
VIRGINIA STATE CRIME COMMISSION

2005
ANNUAL REPORT





COMMONWEALTH of VIRGINIA

Virginia State Crime Commission

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Delegate David B. Albo, *Vice Chairman*

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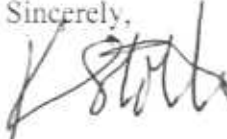
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September 12, 2006

TO: The Honorable Mark Warner, Governor of Virginia
Members of the Virginia General Assembly

Pursuant to the provisions of the Code of Virginia §§ 30-156 through 30-164 creating the Virginia State Crime Commission and setting forth its purpose, I have the honor of submitting herewith the year end 2005 Annual Report.

Sincerely,

Kenneth W. Stolle
Chairman

Senator Kenneth W. Stolle, Chairman
Delegate David B. Albo, Vice-Chairman

Delegate Robert B. Bell

Mr. Glenn R. Croshaw

Senator Janet D. Howell

The Honorable Jerry W. Kilgore

Delegate Terry G. Kilgore

Delegate Robert F. McDonnell

Colonel W. Gerald Massengill

Delegate Kenneth R. Melvin

Delegate Brian J. Moran

Senator Thomas K. Norment, Jr.

The Honorable William G. Petty

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Commission
Membership**



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Delegate Phillip A. Hamilton

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Colonel W. Gerald Massengill

Interim Director, Department of Game &
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**Virginia Association of
Commonwealth Attorneys**

The Honorable Richard E. Trodden

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VIRGINIA STATE CRIME COMMISSION

Authority of the Commission

Established in 1966, the Virginia State Crime Commission is a legislative agency authorized by the *Code of Virginia* § 30-156 *et seq.* to research and make recommendations on all aspects of criminal justice and public safety issues. The Crime Commission is a Criminal Justice Agency as defined in Title 9.1-101 of the *Code of Virginia*.

Pursuant to House and Senate Joint Resolutions, General Assembly committees' directions, member requests and its own initiative, the Commission focuses on, among other things, issues related to:

- Institutional and community corrections
- Education and treatment of inmates
- Powers of law enforcement officers
- Training and compensation of criminal justice professionals
- Criminal statutes and procedures

Thirteen members from across the state comprise the Commission's membership. The Speaker of the House appoints six members from the House of Delegates; the Senate Committee on Privileges and Elections appoints three members from the Senate; the Governor appoints three members; and the Attorney General or his designee is a *de facto* member. Each member serves on the Commission for four years and, the Commission elects its own chairman annually.

The Crime Commission created the Juvenile Law and Policy Sub-Committee, as well as the Criminal Law Sub-Committee to address mandated studies that were referred during 2005. In addition to the standing committees, the Commission also formed the Sex Offender Task Force. The annual report highlights the Commission's research and legislative recommendations of these studies over the past year.

VIRGINIA STATE CRIME COMMISSION

HJR 122: Campus Safety

During the 2004 Session of the Virginia General Assembly, Delegate Phillip A. Hamilton introduced House Joint Resolution 122 (HJR 122), which directed the Crime Commission to study campus safety at Virginia's public and private institutions of higher education. Specifically, the resolution directs the Commission to examine the following areas: (i) current Virginia policies, procedures and programs used to promote safety at institutions of higher education; (ii) nature of criminal offenses at Virginia's public and private institutions of higher education; (iii) use of best practices or models for campus safety nationally; and, (iv) need to develop statewide procedures to ensure the dissemination of information pertaining to best practices for campus safety to Virginia's public and private institutions of higher education.

The Crime Commission utilized several research methodologies to address the directives of the two-year study mandate on campus safety inside the Commonwealth including: (i) literature review, (ii) field visits to selected institutions, (iii) statistical analysis of reported crimes on campus, (iv) surveys of institutions and other key stakeholders, (v) convening of the Crime Commission Campus Safety Task Force and, (vi) creation of best practices for campus safety. The Crime Commission Campus Safety Task Force submitted legislative initiatives and best practice recommendations to the Crime

Commission at the December 14th, 2005 meeting. At the next Crime Commission meeting, the Commission adopted the majority of the Task Force best practices and the legislative recommendations. Legislative recommendations were included in House Bill 1036 and Senate Bill 560.

Legislative Recommendations for Campus Safety

Recommendation 1

The General Assembly should expand the DCJS School Safety Center to include an advisory campus safety division that would specialize in post-secondary safety issues including, but not limited to:

- Specialized campus police officer and security officer training;
- Technical support;
- Establishment and management of a database for campus safety and security information sharing;
- Role in laying out parameters that may assist colleges in establishing uniform record-keeping for disciplinary records and statistics, such as campus crime logs, judicial referrals and Clery Act statistics; and,

- Provide support for the establishment and management of campus law enforcement, investigations, statistics, judicial referrals, and all other policies and procedures utilized by campus police and security departments.

The Secretary of Public Safety should designate the Deputy Secretary to work with the School Safety Center in establishing the aforementioned duties.

Recommendation 2

The DCJS's School Safety Center, in collaboration with the Crime Commission, VACLEA, ABC and other state agencies, shall convene an annual state-wide summit between campus police and security departments, local law enforcement agencies with a campus in its jurisdiction, and any other appropriate entities.

Recommendation 3

Models for mutual-aid agreements, concurrent jurisdictions and memoranda of understanding between campus police/security agencies and other public safety organizations should be developed and/or updated by DCJS and made available to the field.

Recommendation 4

DCJS, with the assistance of the Attorney General's Office will help to develop guidelines for colleges and universities regarding dissemination of judicial council findings.

