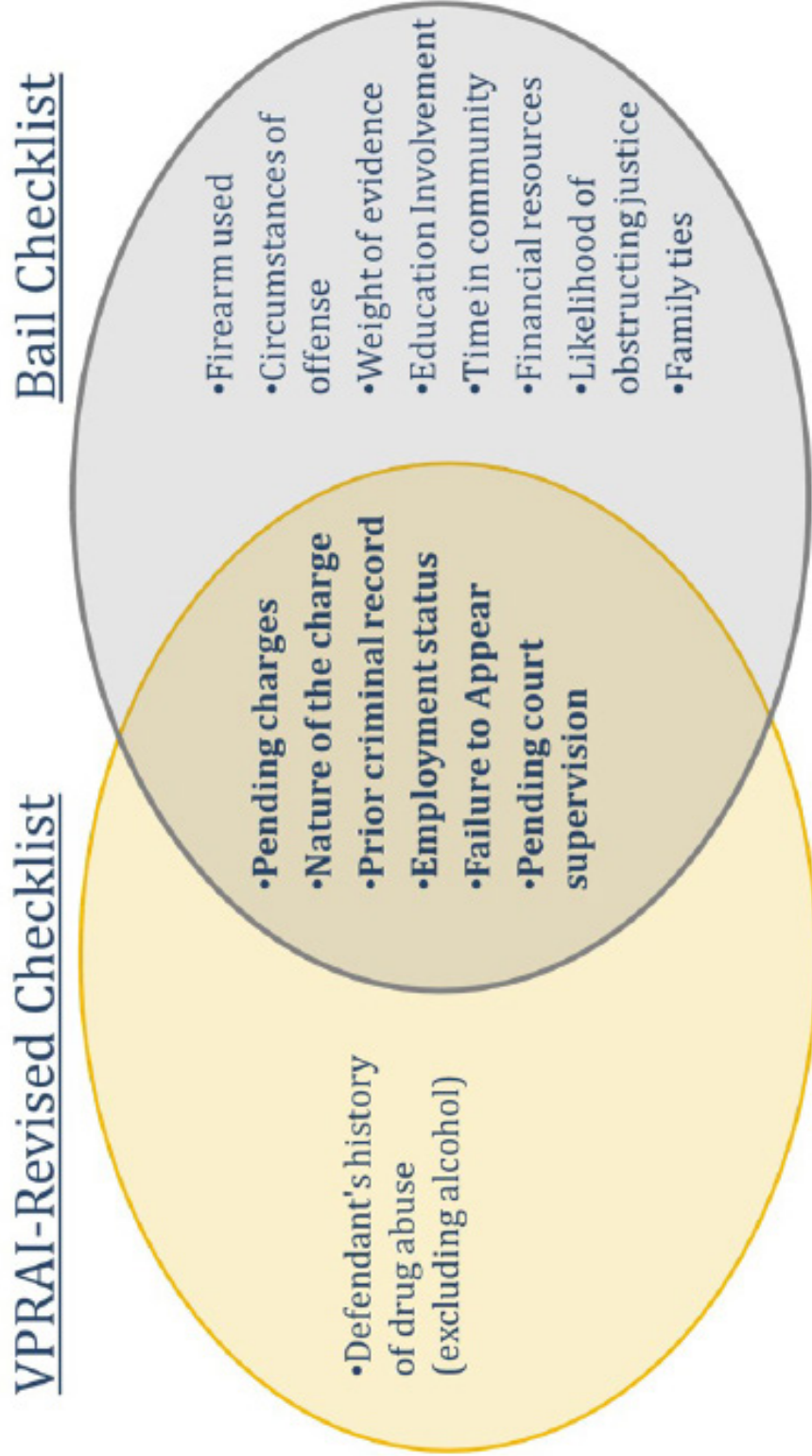
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## APPENDIX D

### Comparison of VPRAI-Revised and Bail Determination



Source: Virginia State Crime Commission staff analysis. Graphic prepared by Virginia State Crime Commission staff.

Note: Use of firearm is not a risk factor on the VPRAI-Revised, but is a consideration in the Praxis recommendation.

## APPENDIX E

### Pretrial Services Placement Types, FY15-FY17

Statewide	FY15	FY16	FY17
Direct Placements by Judges	9,480	11,390	12,131
Direct Placements by Magistrates	5,492	6,038	5,949
Placements Made w/Benefit of VPRAI	7,261	8,204	8,795
<b><i>Total Placements</i></b>	<b><i>22,233</i></b>	<b><i>25,632</i></b>	<b><i>26,875</i></b>

Source: Virginia Department of Criminal Justice Services, PTCC Case Management System. Virginia State Crime Commission staff analysis. Chart prepared by Virginia State Crime Commission staff.

