Admissibility of Prior Inconsistent Statements

Study Highlights **January 2018**

SB 1445 was introduced by Senator Howell during the Regular Session of the 2017 General Assembly and was referred to the Crime Commission by the Senate Courts of Justice Committee.

This bill proposed amending the rules of evidence in Virginia to permit the admission of prior inconsistent statements as substantive evidence in criminal cases. Substantive evidence is used to support a fact in issue at the trial or hearing, as opposed to impeaching or corroborating the testimony of the witness.

Crime Commission members endorsed SB 1445 to amend Virginia's rules of evidence. SB135 and HB 841 were introduced during the 2018 Session of the General Assembly.

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What are the study findings?

Virginia's rules of evidence could be amended to allow for the admissibility of prior inconsistent statements as substantive evidence in criminal cases, provided that the witness who made the prior inconsistent statement testifies at the trial or hearing and is subject to cross-examination. A prior inconsistent statement is defined as any previous statement by a witness which has a reasonable tendency to discredit their direct testimony on a material matter. The statement can include evasive answers, silence, changes in position, claims of memory loss, or a denial of the previous statement.

No legal impediments exist to amending Virginia law to allow for the introduction of prior inconsistent statements as substantive evidence. The Confrontation Clause of the U.S. Constitution guarantees a defendant the right to confront witnesses against him in a criminal trial. The proposed legislation satisfies this standard by requiring that the witness who made the prior statement be present at trial and subject to cross-examination. Additionally, nearly all states have adopted some variation of this proposed rule of evidence.

By a majority vote, Crime Commission members endorsed SB 1445 as introduced during the Regular Session of the 2017 General Assembly to amend existing law to allow for the introduction of prior inconsistent statements as substantive evidence.

What rules govern the admissibility of prior statements?

Two competing rules exist regarding the admissibility of prior inconsistent statements: the common law rule and the modern rule. Under the common law rule, out-of-court statements are treated as hearsay and can only be used to *impeach* the credibility of a witness. These prior statements are not deemed sufficiently reliable to be introduced as substantive evidence because they were not under oath, before the trier of fact, or subject to cross-examination. Virginia and two other states currently follow this rule.

The modern rule allows for out-of-court statements to be admitted as *substantive* evidence in consideration of the defendant's guilt, provided that the witness who made such statements testifies at the proceeding and is subject to cross-examination. Under this rule, the trier of fact can consider all relevant evidence, observe the demeanor of the witness, and hear an explanation for any discrepancy between statements of the witness. This rule is observed in some form by 47 states, the District of Columbia, and the Federal Rules of Criminal Procedure. The degree to which prior inconsistent statements are admissible in these jurisdictions varies based upon the circumstances under which the prior inconsistent statement was made.

Decriminalization of Marijuana

Study Highlights **January 2018**

Why was decriminalization of marijuana studied?

Two bills, SB 908 (Senator Lucas) and SB 1269 (Senator Ebbin), and a letter request from Senator Norment were sent to the Crime Commission during the 2017 Session of the General Assembly requesting a review of the decriminalization of possession of marijuana.

Decriminalization of marijuana has been proposed as a potential solution to the collateral consequences individuals incur as a result of being convicted for possession of marijuana. Such consequences may include significant financial costs to an offender and could have a negative impact to their driver's license, employment, higher education financial aid, housing, immigration status, ability to purchase and possess firearms, eligibility to obtain a concealed handgun permit. Another concern raised by proponents of decriminalization has been the racial disparity amongst persons arrested and prosecuted for possession of marijuana.

What were the findings of this study?

Decriminalization refers to the removal of criminal penalties for possessing small amounts of marijuana for personal use. Such possession would be punished as a civil offense. Marijuana would remain a prohibited substance under the law.

Ultimately decriminalization of marijuana is a policy decision. Virginia's current criminal penalty structure for possession of marijuana, Va. Code § 18.2-250.1, was enacted in 1979. Twelve states have decriminalized possession of marijuana in some manner using varying penalty structures, punishments, and quantity limits. Some of these states impose the same civil penalty regardless of the number of prior offenses, other states mandate an increasing civil penalty for subsequent offenses, and certain states treat initial violations as civil and subsequent offenses as criminal. The laws of these states could serve as models for amending the Code of Virginia to decriminalize possession of marijuana in some manner.