Best Practice Recommendations for Campus Safety

Best Practice 1

Each college and university should establish a Safety and Security Committee(s) to determine the necessary mechanisms to ensure campus safety and the prevention of crime. The purpose of the Committee is to encourage communication and collaboration across the campus community, as well as provide an advisory role in protocol development, such as appropriate educational programming for its campus. The Committee should meet, at a minimum, quarterly and should report to the President or his designee. Consideration for membership on the Committee should be given to representatives from:

- Campus police and security departments;
- Local law enforcement;
- Chief financial officer or designee;
- Maintenance/facilities departments;
- Student, athletic/intramural/recreation departments;
- Environmental health and safety;
- Residence life;
- Emergency planners;
- Student Government Association (SGA);
- Greek life;
- Counseling/women's center;
- Staff/faculty; and,
- Other representatives, as deemed appropriate.

Best Practice 2

Colleges and universities should apply Crime Prevention Through Environmental Design (CPTED) in planning and maintaining facilities and grounds.

- Smaller colleges and universities should partner with other law enforcement agencies in implementing CPTED.
- Police and security personnel should be actively involved in the review of plans for new buildings and building renovations to ensure that security concerns are addressed. Security concerns should include: landscape, access and key control systems, interior and exterior lighting, windows and doors, traffic safety (reflective tape for crosswalks, etc.) and electronic detection systems.

Best Practice 3

When developing new student orientation curriculum, institutions should work with campus police/security departments, SGA and other groups to establish the appropriate framework in addressing inappropriate/illegal student behavior. There should be multiple approaches to present the immediate and long-term effects of being arrested to both students and their parents. Approaches should include a mandatory overview at student orientation followed by supplemental meetings with residence life, student groups (i.e., Greek Life), and other organizations.

Best Practice 4

Each college and university should offer multiple courses/training sessions of Rape Aggression Defense (RAD) with certified instructors.

Best Practice 5

Each college and university should consider establishing trained and supervised student employees as an augmentation to security services. At a minimum, such students should receive 32 hours of training.

Best Practice 6

Each college and university with a police department should consider establishing a student police academy to give the campus community a working knowledge of the campus police department's personnel, policies, goals and objectives.

Best Practice 7

Each college and university should embrace the community policing philosophy and establish several programmatic initiatives in order to establish better relationships with the campus community. (Examples include: Adopt-A-Hall, "park, walk, and talk", bicycle patrols, satellite offices, and silent witness programs).

Best Practice 8

Each campus police and security department should have a written policy and procedure manual, which gives consideration to the

standards set forth by the Commission on Accreditation for Law Enforcement Agencies (CALEA), the Virginia Law Enforcement Professional Standards Commission (VLEPSC) and/or the International Association of Campus Law Enforcement Administrators (IACLEA).

Best Practice 9

Campus police departments should seek accreditation by an appropriate accrediting agency, such as CALEA, VLEPSC or IACLEA.

Best Practice 10

Campus security departments should seek accreditation by an appropriate accrediting agency, such as the International Association for Campus Law Enforcement Administrators (IACLEA).

Best Practice 11

Each college and university should encourage and participate in professional development provided by regional, state (VACLEA), national, or other organizations.

Best Practice 12

The Chief of Police or Director of Security and senior staff as deemed appropriate should belong to one or more professional organizations or associations to stay up-to-date with current practices. (Examples: VACLEA, IACLEA, VACP, IACP, IAHS, ASIS).

Best Practice 13

Campus police and security departments should meet annually with their local community officials, such as Fire Chiefs, Police Chiefs or designees, building officials, Emergency Medical Services representatives, Commonwealth's Attorney, ABC Regional Supervisor, City/County Manager or designee, City/County public relations representative, and other representatives.

Best Practice 14

Campus police and security departments should meet annually with their college's or university's officials including Vice-Presidents for Student and Business Affairs, Housing Directors, Judicial Affairs head administrator, college public relations person and other representatives.

Best Practice 15

Each college and university should seek inclusion in regional disaster plans consistent with the National Incident Management System (NIMS) and other regional and local plans.

Best Practice 16

Campus police departments should consider seeking concurrent jurisdiction with their surrounding locality.

Best Practice 17

Colleges and universities should consider working with their institutional research personnel to develop a survey tool that addresses campus safety.

Best Practice 18

Every police department should have written procedures for the investigation of crimes.

Best Practice 19

Every police department should have written protocols for dealing with victims, including referrals for victim services.

Best Practice 20

Each school should develop a mechanism to identify each case involving actions by a student that could be considered criminal in a court of law that has occurred and be able to track the outcome of that case both on the campus level of disciplinary process and the court disciplinary process, if this so occurs.

Best Practice 21

Each college and university should develop and adopt a set of written sanctions that are available to address actions that would be violations of the law, including alcohol and drug violations. Responses to violations could include strong or progressive sanctions. (Examples: "Three Strikes You're Out," removal from residence halls, publicizing to students and parents, and/or expulsion).

Best Practice 22

Campus police and security departments should receive institutional support for their alcohol control and enforcement programs.

Best Practice 23

Commonwealth campus police and security departments should develop a system for sharing information regarding violations occurring on their campus that are committed by students from other Commonwealth colleges and universities. This system will allow for student conduct on other colleges and universities to be acknowledged and dealt with by that student's college or university, as well as the campus or local law enforcement where the incident took place.

Best Practice 24

Institutions should designate a liaison between the Commonwealth's Attorney office and campus police or security departments regarding criminal investigations.

Best Practice 25

Whenever there is any crime on campus the student victim should be informed of his or her right to bring their case to the magistrate.