## APPENDIX F

### Pretrial Services Placements for Specified Misdemeanors, FY15-FY17

Placement by Sole Charge	FY15 (N=22,233)	FY16 (N=25,632)	FY17 (N=26,875)	FY15-FY17 TOTAL (N=74,740)	% of FY15-FY17 TOTAL
DUI- 1st offense	1,270	738	653	<b>2,661</b>	3.6%
Trespassing	218	150	133	<b>501</b>	0.7%
Possess marijuana- 1st offense	128	107	123	<b>358</b>	0.5%
Petit larceny under \$200 -1st offense	122	92	67	<b>281</b>	0.4%
Underage Possession of Alcohol	66	44	40	<b>150</b>	0.2%
Shoplifting under \$200- 1st offense	60	52	35	<b>147</b>	0.2%
Drive while license revoked-1st offense	57	23	16	<b>96</b>	0.1%
Reckless driving	11	12	15	<b>38</b>	0.1%
Drive without license	5	3	7	<b>15</b>	0.0%

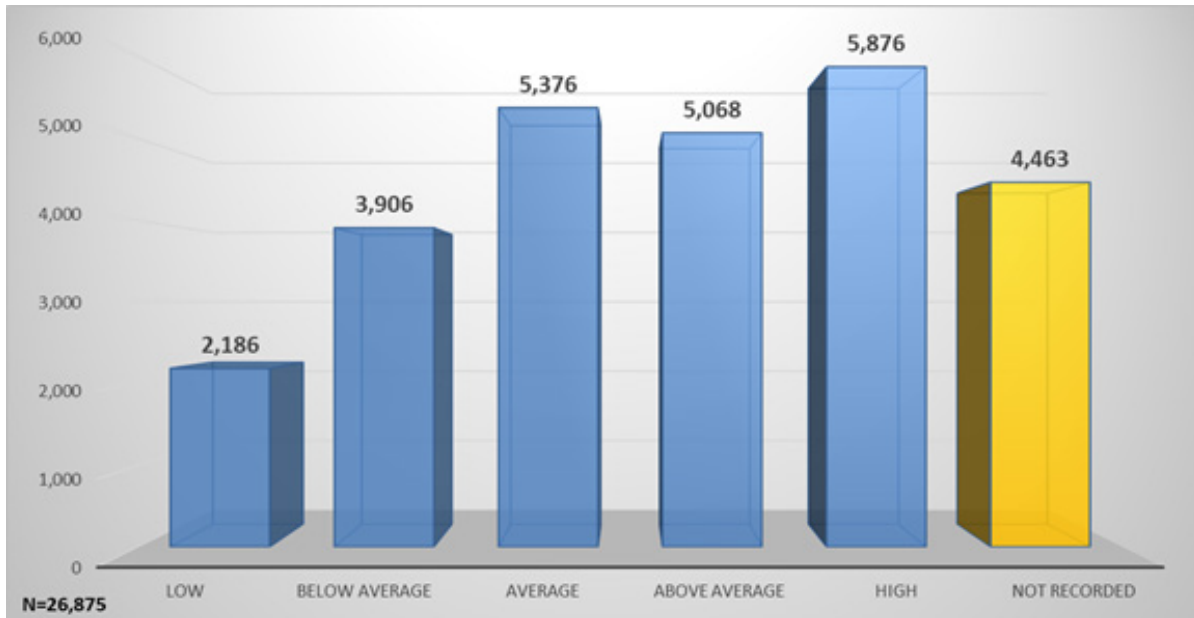
Source: Virginia Department of Criminal Justice Services, PTCC Case Management System. Virginia State Crime Commission staff analysis. Chart prepared by Virginia State Crime Commission staff.

Note: These numbers capture the number of placements where the offense listed is the sole charge.

Note: The above nine offenses comprised only 5.7% (4,247 of 74,740) of all pretrial services placements over a three-year time period (FY15-FY17). Additionally, while placements to pretrial services supervision have been increasing (as demonstrated in Appendix E), there has been a significant decrease in the number of pretrial services placements for several of these common, seemingly minor misdemeanor offenses.

## APPENDIX G

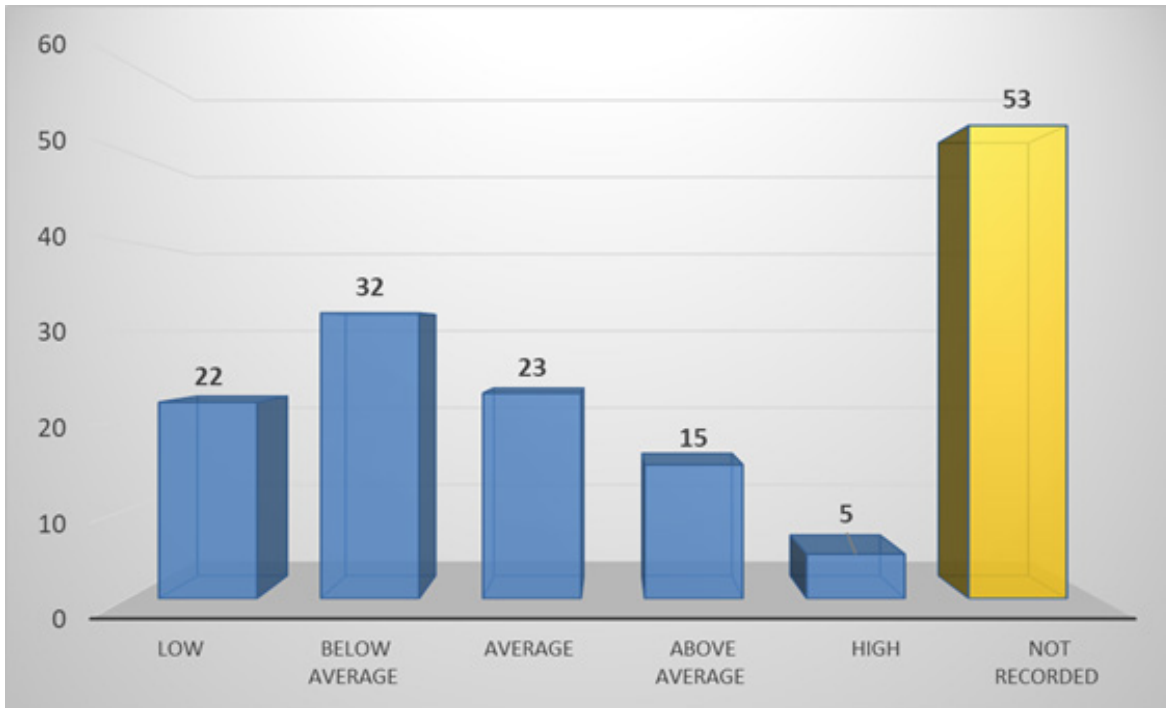
### Total Pretrial Supervision Placements by Risk Level, FY17



Source: Virginia Department of Criminal Justice Services, PTCC Case Management System. Virginia State Crime Commission staff analysis. Chart prepared by Virginia State Crime Commission staff.