The Crime Commission received over 5,500 written comments and heard extensive testimony from the public.

Any legislation that amends the current penalty structure and decriminalizes marijuana will impact numerous other areas of Virginia law, including the punishment, enforcement, trial procedures, and administrative processes relating to possession of marijuana. Such legislation may require consideration of other policies matters, including, but not limited to: (i) the creation of a central repository to store the records of civil violations, (ii) quantity limits for personal use and punishments for possession over those limits, (iii) development of weight measurement standards, (iv) which forms of marijuana to decriminalize, (v) whether possession in vehicles, other areas, or public use should remain criminal, (vi) trial matters, such as the burden of proof and how to count prior marijuana convictions, (vii) whether to suspend a person's driver's license as a result of a civil conviction, (viii) any amendments to Virginia's first time drug offender statute, (ix) any modifications to Virginia's firearm and concealed handgun permit statutes, (x) any amendments to Virginia's DUI statutes, (xi) providing training to law enforcement to recognize signs of drug-impaired driving, and (xii) a delayed or emergency enactment clause.

Crime Commission members were presented with three policy options in regard to decriminalization of marijuana. No motions were made on any of the following three options:

Policy Option 1: Maintain the status quo.

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

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

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What does the data show?

Data demonstrated that males, young adults, and Blacks/African Americans are overrepresented in the total number of arrests for possession as compared to their overall general population. Arrest data provided by the Virginia State Police for possession of marijuana in Virginia from CY07-CY16 showed the following:

- The U.S. Census Bureau estimated that as of 2016, Virginia's total population by sex was comprised of 51% females and 49% males:
  - 81% of first offense arrests were of males.
  - 91% of second or subsequent offense arrests were of males.
- When examining the age of the person arrested:
  - 54% of first offense arrests were of persons aged 18 to 24.
  - 37% of second or subsequent offense arrests were of persons aged 18 to 24.
- The U.S. Census Bureau estimates that as of 2016, approximately 70% of Virginia's population was White and 19.8% was Black/African American:
  - 45.5% of first offense arrests were of Blacks/African Americans.
  - 52.7% of second or subsequent offense arrests were of Blacks/African Americans.

Data 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. There appeared to be a large attrition rate between the total first offense charges filed and total convictions obtained. Of these first offense charges filed in the general district courts, approximately:

- 55% resulted in a conviction for possession of marijuana or some other related offense; and,
- 45% resulted in dismissal, *nolle prosequi*, or a finding of not guilty.

It could not be ascertained how many of these first offense charges represented defendants who had previously had a possession of marijuana charge dismissed pursuant to the first offender statute.

Data further showed that an extremely low number of offenders serve jail time solely for possession of marijuana offenses.

- Jail time is frequently waived for first time offenders.
- For defendants convicted of second or subsequent offense possession of marijuana, approximately:
  - One-third receive a fine only;
  - One-third receive a fine and a suspended jail sentence; and,
  - One-third receive an active jail sentence.
- The median effective jail sentence for defendants convicted of second or subsequent possession of marijuana during FY16 was 15 days.

Will Virginia's DUI laws be impacted?

Virginia's existing statutes are sufficient to prosecute individuals for driving under the influence of marijuana. Current research does not support a reliable correlation between THC blood levels and impairment while operating a motor vehicle. Law enforcement may need additional training to recognize signs of drug-impaired driving. Approximately one year ago, DMV began offering Drug Recognition Expert (DRE) training to law enforcement to assist in identifying drug-impaired drivers.