Best Practice 26

Campus police and security departments should consult with the Commonwealth's Attorney as soon as possible regarding any violent felonious crimes.

Best Practice 27

Colleges and universities may consider establishing protocols addressing student interaction between all involved parties after a criminal action is alleged.

VIRGINIA STATE CRIME COMMISSION

HJR: 225 Commonwealth's Attorneys

During the 2004 Session of the Virginia General Assembly, Delegate Robert F. McDonnell introduced House Joint Resolution 225 (HJR 225), which directed the Crime Commission to study the operations of all Commonwealth's Attorneys' offices. Specifically, the objectives of the two-year study were to:

- Examine the quality of prosecutorial representation;
- Assess the efficiency by which prosecutorial services are provided;
- Determine the impact of existing workloads;
- Identify any disparity in workload per attorney;
- Examine training and technical support services provided;
- Review opportunities for continuing legal education;
- Assess the ability to hire and retain qualified prosecutors;
- Determine reasonable caseloads per attorney;
- Determine the appropriate role of localities in providing support for Commonwealth's Attorneys;
- Identify disparity among offices in the ability to provide quality prosecutorial representation to each locality; and,
- Examine considerations that would, if implemented, reduce pre-trial delay and minimize the costs of pretrial incarceration.

Crime Commission staff utilized several methodologies to address the directives of the two-year study mandate, including telephone interviews with other states' statewide prosecutor agencies and coordinators, analysis of 50 states' enabling statutes and regulatory codes, review of relevant literature, survey of all elected and assistant Virginia Commonwealth's Attorneys and compilation of all relevant statutory references to Commonwealth's Attorneys responsibilities in the *Code of Virginia*.

In 2005, staff developed and disseminated a survey instrument to all 120 Commonwealth's Attorneys' offices that addressed: current staff and salaries; staff separations; resource needs; training; workload levels; and, employment considerations. For purposes of analysis, the information was broken into three categories: Elected versus Assistant Commonwealth's Attorneys; geographic region; and, size of office.

Seventy-nine percent (95 of 120) of the Commonwealth's Attorneys' offices responded to the survey. Survey responses were then divided and classified into the following categories for purposes of analysis: Elected Commonwealth's Attorneys versus Assistant Attorneys, size of office, and geographic region. Seventy-four percent (89 of 120) of Elected Commonwealth's Attorneys and 70 percent (402 of 575) of Assistant Commonwealth's Attorneys responded.

Under Virginia’s current funding system for Commonwealth’s Attorneys, the Compensation Board is responsible for determining personnel needs for each office and the allocation of funds to each office. In the past few years, the Compensation Board has been unable to allocate personnel funding according to the level required by the funding formula. Increasingly, local governments are providing increased funding for Commonwealth’s Attorneys, and in some areas of the Commonwealth, are providing more funding than the Compensation Board. Every Commonwealth’s Attorney prosecutes at least some misdemeanors, and several prosecute a considerable amount, however, the current funding formula does not take the level of misdemeanor prosecution into consideration.

Virginia follows a decentralized prosecutorial system like most states. In this system the prosecutors are locally elected constitutional officers. The Commonwealth’s Attorneys’ Services Council (CASC) provides training and some administrative and technical support to prosecutors. The only significant difference in Virginia’s version of the decentralized system is that CASC, unlike some other prosecutor coordinators agencies, is not involved with requesting or administering funding.

The survey identified important areas of concern such as insufficient retirement benefits, inadequate state funding, and high workloads that detract from the quality of work. While most Elected and Assistant Commonwealth’s Attorneys plan to make prosecution a career, “inadequate” pay and considerable student loan debt may influence their decision to stay in prosecution. Staff separations were also of concern and retention seems most challenging in the larger and more urban offices.

Commonwealth’s Attorneys are an essential part of Virginia’s criminal justice system. Commonwealth’s Attorneys’ offices are part of the larger public safety function that protects our communities and effective Commonwealth’s Attorneys Offices are necessary for the future safety of the Commonwealth. Without effective and adequately funded prosecutors, criminal cases cannot be pursued and decided in a timely or just manner.

Regarding perceptions of salaries, only 9% of Elected and 17% of Assistant Commonwealth’s Attorneys believe the current level of compensation for Assistant Commonwealth’s Attorneys was “appropriate.”

87% of Elected and 82% of Assistant Commonwealth’s Attorneys believe that the current level of compensation limits the availability of qualified applicants.

VIRGINIA STATE CRIME COMMISSION

SJR 451: Crawford and Booker Cases

During the 2005 Session of the Virginia General Assembly, Senator William C. Mims introduced Senate Joint Resolution 451 (SJR 451), which directed the Crime Commission to study the implications of Crawford v. Washington, United States v. Booker, and other related United States Supreme Court cases on established criminal procedures in the Commonwealth. Crawford v. Washington raises issues on the constitutionality of crime lab certificates and uncontested affidavits used at trial. United States v. Booker calls into question the constitutionality of sentence enhancements based on facts that have not been found by a jury. Specifically, the SJR 451 directs that the Commission “shall determine the impact of these United States Supreme Court cases on Virginia’s statutes by surveying Virginia statutes and Rules of Court, and identifying those that may be in need of amendment or repeal.”

In response to staff’s analysis of the Crawford case and its implications on Virginia law, the Crime Commission determined that Virginia’s statutes and Rules of Court are in no need of amendment or repeal. Any action at this time would be premature, as the Supreme Court of Virginia and federal courts around the country have not yet had the opportunity to fully interpret the Crawford case.