## APPENDIX H

### Total Pretrial Services Supervision Placements for Underage Possession of Alcohol by Risk Level FY15-FY17 (N=150)



Source: Virginia Department of Criminal Justice Services, PTCC Case Management System. Virginia State Crime Commission staff analysis. Chart prepared by Virginia State Crime Commission staff.

## Endnotes

- <sup>1</sup> The Executive Committee authorized this study based upon House Bills 774 and 776 (Delegate C. Todd Gilbert) which were referred to the Crime Commission by the House Courts of Justice Committee during the Regular Session of the 2016 General Assembly.
- <sup>2</sup> See VA. CODE § 19.2-152.2 (2018).
- <sup>3</sup> Virginia Department of Criminal Justice Services. (2013, July 1, through 2014, June 30). *Comprehensive Community Corrections Act And Pretrial Services Act Report*. Available at <https://www.dcjs.virginia.gov/sites/dcjs.virginia.gov/files/publications/corrections/community-corrections-act-and-pretrial-services-act-report-fy-2014.pdf>.
- <sup>4</sup> VA. CODE § 19.2-152.7 (2018).
- <sup>5</sup> 2018 Va. Acts ch. 180, 407. Delegate C. Todd Gilbert introduced House Bill 996 and Senator Mark J. Peake introduced Senate Bill 783 during the Regular Session of the 2018 General Assembly.
- <sup>6</sup> See Hoffman, N.G. UNCOPE. Available at [http://www.evinceassessment.com/UNCOPE\\_for\\_web.pdf](http://www.evinceassessment.com/UNCOPE_for_web.pdf).
- <sup>7</sup> National Association of Pretrial Services Agencies. (October 2004). *Standard 1.3. Standards on Pretrial Release, 3rd Ed.* Available at <https://drive.google.com/file/d/0B1YIoljVNUF5NmJkY0wzRHR1Tmc/view>.
- <sup>8</sup> VA. CODE § 19.2-152.2 *et al.* (2018).
- <sup>9</sup> 1994 Special Session II, Va. Acts ch. 1, 2. The agencies and programs created include the Virginia Criminal Sentencing Commission, pretrial services agencies, detention and diversion center incarceration programs, a community-based corrections system for state-responsible offenders, community-based corrections programs for local-responsible offenders, and earned sentence credits.
- <sup>10</sup> Virginia Department of Criminal Justice Services. (January 2018). *Community-Based Probation and Pretrial Services Administrative & Fiscal Agents and Localities Served*. Available at <https://www.dcjs.virginia.gov/sites/dcjs.virginia.gov/files/publications/corrections/community-based-probation-and-pretrial-services-map.pdf>.
- <sup>11</sup> VA. CODE § 19.2-152.2 (2018). Pretrial services are generally available only to adult criminal defendants. Pretrial services are not available to adult defendants charged with a capital offense or to juvenile defendants, unless that juvenile has been transferred for trial as an adult.
- <sup>12</sup> VA. CODE § 19.2-152.4:3(A) (2018). See also VA. CODE § 19.2-152.4 (2018).
- <sup>13</sup> VA. CODE § 19.2-152.4:3(A)(1) (2018).
- <sup>14</sup> VA. CODE § 19.2-152.4:3(A)(2) (2018).
- <sup>15</sup> VA. CODE § 19.2-152.4:3(A)(3) (2018).
- <sup>16</sup> VA. CODE § 19.2-152.4:3(B) (2018).
- <sup>17</sup> VA. CODE § 19.2-152.4:3(B)(2) (2018).
- <sup>18</sup> VA. CODE § 19.2-152.4:3(B)(5) (2018).
- <sup>19</sup> VA. CODE § 19.2-152.4:3(B)(6) (2018).
- <sup>20</sup> A total of 88% (28 of 32) of directors responded to this survey. Although Culpeper County did not begin offering pretrial services until January 1, 2018, that agency also completed a survey; however, their survey response was not included in the response rate.
- <sup>21</sup> VA. CODE § 19.2-152.2 (2018). Per this same Code provision, localities receiving state reimbursement for construction of a local correctional facility must establish a pretrial services agency. See VA. CODE § 53.1-82.1 (2018). Based on personal communications with DCJS, it was determined that state funding was previously provided for pretrial services agencies in relation to construction of the Central Virginia Regional Jail and Southwest Virginia Regional Jail; however, no pretrial services agencies are currently receiving such funding.
- <sup>22</sup> VA. CODE § 19.2-152.3 (2018).