DNA Databank: Expansion of Misdemeanor Crimes

Study Highlights **January 2018**

The Crime Commission voted unanimously to expand the number of misdemeanor crimes requiring a DNA sample submission upon conviction:

- **Assault & battery** (§ 18.2-57)
- **Domestic assault & battery** (§ 18.2-57.2)
- **Trespassing** (§ 18.2-119)
- **Petit larceny** (§ 18.2-96)
- **Destruction of property** (§ 18.2-137)
- **Obstruction of justice** (§ 18.2-460)
- **Conceal merchandise/ alter price tags** (§ 18.2-103)

The Crime Commission also voted unanimously to require fingerprinting upon conviction for trespassing and disorderly conduct.

HB 1264 and 1266 and SB 565 and 566 were introduced during the 2018 Session of the General Assembly.

Nearly 70% of individuals convicted of a violent felony or certain burglary offense in 2016 had at least one prior misdemeanor conviction.

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What are the study findings?

The Crime Commission received a letter from Speaker Howell and Delegates Toscano and Landes as a result of HJR711 requesting an examination of whether additional misdemeanors should be added to § 19.2-310.2, which requires adults to submit a DNA sample upon conviction for certain misdemeanor offenses. This statute currently requires that a DNA sample be submitted for 14 misdemeanors upon conviction. Staff identified 7 additional misdemeanor crimes most associated with violent felonies and certain burglary offenses that could be beneficial to add to this statute.

During the study, detailed prospective and retrospective analyses were completed. These analyses identified 7 misdemeanor crimes most associated with violent felonies and certain burglary offenses for a subset of offenders.

- Assault and battery convictions had the most compelling relationship with the violent felonies/certain burglary convictions in both analyses.
- Domestic assault and battery, trespassing, petit larceny, and destruction of property were also strongly associated in both analyses.
- Obstruction of justice and concealing merchandise/altering price tags showed a stronger association in the prospective analysis than the retrospective analysis.

Both data analyses can only be generalized to convictions in the stated time periods, rather than actual rates of offending, arrests, or charges.

Staff also discovered that trespassing and disorderly conduct convictions do not consistently appear on defendants' criminal histories because fingerprints are not specifically required for these two crimes. The Crime Commission unanimously endorsed both legislative recommendations as well as an administrative recommendation that DFS update their current training materials and provide adequate notice to law enforcement of any additional changes to the law before they become effective.

What are the benefits of including these 7 misdemeanors?

Adding these offenses will increase the number of samples in the DNA Databank, which in turn could lead to more investigations being aided, crimes solved, and innocent persons exonerated.

How many new DNA samples will be collected?

Based upon a review of conviction data, it is estimated that approximately 16,390 actual new samples will be entered by DFS annually.

Do any other states collect DNA for misdemeanor convictions?

Forty-two states and the District of Columbia collect DNA for certain sexual misdemeanor convictions. Twenty-six states, including Virginia, collect DNA for limited non-sexual misdemeanor convictions. Three states (New York, Utah, Wisconsin) collect DNA for large classes of misdemeanor offenses.

Pretrial Services in Virginia

Study Highlights **January 2018**

During the Regular Session of the 2016 General Assembly, Delegate C. Todd Gilbert introduced House Bills 774 and 776. Both bills were referred to the Crime Commission by the House Courts of Justice Committee. The Executive Committee of the Crime Commission authorized a two-year broad review of pretrial services in Virginia.

Crime Commission members unanimously endorsed all 7 recommendations to improve multiple areas of concern identified during the study. HB 996 and SB 783 were introduced during the 2018 Session of the General Assembly.

The Crime Commission sent a letter to DCJS requesting that they address several administrative recommendations. DCJS is expected to provide a report on the status of pretrial services to the Crime Commission by November 1, 2018.

What are the two-year study findings?

The study found that while broad support exists among local stakeholders for the use of pretrial services, there are multiple areas within the administration of these services that need to be addressed. As a result of the study, Crime Commission members unanimously endorsed the following seven legislative and administrative recommendations to ensure state funds are being allocated in a transparent and constructive manner and that pretrial services agencies are fulfilling their statutory duties and responsibilities.