Also, based on staff’s analysis of the Booker case and its implications on Virginia law, the Crime Commission determined that Virginia’s sentencing guidelines do not violate the mandates established by Apprendi v. New Jersey, Blakely v. Washington, and Booker. As such, no change to Virginia’s sentencing procedures is necessary at this time.

HB 2932: Videotaped Statements from Children as Testimony

During the 2005 Session of the Virginia General Assembly, Delegate Robert B. Bell introduced House Bill 2932. This bill was referred to the House Courts of Justice Committee and a letter was sent to the Crime Commission, asking them to review the proposal. House Bill 2932 would permit videotaped statements made by victims under the age of 13 to be admissible as evidence in criminal trials involving either a felonious sexual offense or an abuse or neglect charge. Under the bill, the statement would be admissible only if the defendant received notice of the intent to introduce the videotaped recording at least ten days prior to the court proceeding, the child testified at the proceeding, and the judge specifically considered enumerated factors to determine if the recording “possesses particularized guarantees of trustworthiness and reliability.”

If it is the determination of the General Assembly that videotaped statements of a child victim should be admissible as direct evidence in sexual abuse cases, it should be a requirement of admissibility that the child testify before the videotape is played. The constitutional requirements of the Sixth Amendment mandate that the child also be available for cross-examination. No specific statutory tests should be created that evaluate the credibility or believability of the testimony. Instead, the legislature should require that all videotaped interviews be conducted in conformity with professional standards of practice.

The Crime Commission recommended that before any legislation similar to House Bill 2932 is passed, further study be done to determine how such interviews are conducted in other states.

HB 2265: Embracery

During the 2005 Session of the Virginia General Assembly, Delegate Robert B. Bell introduced House Bill 2265. This bill was referred to the House Courts of Justice Committee, which sent a letter to the Crime Commission, asking for an examination of the bill. Embracery is a common law crime, usually defined as “attempting to influence a jury corruptly to one side or the other, by promises, persuasions, entreaties, entertainments...and the like.” Implicit in this definition is the fact that neither a bribe nor a threat needs to be involved for the crime of embracery to be committed. The crime has also been defined as an attempt, “by any means other than production of evidence and argument in court, to influence a grand or petit juror.”

The crime of trying to corruptly influence a juror, without using either threats or bribes, does exist in the Commonwealth as the common law offense of embracery. A person can be indicted and punished for this crime, even though it has never been codified by the legislature. While there may seem to be some advantages to creating statutes and definitions for all of the common law crimes, the state of Virginia has traditionally resisted this approach. Many frequent and familiar offenses, such as murder, robbery, and larceny are not statutorily defined, although the legislature has specified their punishments. Instead, the common law is used to supply the elements of the offense, as well as any exceptions or defenses that may exist for those particular crimes.

Because the common law crime of embracery already exists as a Class 1 misdemeanor under Virginia law, the Crime Commission determined that it is not necessary for an “embracery” statute to be enacted.

HB 1169: Use of communication systems to facilitate offenses involving children

During the 2005 Session of the Virginia General Assembly, the House Courts of Justice Committee referred the engrossed version of Senate Bill 1169 to the Crime Commission for an analysis of the proposed legislation and the statute which it would modify, *Code of Virginia* § 18.2-374.3 (use of communications systems to facilitate certain offenses involving children).

This statute was originally passed in 1992 and was amended in 1999. The statute in its current form has many cross-references to other *Code* sections. Although difficult to read, its two subsections are not inconsistent with each other.

Code of Virginia § 18.2-374.3 is difficult to read and understand due to the large number of cross-references it contains. The legislature should consider, in the future, rewriting the entire statute and simplifying its basic structure. Nevertheless, there are no inherent contradictions in the statute.

The Crime Commission reviewed the development of the statute, the different types of conduct that it prohibits and decided that no substantive amendments should be made to the statute at this time.

The engrossed version of Senate Bill 1169 would de-criminalize, within the statute, solicitations by minors over computers (or other communication devices) for the production of child pornography. The Crime Commission recommended that the engrossed version of Senate Bill 1169, which was proposed in 2005, not be adopted. While *Code of Virginia* § 18.2-374.3 could be rewritten in the future for clarity and ease of understanding, there is no need at the current time to make any substantive changes to its wording.

VIRGINIA STATE CRIME COMMISSION

Dog Attacks in Virginia

During the 2005 Session of the Virginia General Assembly, Senator Edward R. Houck requested that the Crime Commission study dog attacks in the Commonwealth and make recommendations on whether there is a need for legislation that would make the owner of a dog involved in a serious attack on a person guilty of a felony.

While the number of fatal dog attacks in Virginia over the past thirty years has been low, dog attacks are a very real problem—each year, thousands of people in Virginia are bitten, with anywhere from eighty to a hundred victims requiring overnight hospital treatment or more because of the extent of their injuries.

When these attacks are due to the criminal negligence of the owner, who knew of the dog's aggressive tendencies, but failed to keep the animal properly secured, a crime has been committed. If the attack results in a death, the owner can be found guilty of involuntary manslaughter.

If such an attack does not result in a death, though, the owner can only be found guilty of the misdemeanor of assault and battery. To the extent the legislature wishes to increase the penalty for this type of criminally negligent conduct, it would have to do so by statute. Virginia currently has misdemeanor statutory provisions that relate to the handling and control of dogs by their owners, including a comprehensive scheme for having aggressive dogs judicially declared "dangerous" or "vicious." However, any new felony statute that criminalizes owners recklessly allowing their animals to roam at large and attack people

should not be incorporated in with these existing statutes. If a dog attacks and causes severe injury to someone, and the owner is at fault due to a reckless failure to contain the previously violent animal, it should not be a defense in a criminal prosecution that the dog had not been officially labeled "dangerous" at the time of the attack.