- <sup>23</sup> See Virginia Department of Criminal Justice Services. (February 2018). *Local Community-Based Probation and Pretrial Services Grant Application Guide for FY 2019 Continuation Funding*. Available at <https://www.dcjs.virginia.gov/sites/dcjs.virginia.gov/files/grants/fy-2019-comprehensive-community-corrections-act-ccca-and-pretrial-services-act-psa/fy-2019-cccapsa-grant-guidelines.pdf>.
- <sup>24</sup> VA. CODE § 19.2-152.6 (2018).
- <sup>25</sup> VA. CODE § 19.2-152.3 (2018).
- <sup>26</sup> *Id.* See also Virginia Department of Criminal Justice Services. (2017, January 12). *Minimum Standards for Pretrial Services*. Available at <https://www.dcjs.virginia.gov/sites/dcjs.virginia.gov/files/publications/corrections/dcjs-minimum-standards-pretrial-services.pdf>.
- <sup>27</sup> VA. CODE § 19.2-152.7 (2018).
- <sup>28</sup> Virginia Department of Criminal Justice Services. (2011, March 18). *Key Definitions*. Available at <https://www.dcjs.virginia.gov/sites/dcjs.virginia.gov/files/publications/corrections/pretrial-key-definitions.pdf>.
- <sup>29</sup> *Id.*
- <sup>30</sup> VA. CODE §§ 19.2-11 and 19.2-129 (2018).
- <sup>31</sup> VA. CODE §§ 16.1-69.24 and 18.2-456 (2018).
- <sup>32</sup> VA. CODE § 19.2-128 (2018).
- <sup>33</sup> VA. CODE §§ 19.2-11 and 19.2-129 (2018).
- <sup>34</sup> VA. CODE §§ 16.1-69.24 and 18.2-456 (2018).
- <sup>35</sup> VA. CODE § 19.2-128 (2018).
- <sup>36</sup> See VA. CODE § 19.2-390 (2018).
- <sup>37</sup> See Office of the Secretary of Public Safety and Homeland Security. (2017, October 15). *Report on the Offender Population Forecasts (FY2018 to FY2023)*. Available at <https://rga.lis.virginia.gov/Published/2017/RD375/PDF>; Virginia Department of Criminal Justice Services. (2010). *Virginia's peculiar system of local and regional jails*. Available at <https://www.dcjs.virginia.gov/sites/dcjs.virginia.gov/files/publications/research/virginias-peculiar-system-local-and-regional-jails.pdf>; Austin, J. *Assessing and Managing Your Jail Population: A Toolkit For Practitioners*. *The JFA Institute*. Available at [http://www.ca-ilg.org/sites/main/files/file-attachments/jailassessmenttoolkit10\\_31\\_12.pdf](http://www.ca-ilg.org/sites/main/files/file-attachments/jailassessmenttoolkit10_31_12.pdf); Virginia Criminal Sentencing Commission. (2015, January 15). *Virginia's Offender Population Forecasts: Presentation to the House Appropriations Public Safety Subcommittee*. Available at [http://hac.state.va.us/subcommittee/2015\\_Subcommittee/public\\_safety/files/01-15-15/Offender%20Forecasts.pdf](http://hac.state.va.us/subcommittee/2015_Subcommittee/public_safety/files/01-15-15/Offender%20Forecasts.pdf).
- <sup>38</sup> Compensation Board, LIDS- Average Monthly Population Reports. See Appendix A for total statewide jail population and number of defendants detained prior to trial by average monthly population, 2013-2017.
- <sup>39</sup> *Id.*
- <sup>40</sup> Figures for grant funding were provided by the Virginia Department of Criminal Justice Services.
- <sup>41</sup> *Id.*
- <sup>42</sup> VA. CODE § 19.2-152.4:3(A)(2) (2018).
- <sup>43</sup> Virginia Department of Criminal Justice Services. (2013, July 1, through 2014, June 30). *Comprehensive Community Corrections Act And Pretrial Services Act Report*, pp. 5, footnote 3. Available at <https://www.dcjs.virginia.gov/sites/dcjs.virginia.gov/files/publications/corrections/community-corrections-act-and-pretrial-services-act-report-fy-2014.pdf>.
- <sup>44</sup> Virginia Department of Criminal Justice Services. *CCCA-PSA –Pretrial Risk Assessment*. Available at DCJS website (2018, May 20): <https://www.dcjs.virginia.gov/correctional-services/programs/comprehensive-community-corrections-act-ccca-pretrial-services-act/ccca-psa-pra>.
- <sup>45</sup> VA. CODE § 19.2-152.3 (2018).



<sup>46</sup> Danner, M.J.E., VanNostrand, M., and Spruance, L.M. (November 2016). *Race and Gender Neutral Pretrial Risk Assessment, Release Recommendations, and Supervision: VPRAI and Praxis Revised*. Available at <https://www.dcjs.virginia.gov/sites/dcjs.virginia.gov/files/publications/corrections/race-and-gender-neutral-pretrial-risk-assessment-release-recommendations-and-supervision.pdf>.

<sup>47</sup> See Virginia Department of Criminal Justice Services. *Legal and Evidence-Based Practices Random Agency Selections Handout*. Prior to September 2017, a total of 14 of the 32 pretrial services agencies were pilot programs for the VPRAI-Revised and Praxis.

<sup>48</sup> Several differences exist between the VPRAI-Revised and the VPRAI, including the following: (a) addition of the Praxis tool, (b) pretrial services officers no longer recommend monetary bail amounts, (c) instrument was re-validated to ensure against gender and racial predictive bias, (d) the number of risk levels increased from 5 to 6, (e) charge type risk factor was amended to “current charge is felony drug, felony theft or felony fraud”, (f) “active community supervision” was added as a risk factor, (g) employment stability risk factor was amended to “unemployed at time of arrest”, and (h) length at residence was removed as a risk factor. See *supra* note 46. See also Virginia Department of Criminal Justice Services. (2017, August 4). *Statewide Implementation of the Revised VPRAI and Praxis*.