Recommendation 1 is a legislatively mandated annual report which will serve a variety of functions, to include (i) requiring DCJS to annually assess each pretrial services agency and each such agency to assess itself, (ii) providing transparency on the performance of each agency to the public and local and state officials, (iii) making insights available to pretrial services agencies on how other agencies are performing across the state, and (iv) offering a picture of the statewide status of pretrial services. Recommendations 2 through 7 are administrative and will require stakeholders to work together to determine the best options for improving the administration of pretrial services in Virginia.

Recommendation 1: Virginia Code § 19.2-152.7 should be amended to require DCJS to report annually on the status of each pretrial services agency, to include: (i) amount of funding (local, state, federal, etc.), (ii) number of investigations and placements, (iii) average daily caseload, (iv) success rates, and (v) whether each pretrial services agency is in compliance with standards set forth by DCJS. The report should also include a plan to address issues within any non-compliant pretrial services agencies.

Recommendation 2: DCJS should conduct a formal needs assessment of stakeholders to identify the strengths and weaknesses of pretrial services programs, to include (i) priorities and expectations of stakeholders, (ii) areas in need of improvement, (iii) integrity of data and reports, (iv) strategic use of resources, and (v) future program planning.

Recommendation 3: DCJS should convene a group of stakeholders to develop specific recommendations to improve pretrial services.

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

Recommendation 5: DCJS should work with localities, pretrial 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.

There are currently 33 pretrial agencies serving 75% (100 of 134) of Virginia's localities.

The Pretrial Services Act took effect in 1995.

Pretrial services agencies are locality-based and therefore practices and resources vary greatly.

A revised risk assessment instrument (VPRAI-R) and a new supervision matrix (PRAXIS) were implemented statewide in September 2017.

Very few defendants are on pretrial supervision for common, relatively minor offenses.

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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 and that necessary data is entered consistently and uniformly.

What questions did the study address?

1. What is the statutory authority governing pretrial services?

Pretrial services agencies are locality based and are governed by the Pretrial Services Act (Va. Code § 19.2-152.2 *et al.*). The primary purposes of pretrial services are to provide information to assist judicial officers in making bail determinations and supervise defendants to monitor compliance with bail conditions. The Department of Criminal Justice Services (DCJS) prescribes standards and manages state grant funding of approximately $10 million dollars annually for these pretrial services agencies.

2. Do pretrial services agencies increase appearance and public safety rates?

Pretrial services agencies track appearance rates, public safety rates, and compliance rates in relation to defendants placed on pretrial supervision. These rates are not tracked on a statewide basis for defendants who are not placed on pretrial supervision. Therefore, a comparison of appearance rates and public safety rates between jurisdictions with pretrial services and those without pretrial services could not be completed with reliability or validity.

3. Are pretrial services agencies being overused in supervising low-risk offenders?

A detailed case review of the Pretrial and Community Corrections Case Management System (PTCC) revealed that very few defendants are on pretrial supervision for common, relatively minor misdemeanor offenses, such as underage drinking or possession of marijuana. This data also showed that the number of defendants on pretrial supervision for such offenses has decreased.

4. Are there fees associated with pretrial supervision?

DCJS minimum standards prohibit the collection of fees, such as supervision fees, drug testing fees, etc., from defendants for the provision of pretrial services. Defendants may be responsible for the costs of other monitoring conditions ordered by the court, such as GPS, home electronic monitoring (HEM), or an alcohol monitoring bracelet (SCRAM).

5. Does the presence of a pretrial services agency impact local jail populations?

Over the past 5 years, the total jail population has remained fairly steady, while the total pretrial jail population has gradually increased. Pretrial jail populations vary greatly amongst localities with and without pretrial services agencies. Because a variety of factors can impact jail populations, it is extremely difficult to isolate the independent impact of pretrial services agencies on such populations.

6. How often are secured bonds ordered in conjunction with pretrial services?

A review of data from FY17 found that most defendants placed on pretrial services supervision were also ordered to post a secured bond. During that time, 62% of the defendants placed on pretrial supervision were on a secured bond, while 38% of defendants were on a personal recognizance or unsecured bond.

7. How often are indigent defendants placed on pretrial supervision?

The number of indigent defendants on pretrial supervision could not be determined because pretrial services agencies do not capture this information.