One minor change should be made to the "dangerous dog" statute. *Code of Virginia* § 3.1-796.93:1 only allows animal control officers to apply for a dog to be declared "dangerous" or "vicious." The statute should be modified, so that regular law enforcement officers may also be allowed to apply for a court hearing when they become aware of a dangerously aggressive dog in their jurisdiction.

When a fatal dog attack results from an owner's criminal negligence, the existing law of manslaughter should be sufficient to obtain a conviction. Therefore, it is not necessary, or advisable, to create a special statute criminalizing owners whose careless handling of their dogs leads to a fatal attack. The doctrines of manslaughter have proven sufficiently adaptable over the years to accommodate a wide variety of fact patterns. Recognizing this, the Virginia legislature has largely abstained from creating specialized manslaughter statutes. The general problem with drafting specific manslaughter statutes is, if they are drafted too specifically, they will not cover enough of the conduct that is to be prohibited, and if they are drafted too broadly, it makes the attempt almost pointlessly redundant, as common law manslaughter itself is a broadly defined criminal offense.

Furthermore, there is always the risk that a specifically defined “manslaughter” crime will be interpreted by the courts as de-criminalizing all related conduct that does not fall within the statutory definition. Unless the legislature wishes to provide either an enhanced penalty or a lowered penalty for a manslaughter offense, it is best to keep Virginia’s current manslaughter law as it is, and not create additional statutory offenses.

While the existing law of manslaughter should be sufficient in cases where an owner’s criminal negligence leads to a fatal dog attack, it is not clear that the common law would be sufficient in instances where the victim was severely injured by a dog but was not killed. Under the common law, it was a crime if a person’s criminal negligence resulted in bodily injury to another, provided that the cause was set in motion by the defendant. However, this type of offense was only a misdemeanor, deemed to be assault and battery. Therefore, without a special statute, the owner of a vicious dog that attacked and severely maimed a person would likely face, at most, several months in jail.

The Virginia legislature should consider adopting a statute that makes the reckless control or containment of an animal a felony, if the owner’s criminal negligence results in an attack with serious injuries inflicted on another person. Such a statute would, in essence, provide a means of obtaining a felonious assault conviction against the owner who, knowing of an animal’s aggressive tendencies, carelessly allowed his or her dog (or other animal) to roam at large, if an unfortunate attack then occurred. This statute should not be connected with Virginia’s scheme to have certain dogs judicially declared “dangerous” or “vicious.”

The Crime Commission recommended that a new felony statute be created, criminalizing

owners whose control or containment of their animals is so criminally negligent as to evidence a reckless disregard for human life, if their animals are involved in a non-fatal attack on another person as a result. The statute should not contain a manslaughter provision if such an attack proves fatal; the current law of manslaughter is sufficient to sustain a conviction under those circumstances. Virginia’s existing “dangerous dog” and “vicious dog” provisions should be kept in effect as a useful complement to this proposed legislation; however, *Code of Virginia* § 3.1-796.93:1 should be modified to allow all law enforcement officers, not just animal control officers, the ability to apply to a magistrate for a summons to have a dog declared “dangerous” or “vicious.”

The Virginia Department of Health reports that from 1998 through 2003, there were 564 serious dog attack injuries in Virginia that required hospitalization of the victim.

VIRGINIA STATE CRIME COMMISSION

HJR 573: Criminal Gang Conduct

During the 2005 Session of the Virginia General Assembly, Delegate David B. Albo introduced House Joint Resolution 573. The resolution, which was passed by the General Assembly, directed the Virginia State Crime Commission to “study criminal street gang conduct and characteristics for the purpose of reducing the burden on prosecutors by producing a formal listing of gang names coupled with conduct and characteristics unique to those gangs.” During the same Session, Delegate Stephen Shannon introduced House Bill 2087, which was referred to the House Courts of Justice Committee, and then referred to the Criminal Law Sub-committee. The Criminal Law Sub-committee sent a letter to the Crime Commission asking them to examine the issue; ultimately, this project was incorporated into the study directed by House Joint Resolution 573.

One of the requirements for a prosecution under Virginia’s criminal gang statutes is proving that the criminal group involved meets the definition of a “criminal street gang.” This term has a precise definition, and includes the requirement that the Commonwealth prove that the criminal group has members who “individually or collectively have engaged in the commission of...two or more predicate criminal acts, at least one of which is an act of violence....” The terms “predicate criminal acts” and “act of violence” also have precise definitions which must be met in order to have a successful prosecution.

Discussions with gang investigators and members of Virginia’s Attorney General’s

Office revealed that one of the chief hindrances for prosecutors in using the gang statutes is the burden of showing that a “gang” meets the definition of a “criminal street gang.” Prosecutors will typically employ an expert witness to testify to the characteristics of a particular gang, including such things as the gang’s usual territory, and any “identifying sign or symbol” which the gang generally employs. However, proving that members of the gang have engaged in two or more predicate criminal acts can be difficult.

Creating a database of identified gang members, along with their convictions for offenses that qualify as predicate criminal acts, would be a helpful tool for Commonwealth’s Attorneys in this regard. Such a database could facilitate a prosecutor’s trial preparation in a gang case by informing him what evidence is available to prove this element of the offense. Obtaining certified copies of a conviction, especially for felony offenses committed in Virginia, would then be a relatively simple task.