<sup>49</sup> See Appendix B for the manual scoring sheet for the VPRAI-Revised and Praxis. The VPRAI-Revised score and Praxis recommendation are commonly generated via data entry into the Pretrial and Community Corrections Case Management System (PTCC).

<sup>50</sup> Virginia Department of Criminal Justice Services. (2017, August 1). *Virginia Pretrial Risk Assessment Instrument Instruction Manual*—Version 4, p. 15.

<sup>51</sup> Virginia Department of Criminal Justice Services. *CCCA-PSA –Pretrial Risk Assessment*. Available at DCJS website (2018, May 20): <https://www.dcjs.virginia.gov/correctional-services/programs/comprehensive-community-corrections-act-ccca-pretrial-services-act/ccca-psa-pra>.

<sup>52</sup> See Appendix C for the checklist for bail determinations.

<sup>53</sup> VA. CODE § 19.2-121 (2018).

<sup>54</sup> *Id.*

<sup>55</sup> See Appendix D for a comparison of the VPRAI-Revised and bail determination checklist factors.

<sup>56</sup> See VA. CODE §§ 19.2-152.4:3(A)(3) and 19.2-152.4:3(A)(4) (2018).

<sup>57</sup> *Id.* See also VA. CODE § 19.2-123 (2018).

<sup>58</sup> VA. CODE § 19.2-119 (2018).

<sup>59</sup> *Id.*

<sup>60</sup> Virginia Department of Criminal Justice Services. (2011, March 18). *Key Definitions*. Available at <https://www.dcjs.virginia.gov/sites/dcjs.virginia.gov/files/publications/corrections/pretrial-key-definitions.pdf>.

<sup>61</sup> Terminology determined based upon personal communication with the Virginia Department of Criminal Justices Services. See also *supra* note 43. A pretrial investigation consists of “a face-to-face interview with the defendant, full criminal history, verification with community contacts, administration of the Virginia Pretrial Risk Assessment Instrument (VPRAI), and a bond recommendation.”

<sup>62</sup> See Appendix E for pretrial services placement types, FY15-FY17.

<sup>63</sup> See Appendix F for pretrial services placements for specified misdemeanors, FY15-FY17.

<sup>64</sup> See VanNostrand, M., & Keebler, G. (2009). *Pretrial Risk Assessment in the Federal Court*. U.S. Department of Justice. Available at [https://www.pretrial.org/download/risk-assessment/Pretrial%20Risk%20Assessment%20in%20the%20Federal%20Court%20Final%20Report%20\(2009\).pdf](https://www.pretrial.org/download/risk-assessment/Pretrial%20Risk%20Assessment%20in%20the%20Federal%20Court%20Final%20Report%20(2009).pdf); Cohen, T.H., Cook, D., Lowenkamp, C.T. (2016). The supervision of low-risk federal offenders: How the Low-Risk Policy Has Changed Federal Supervision Practices Without Compromising Community Safety. *Federal Probation*, 80(1), 3-11. Available at [http://www.uscourts.gov/sites/default/files/80\\_1\\_1\\_0.pdf](http://www.uscourts.gov/sites/default/files/80_1_1_0.pdf).

<sup>65</sup> See Appendix G for a breakdown of FY17 pretrial services placements by risk level.

<sup>66</sup> See Appendix H for total underage possession of alcohol placements by risk level, FY15-FY17.

<sup>67</sup> VA. CODE §§ 19.2-152.2 and 19.2-152.4:3 (2018). See also VA. CODE §§ 19.2-119 through 19.2-134 (2018).

<sup>68</sup> VA. CODE § 19.2-303 (2018).

<sup>69</sup> VA. CODE § 19.2-303.3(A) (2018).

<sup>70</sup> Virginia Department of Criminal Justice Services, personal communication, November 13, 2017.

<sup>71</sup> Virginia Department of Criminal Justice Services. (2017, January 12). Standard § 3.8. *Minimum Standards for Pretrial Services*. Available at <https://www.dcjs.virginia.gov/sites/dcjs.virginia.gov/files/publications/corrections/dcjs-minimum-standards-pretrial-services.pdf>.

<sup>72</sup> VA. CODE § 19.2-123(A)(4) (2018).

<sup>73</sup> Virginia Department of Criminal Justice Services, PTCC Case Management System. Note that 241 cases did not have a bond type recorded in PTCC for FY17.

<sup>74</sup> See VA. CODE § 19.2-159 (2018) regarding the determination of indigency.

<sup>75</sup> Virginia Department of Criminal Justice Services. (2017, January 12). Standard § 3.5(A). *Minimum Standards for Pretrial Services*. Available at <https://www.dcjs.virginia.gov/sites/dcjs.virginia.gov/files/publications/corrections/dcjs-minimum-standards-pretrial-services.pdf>.

<sup>76</sup> Virginia Department of Criminal Justice Services. (2017, January 12). *Minimum Standards for Pretrial Services*. Available at <https://www.dcjs.virginia.gov/sites/dcjs.virginia.gov/files/publications/corrections/dcjs-minimum-standards-pretrial-services.pdf>.

<sup>77</sup> See VA. CODE § 19.2-152.2 (2018).

<sup>78</sup> Virginia Department of Criminal Justice Services. (2013, July 1, through 2014, June 30). *Comprehensive Community Corrections Act And Pretrial Services Act Report*. Available at <https://www.dcjs.virginia.gov/sites/dcjs.virginia.gov/files/publications/corrections/community-corrections-act-and-pretrial-services-act-report-fy-2014.pdf>.

<sup>79</sup> VA. CODE § 19.2-152.7 (2018).

<sup>80</sup> 2018 Va. Acts ch. 180, 407.

<sup>81</sup> See Hoffman, N.G. *UNCOPE*. Available at [http://www.evinceassessment.com/UNCOPE\\_for\\_web.pdf](http://www.evinceassessment.com/UNCOPE_for_web.pdf).

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# Update: Asset Forfeiture

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## Overview

In 2015, the Crime Commission conducted a comprehensive study on asset forfeiture in Virginia.<sup>1</sup> As a result of that study, Crime Commission members endorsed a recommendation requiring staff to work with stakeholders to develop a training program on asset forfeiture. Staff began working with stakeholders in 2016 to develop and coordinate this training. As a result, the Commonwealth's Attorneys' Services Council (CASC), the Virginia Sheriffs' Institute (VSI), and the Virginia Department of Criminal Justice Services (DCJS) sponsored an in-person training entitled *Asset Forfeiture: Law and Procedure* in Chesterfield County on March 9, 2017, at no cost to participants. Over 230 individuals from throughout the Commonwealth attended this training.<sup>2</sup>

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## Development

While developing the training, it was determined that the program should specifically focus on the needs of the various stakeholders involved in the asset forfeiture process, including the following: (i) law enforcement officers, (ii) asset forfeiture coordinators, and (iii) prosecutors and staff in Commonwealth's Attorneys' Offices. The initial plan to provide this training involved video-recording presentations on asset forfeiture specifically tailored to each stakeholder group and making those recordings and accompanying training materials available online. Various online distribution options were explored; however, these options were not accessible to all stakeholders due to cost, data security concerns, or privacy considerations.

Because online training options were not feasible, planning was commenced for a live training that would be available at no cost to participants. Crime Commission staff maintained regular contact with the stakeholders involved in planning and presenting this training program. Mock training sessions were conducted for the instructors to present their training materials and receive feedback to ensure that the information being offered was clear, complete, and accurate.

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## Implementation

On March 9, 2017, a training entitled *Asset Forfeiture: Law and Procedure* was held at the Thomas R. Fulghum Conference Center in Chesterfield County. This training was sponsored by CASC, VSI, and DCJS. The agenda included the following topics: (i) introduction to asset forfeiture, (ii) investigation of asset forfeiture cases, (iii) law enforcement asset forfeiture coordinators, (iv) Commonwealth's Attorneys' asset forfeiture coordinators and procedure, (v) legal standards and alternatives, and (vi) Department of Criminal Justice Services' policy and procedure.

This training was open to a wide variety of stakeholders, including law enforcement, asset forfeiture coordinators, prosecutors and staff from Commonwealth's Attorneys' Offices, local government administrators, and city/county Treasurers. There were 237 registered attendees present for this event. The CASC made the materials from this training available online to all Virginia prosecutors along with a guide to asset forfeiture.<sup>3</sup>

Due to the overall success of the March 2017 program, training on asset forfeiture was again offered by CASC, in conjunction with VSI, on April 5, 2018, in Roanoke.<sup>4</sup> Tentative plans exist to offer this training program in 2019 in another area of the Commonwealth.<sup>5</sup> Additionally, DCJS published an updated program manual on asset forfeiture in March 2018.<sup>6</sup>

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## Acknowledgements

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

Chesterfield County Public Schools  
Commonwealth's Attorneys' Services Council  
Virginia Association of Chiefs of Police  
Virginia Center for Policing Innovation  
Virginia Department of Criminal Justice Services  
Virginia Sheriffs' Association  
Virginia Sheriffs' Institute

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**The Crime Commission would like to especially thank all individuals who presented at the March 2017 training:**

Det. Scott Bailey, Chesterfield County Police Department  
Det. Charles Brown, Arlington County Police Department  
Elliott Casey, Commonwealth's Attorneys' Services Council  
John Colligan, Department of Criminal Justice Services  
Benjamin Garrison, Asst. Commonwealth's Attorney for Chesterfield County  
Det. Robert LaBlanc, Fairfax County Police Department  
Bronwyn (Bobbie) Morris, Department of Criminal Justice Services  
Tom Shaia, Deputy Commonwealth's Attorney for the City of Suffolk

## Endnotes

<sup>1</sup> The Crime Commission report on asset forfeiture is available at <http://vscc.virginia.gov/Asset%20Forfeiture-1.pdf>.

<sup>2</sup> Commonwealth's Attorneys' Services Council, personal communication, March 21, 2018.

<sup>3</sup> *Id.*

<sup>4</sup> Commonwealth's Attorneys' Services Council, personal communication, April 19, 2018. A total of 123 individuals attended this Roanoke event.

<sup>5</sup> *Id.*

<sup>6</sup> Virginia Department of Criminal Justice Services. (March 2018). *Forfeited Asset Sharing Program Manual*. Available at <https://www.dcjs.virginia.gov/sites/dcjs.virginia.gov/files/publications/dcjs/forfeited-asset-sharing-program-manual.pdf>.