The basic data needed to create such a database for prosecutors is already gathered on a routine basis by the Virginia Department of Corrections and the Virginia Department of Juvenile Justice. Both agencies interview all inmates (or committed juveniles in the case of the Department of Juvenile Justice) as part of the admission process into state facilities, specifically screening for and seeking to identify gang members.

This screening is done for facility security purposes as well as the personal safety of the individual inmates. If the criminal histories of these identified gang members were examined and specific convictions for “predicate criminal acts,” including “acts of violence,” were collated, a “gang database” for prosecutors would automatically result. This database could then be updated on a periodic basis, providing prosecutors throughout the state with a useful and continually evolving information source.

The Commonwealth’s Attorneys’ Services Council should establish and maintain a state-wide list of identified gang members who have been convicted of “predicate criminal acts,” including “acts of violence.” This information can then be disseminated to Commonwealth’s Attorneys as needed, to assist in criminal street gang prosecutions. Information for this collated list should come from the Virginia Department of Corrections and the Virginia Department of Juvenile Justice, and should be updated on a monthly basis. *Code of Virginia* § 16.1-300 should be amended to allow the Virginia Department of Juvenile Justice to provide this information to the Commonwealth’s Attorneys Services Council, and to allow the Department of Juvenile Justice to provide similar information to any state criminal justice agency for purposes of conducting research.

“Feeble-minded”

The *Code of Virginia* § 30-151 requires the Code Commission to continuously review and identify obsolete provisions in the *Code of Virginia* and annually make recommendations to the General Assembly for legislative revisions to the *Code*. Pursuant to this directive, on December 29, 2004, the Code Commission sent a letter requesting the Crime Commission to examine the Code Commission’s draft legislation removing the last remaining references in the *Code of Virginia* to the term “feeble-minded.” Because the remaining references to “feeble-minded” involve the prohibition of putting on trial a defendant in a criminal case if he or she is mentally incompetent, before any legislation was introduced, the Code Commission decided to have the Crime Commission review this legislation before its introduction and advise how best to remove the term “feeble-minded” from the text in these sections.

After conducting its examination, the Crime Commission made the following recommendation regarding the use of the term “feeble-minded” in the *Code of Virginia*:

If it is the determination of the General Assembly that the term “feeble-minded” is outdated, it should not be replaced with the term “mentally retarded” because constitutional issues would arise. In lieu of using “mentally retarded,” the word “feeble-minded” should be replaced with “mentally incompetent.”

VIRGINIA STATE CRIME COMMISSION

Virginia Sex Offender Study

In May 2005, Delegate Robert F. McDonnell requested that the Virginia State Crime Commission examine possible policy changes to improve the registration, commitment and monitoring of sex offenders in Virginia. Specifically, the letter requested the Crime Commission appoint a Task Force to study the following issues regarding Virginia's Sex Offender and Crimes Against Minors Registry ("Sex Offender Registry"):

- (i) Completeness of records for each violation;
- (ii) Compliance with the Sex Offender Registry;
- (iii) *Code of Virginia* provisions for notification requirements; and,
- (iv) Mechanisms to ensure public and law enforcement notification of locations for all registered offenders.

Crime Commission Chairman, Senator Kenneth W. Stolle, formed a statewide Sex Offender Task Force to assist the Commission in examining the study issues. Senator Stolle also appointed Delegate Robert F. McDonnell and Delegate David B. Albo to co-chair the Task Force. The Task Force was composed of legislators from the General Assembly, in addition to representatives from the victim/witness community, the mental health community, the Office of the Attorney General of Virginia, the Virginia Association of

Commonwealth's Attorneys, law enforcement and state agency directors overseeing programs and services impacting sex offenders.

To efficiently handle the magnitude of information, the Sex Offender Task Force divided into two subcommittees: The Sex Offender Civil Commitment and Probation Reform Subcommittee and the Sex Offender Registry and Sentencing Reform Sub-Committee. The Subcommittees met on September 22, 2005, and the full Sex Offender Task Force convened on four occasions: June 7, 2005; September 22, 2005; October 25, 2005; and, November 30, 2005.

As a result of the study effort, the Sex Offender Task Force made recommendations to improve the registration, commitment and monitoring of sex offenders in Virginia. These recommendations, as follows, were approved by the Virginia State Crime Commission:

A. Enhanced Penalty Recommendations

Based on the current sentencing structure, the nature of the sex offenses and the high recidivism rate for sex offenders, the Crime Commission voted to recommend the following enhanced penalty and probation/monitoring of sex offenders:

Recommendation 1

Amend the *Code of Virginia* to require a minimum, mandatory 25 year sentence for a first time conviction of the following serious sex offenses when the victim is under the age of 13: Forcible Sodomy; Object Sexual Penetration; and, Rape.

Recommendation 2

Amend the *Code of Virginia* to allow for a mandatory minimum of 3 years supervised probation with electronic monitoring for the following sex offenses: Forcible Sodomy; Object Sexual Penetration; Rape; Kidnapping with Intent; Aggravated Sexual Battery; Carnal Knowledge; and, Indecent Liberties.

Recommendation 3

Amend the *Code of Virginia* to provide for mandatory unsupervised probation for the duration of the sentence allowed for the following sex offenses: Forcible Sodomy (Life); Object Sexual Penetration (Life); Rape (Life); Kidnapping with Intent (Life); Aggravated Sexual Battery (20 years); Carnal Knowledge (10 years); and, Indecent Liberties (10 years).

B. Sex Offender Registry Recommendations

Based on the study effort, the Crime Commission made the following recommendations concerning the Sex Offender Registry by subject area:

Enhanced Penalties

Recommendation 4

Amend *Code of Virginia* § 9.1-904 to increase the frequency of re-registration timeframes for sex offenders from 1 year to 180 days for a conviction of § 18.2-472.1 (Failure to Register); and, increase the frequency of re-registration timeframes for violent sex offenders from 90 days to monthly for a conviction of § 18.2-472.1.

Recommendation 5

Amend *Code of Virginia* § 9.1-908 to increase the duration of a sex offender's registration upon conviction of § 18.2-472.1 to 10 years from the date of last § 18.2-472.1 conviction.

Recommendation 6

Amend *Code of Virginia* § 9.1-909 to modify a sex offender's ability to petition for relief from registration or re-registration as sex offender upon conviction of a § 18.2-472.1 violation; must wait 5 years from date of last § 18.2-472.1 violation to petition for relief.

Recommendation 7

Amend *Code of Virginia* § 9.1-910 to increase, upon conviction of § 18.2-472.1 violation, the duration a sex offender must wait to petition to have his information removed from the registry to 10 years from date of the last § 18.2-472.1 conviction.

Recommendation 8

Amend *Code of Virginia* § 46.2-348 to add the providing of false information in order to obtain a driver's license or ID card for purposes of proof of residency for the Sex Offender Registry to be penalized as a Class 4 Felony.

Recommendation 9

Amend *Code of Virginia* § 18.2-472.1 related to convictions of a first time violation of the Registry requirements:

- For violent sex offenders who are convicted of a 1st offense of failure to register, require mandatory electronic monitoring for two years as part of each sentence; and,
- For sex offenders who are convicted of a 1st offense of failure to register, require a mandatory minimum electronic monitoring for six months as part of each sentence.

Amend *Code of Virginia* § 18.2-472.1 related to second and subsequent convictions of the Registry requirements. Specifically,

- For violent sex offenders convicted of a 2nd or subsequent offense:
 - (1) Increase the penalty from a Class 6 felony to a Class 5 felony;
 - (2) Require mandatory electronic monitoring for five years as part of each sentence.
- For sex offenders convicted of a 2nd or subsequent offense:

- (1) Increase the penalty for 2nd or subsequent conviction from a Class 1 misdemeanor to a Class 6 felony;
- (2) Require a mandatory electronic monitoring for two years as part of each sentence.

Limitations on Offenders

Recommendation 10

Amend *Code of Virginia* § 18.2-370.2 to:

Add schools, day care service or child minding service to the locations where loitering by certain sex offenders is prohibited within 100 feet; and,

Require the court as part of the sentence for a conviction of § 18.2-472.1 to prohibit the offender from loitering if his original offense was prohibited under this statute.

Recommendation 11

Add *Code of Virginia* § 18.2-370.3 to:

Prohibit persons convicted of Rape, Forcible Sodomy and Object Sexual Penetration against a victim 13 or younger from working on school property or child day center property;

Make a violation of this section a Class 6 felony; and,

To grant civil immunity to employers, schools and child day centers, unless they had actual knowledge that the employee was a serious sex offender.

Recommendation 12

Add *Code of Virginia* § 18.2-370.3 to:

Prohibit a person, who has been convicted of a sex offense that would prohibit him from loitering near a school (a violation of § 18.2-370.2), establishing residence within 500 feet of a school or child day center;

Allow a person to continue to live in a residence he inhabited prior to conviction for such a sex offense, if a new school or child day center is built nearby; and,

Make a violation of this section a Class 6 felony.

New Offenses

Recommendation 13

Amend *Code of Virginia* § 9.1-902 to:

Require a person convicted of a first offense of child pornography (§ 18.2-374.1:1) to register as a sex offender;

Require a person convicted of a burglary with intent to commit a felony offense enumerated in § 9.1-902 (§ 18.2-91) to register as a sex offender; and,

Require a person convicted in a foreign country to register as a sex offender/violent sex offender for a required offense.

Murder of a Minor

Recommendation 14

Amend *Code of Virginia* § 9.1-904 to require a person registered for murder of a minor to

re-register the same as a violent sex offender.

Recommendation 15

Amend *Code of Virginia* § 9.1-908 to require a person registered for murder of a minor to register for life.

Recommendation 16

Amend *Code of Virginia* § 9.1-910 to prohibit a person registered for the murder of a minor from having his information removed from the registry.

Recommendation 17

Amend *Code of Virginia* § 18.2-472.1 to provide persons registered for the murder of a minor to be designated as a violent sex offender for penalties for failure to register.

Recommendation 18

Amend *Code of Virginia* § 9.1-902 to require an offender to register for a conviction of a murder of a minor when:

- the victim is less than 15 years of age; or,
- the victim is at least 15 years of age, but less than 18 years of age, and,
- the murder is related to a violation listed in § 9.1-902.

Mandatory Offender Information

Recommendation 19

Amend *Code of Virginia* § 9.1-903 to include the following additional mandatory registration requirements:

- Place of employment as a new requirement;
- Collection of a DNA sample, if not present in LIDS Database;
- Provision of a physical address (no longer accept P.O. Boxes to satisfy the address requirement);
- Offender submit to having his/her photograph taken; and,
- New registration for any changes in employment status.

Recommendation 20

Amend *Code of Virginia* § 9.1-904 to require the offender to submit to a law enforcement agency to have his photograph taken every two years.

Timelines for Notification

Recommendation 21

Amend *Code of Virginia* § 9.1-903 to:

Require offenders to re-register within 3 days upon a change of address or a change in employment status;

Require law enforcement agencies to submit registration information to the VSP forthwith;

Require law enforcement agencies to submit registration information to the VSP forthwith at

time of conviction; and,

Require parole officers and probation officers to notify the VSP forthwith for change of address information regarding an offender of which they become aware.