# Update: Restitution

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## Overview

In 2016, the Crime Commission conducted a study on restitution collection practices in Virginia and the extension of probation for failure to comply with an order to pay restitution.<sup>1</sup> As a result of this study, the Crime Commission endorsed 13 policy options and recommendations to improve the collection of restitution for victims of crime throughout the Commonwealth.<sup>2</sup>

Based on the continued work of the Crime Commission and numerous stakeholders, legislation was enacted during the Regular Session of the 2018 General Assembly to protect the confidentiality of victims' phone numbers and email addresses,<sup>3</sup> require court reviews to determine whether defendants are in compliance with restitution orders,<sup>4</sup> and facilitate the delivery of unclaimed restitution to crime victims more effectively.<sup>5</sup>

As a result of the 2016 study, other administrative recommendations were also completed during 2017 to 2018. The Office of the Executive Secretary of the Supreme Court of Virginia (OES) assembled numerous stakeholders to develop recommendations and best practices for the collection of restitution at the request of the Crime Commission. That group produced the following two reports: (i) *Recommendations for the Enhancement of the Collection of Restitution* and (ii) *Best Practices for the Collection of Restitution*.<sup>6</sup> The best practices were provided to all judges and clerks of the circuit, general district, and juvenile and domestic relations district courts and will be discussed at future trainings for judges and clerks.

The Department of Criminal Justice Services (DCJS) worked with stakeholders to develop an informational brochure for victims of crime to explain the restitution process. The brochure is publicly available on the DCJS website and was distributed to stakeholders.<sup>7</sup>

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## Summary of Legislation

During 2017 and 2018, legislation was developed to protect the confidentiality of victims' phone numbers and email addresses, require court reviews to determine whether defendants are in compliance with restitution orders, and facilitate the delivery of unclaimed restitution to victims of crime more effectively.

## Confidentiality of Victims' Phone Numbers and Email Addresses

The OES report on *Recommendations for the Enhancement of the Collection of Restitution* included 13 total recommendations. Crime Commission members were presented with the following three legislative recommendations from that report at the December 2017 meeting:

**Recommendation 1:** Virginia Code § 19.2-305.1 should be amended to clarify that the court has the authority to reduce the amount of restitution owed by the defendant, or the restitution amount could be marked as satisfied, when such action is requested by the victim during any period in which all or part of the restitution is outstanding.

**Recommendation 2:** Virginia Code §§ 19.2-11.01, 19.2-11.2, and 19.2-269.2 should be amended to set forth that victims' email addresses and any telephone numbers cannot be disclosed if the victim requests confidentiality of their personal information in accordance with the statute.

**Recommendation 3:** Virginia Code § 19.2-305.2 should be amended to provide that if restitution ordered by a district court remains outstanding 20 years after it was ordered, then that restitution could be marked as inactive in the court's financial system, except for good cause shown. Furthermore, if restitution ordered by a circuit court remains unpaid 40 years after it was ordered, that restitution could likewise be marked as inactive.

Crime Commission members unanimously endorsed Recommendation 2 to protect the confidentiality of victims' email addresses and telephone numbers. No motions were made in regard to Recommendations 1 or 3. Identical legislation was introduced in both chambers during the Regular Session of the 2018 General Assembly. Delegate Robert B. Bell introduced House Bill 840 and Senator Janet D. Howell introduced Senate Bill 457. Both of these bills were passed unanimously by the General Assembly and were signed into law by the Governor.<sup>8</sup>

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## Monitoring Compliance with Restitution Orders

At its December 2016 meeting, Crime Commission members unanimously endorsed a recommendation to amend several sections of the Code of Virginia in order to specify who is responsible for monitoring a defendant's compliance with the payment of restitution.<sup>9</sup>

As a result of that recommendation, legislation was introduced in both chambers during the Regular Session of the 2017 General Assembly. Delegate Robert B. Bell introduced House Bill 1856 and Senator Mark D. Obenshain introduced Senate Bill 1285. The General Assembly passed both bills and the Governor returned both bills with proposed amendments to implement a pilot program, sunset the provisions in 2019, and require the Crime Commission to monitor the effectiveness of the approach.<sup>10</sup> Both chambers voted to reject these amendments and the Governor vetoed both bills.<sup>11</sup>

During the Regular Session of the 2018 General Assembly, legislation was again introduced in both chambers to address the same concerns related to the monitoring of restitution. Delegate Robert B. Bell introduced House Bill 484 and Senators Mark D. Obenshain and Janet D. Howell introduced Senate Bill 994. These bills established procedures for courts to review and monitor the payment of restitution by criminal defendants. The bills also created a new penalty for contempt which courts may impose when a defendant fails to comply with the restitution order. Both bills were included as part of an agreement between the Governor and the General Assembly to increase the felony larceny threshold and ensure that restitution is paid to victims.<sup>12</sup> Both bills passed the General Assembly and were signed into law by the Governor.<sup>13</sup>

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## **Disbursing Unclaimed Restitution to Crime Victims**

During 2017, an investigation by a local news agency revealed issues faced by victims when trying to collect unclaimed restitution.<sup>14</sup> Crime Commission staff followed up on this report and found that the Criminal Injuries Compensation Fund (CICF)<sup>15</sup> is in possession of millions of dollars in unclaimed restitution. Since CICF first started collecting unclaimed restitution in 2003, the Fund has received over \$8 million;<sup>16</sup> however, during that same time period, only \$419,000 of that sum has been returned to crime victims.<sup>17</sup> Staff also found that no one in the restitution process is specifically tasked with attempting to locate victims when a defendant is paying restitution.

As a result of the media reports and subsequent investigation, Delegate Robert B. Bell introduced House Bill 483 and Senator Mark D. Obenshain introduced Senate Bill 562 during the Regular Session of the 2018 General Assembly. The primary purpose of these bills was to require CICF to attempt to identify and locate any victims owed unclaimed restitution and to pay restitution directly to those victims. As part of the legislation, the General Assembly funded two additional positions at CICF to perform these duties. Additionally, the bills accomplished the following:



- Established procedures for courts to share information about unclaimed restitution with CICF;
- Required that CICF develop policies and procedures for collecting and disbursing unclaimed restitution and include information on unclaimed restitution in its annual report; and,
- Mandated OES to report on the amount of restitution assessed, collected, and unpaid each year, along with the amount of unclaimed restitution forwarded to CICF.

Both of these bills were also included as part of an agreement between the Governor and the General Assembly to increase the felony larceny threshold and ensure that restitution is paid to victims.<sup>18</sup> Both bills passed the General Assembly and were signed into law by the Governor.<sup>19</sup>

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## Acknowledgements

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Kerri O'Brien, ABC 8 News Richmond

Office of the Executive Secretary of the Supreme Court of Virginia

Office of the Secretary of Public Safety and Homeland Security

Virginia Department of Criminal Justice Services

Virginia Victims Fund (officially Criminal Injuries Compensation Fund)

## Endnotes

- <sup>1</sup> The Crime Commission report on restitution is available at <http://vscc.virginia.gov/FINAL%20Restitution.pdf>. Of the 13 recommendations endorsed by the Crime Commission, 8 were legislative and 5 were administrative in nature.
- <sup>2</sup> *Id.*
- <sup>3</sup> 2018 Va. Acts ch. 47, 83.
- <sup>4</sup> 2018 Va. Acts ch. 316, 671.
- <sup>5</sup> 2018 Va. Acts ch. 724, 725.
- <sup>6</sup> Office of the Executive Secretary of the Supreme Court of Virginia. (2017, October 30). *Recommendations for the Enhancement of the Collection of Restitution and Best Practices for the Collection of Restitution*. Available at <http://vscc.virginia.gov/Recommendations%20for%20the%20Enhancement%20of%20the%20Collection%20of%20Restitution%20and%20Best%20Practices%20for%20the%20Collection%20of%20Restitution.pdf>.
- <sup>7</sup> Virginia Department of Criminal Justice Services (January 2018). *Restitution in Virginia: A Guide for Crime Victims*. Available at <https://www.dcjs.virginia.gov/sites/dcjs.virginia.gov/files/publications/victims/restitution-virginia-guide-crime-victims.pdf>.
- <sup>8</sup> 2018 Va. Acts ch. 47, 83.
- <sup>9</sup> *See supra* note 1. This was Recommendation 8 in the restitution report.
- <sup>10</sup> Governor's Veto and Recommendation (HB 1856). Available at <https://lis.virginia.gov/cgi-bin/legp604.exe?171+amd+HB1856AG>. Governor's Veto and Recommendation (SB 1285). Available at <https://lis.virginia.gov/cgi-bin/legp604.exe?171+amd+SB1285AG>.
- <sup>11</sup> Governor's Veto (HB 1856). Available at <https://lis.virginia.gov/cgi-bin/legp604.exe?171+amd+HB1856AG>. Governor's Veto (SB 1285). Available at <https://lis.virginia.gov/cgi-bin/legp604.exe?171+amd+SB1285AG>.
- <sup>12</sup> Office of the Governor (2018, February 8). *Governor Northam and Speaker Cox Announce Bipartisan Compromise on Grand Larceny Threshold and Legislation to Protect Crime Victims*. Available at <https://governor.virginia.gov/newsroom/newsarticle?articleId=25431>. Virginia House GOP (2018, February 8). *Governor Northam and Speaker Cox Announce Bipartisan Compromise on Grand Larceny Threshold and Legislation to Protect Crime Victims*. Available at <https://virginiahouse.gop/2018/02/08/governor-northam-speaker-cox-announce-bipartisan-compromise-grand-larceny-threshold-legislation-protect-crime-victims/>.
- <sup>13</sup> 2018 Va. Acts ch. 316, 671.
- <sup>14</sup> O'Brien, K. (2017, May 22). 8 News Investigates: Crime Victims Owed, Victimized Again. *ABC 8 News Richmond*. Available at <http://www.wric.com/news/8news-investigates-crime-victims-owed-victimized-again/1059811964>. O'Brien, K. (2017, Nov. 20). 8 News Investigates: Crime Victims Victimized Again Across the Commonwealth. *ABC 8 News Richmond*. Available at <http://www.wric.com/news/8-investigates/8news-investigates-crime-victims-victimized-again-across-the-commonweal> [th\\_2018032607012479/1078055191](http://www.wric.com/news/8-investigates/8news-investigates-crime-victims-victimized-again-across-the-commonweal_th_2018032607012479/1078055191). O'Brien, K. (2018, February 2). Bill Moves Forward After 8 News Shares Investigation Findings with Lawmakers. *ABC 8 News Richmond*. Available at [http://www.wric.com/news/8-investigates/bill-moves-forward-after-8news-shares-investigation-findings-with-lawmakers\\_20180326072516661/1078202324](http://www.wric.com/news/8-investigates/bill-moves-forward-after-8news-shares-investigation-findings-with-lawmakers_20180326072516661/1078202324).
- <sup>15</sup> As of January 1, 2017, this fund is referred to as the Virginia Victims Fund (officially Criminal Injuries Compensation Fund).
- <sup>16</sup> Criminal Injuries Compensation Fund, personal communication, January 24, 2018.
- <sup>17</sup> Criminal Injuries Compensation Fund, personal communication, January 28, 2018.
- <sup>18</sup> *See supra* note 12.
- <sup>19</sup> 2018 Va. Acts ch. 724, 725.