Recommendation 22

Amend *Code of Virginia* § 9.1-905 to require new residents and non-resident sex offenders to register and complete change of address information within three days.

Recommendation 23

Amend *Code of Virginia* § 9.1-906 to:

Require students enrolled or employed at institutions of higher education to register with local law enforcement within three days of enrollment or employment; and,

Require the local law enforcement agency to forthwith provide the information to the VSP.

Public Notification

Recommendation 24

Amend *Code of Virginia* § 9.1-913 to allow all information on all sex offenders, not just violent sex offenders available to the public via the Internet.

Recommendation 25

Amend *Code of Virginia* § 9.1-914 to add institutions of higher learning to those entities eligible to receive automatic notification of registration information.

Recommendation 26

Amend *Code of Virginia* § 9.1-918 to clarify what is not misuse of public registry information.

Recommendation 27

Amend *Code of Virginia* § 22.1-79 to require the school boards to ensure that all public schools to register for automatic community notification from the Department of State Police.

Recommendation 28

Amend *Code of Virginia* § 22.1-79.3 to:

Require the school boards to develop and implement policies to provide parents with information regarding the operations of the Sex Offender Registry; and,

Require the school boards to develop protocols for the release of a child to any person other than his/her parent or legal guardian.

Governmental Notifications

Recommendation 29

Add a new section to the *Code of Virginia* titled § 16.1-249.1 to require juvenile jail facilities to register and forthwith furnish registration information to the State Police (VSP) upon receipt of a person required to register.

Recommendation 30

Add a new section to the *Code of Virginia* titled § 16.1-278.1:01 to require the Department of Juvenile Justice to register and forthwith

furnish registration information to the VSP upon receipt of a person required to register.

Recommendation 31

Add a new section to the *Code of Virginia* titled § 16.2-278.1:02 to require the Department of Juvenile Justice to register and forthwith furnish registration information to the VSP upon the release of a person required to register.

Recommendation 32

Add a new section to the *Code of Virginia* titled § 53.1-23.1 to require DOC to register and forthwith furnish registration information to the VSP upon receipt of a person required to register.

Recommendation 33

Amend *Code of Virginia* § 53.1-116.1 to require jails to register and forthwith furnish registration information to the VSP upon the release of a person required to register.

Recommendation 34

Add a new section to the *Code of Virginia* titled § 53.1-116.1:01 to require jails to register and forthwith furnish registration information to the VSP upon the receipt of a person required to register.

Recommendation 35

Amend *Code of Virginia* § 53.1-160.1 to require DOC to register and forthwith furnish registration information to the VSP upon release of a person required to register.

State Police Responsibilities

Recommendation 36

Amend *Code of Virginia* § 9.1-907 to require the VSP to physically verify all registration information and change of address within 30 days and semi-annually thereafter.

Recommendation 37

Amend *Code of Virginia* § 19.2-390.1 to require the Superintendent of the VSP to staff and operate Virginia's Sex Offender and Crimes against Minors Registry.

Training

Recommendation 38

Amend *Code of Virginia* § 9.1-102 to require the Department of Criminal Justice Services to develop new training standards for all law enforcement, DOC and Jails regarding investigative, registration and dissemination of information pertaining to the Sex Offender Registry.

Database Issues

Recommendation 39

Amend *Code of Virginia* §§ 2.2-3703 and 2.2-3802 to exempt provisions of the Sex Offender Registry from Virginia's Freedom of Information Act (FOIA) unless specified for public dissemination.

Recommendation 40

Amend *Code of Virginia* § 9.1-921 to exempt

Sex Offender Registry information in databases operated by DOC, DJJ, the Virginia Compensation Board and VSP from the Virginia Information Technology Agency (VITA).

Recommendation 41

Amend *Code of Virginia* § 23-2.2:1 to require Institutions of Higher Learning to submit enrollment information in an electronic format to the State Police for comparison with State and Federal Sex Offender Registry files.

Recommendation 42

Amend *Code of Virginia* §§ 46.2-323; 46.2-324; 46.2-330; 46.3-345 to require the Department of Motor Vehicles (DMV) to submit the following information in an electronic format to the VSP for comparison with State and Federal Sex Offender Registry files:

- Driver's license information;
- Change of address information;
- Renewal information; and,
- Identification card information.

Recommendation 43

Amend *Code of Virginia* § 53.1-115.1 to require local and regional jails to submit daily prisoner jail information to the Compensation Board in an electronic format.

Recommendation 44

Amend *Code of Virginia* § 53.1-121 to require the Sheriff to submit daily prisoner information to the Compensation Board in an electronic format.

Miscellaneous

Recommendation 45

Amend *Code of Virginia* § 9.1-907 to require local law enforcement agencies to notify the State Police when initiating a Sex Offender Registry investigation.

Recommendation 46

Amend *Code of Virginia* § 9.1-909 to provide non-residents with an avenue for relief from the 90 day registration requirement.

C. Civil Commitment of Sexually Violent Predators Recommendations

Based on the study effort, the Crime Commission recommended the following legislative changes to the Involuntary Civil Commitment laws and processes:

Recommendation 47

Allow the Department of Mental Health, Mental Retardation and Substance Abuse Services (DMHMRSAS), through an emergency enactment bill, to contract with the Department of Corrections (DOC) for assistance with monitoring and supervising sexually violent predators who are on conditional release.

Recommendation 48

Amend *Code of Virginia* § 37.2-903 (C) to designate the Static-99 as the screening instrument for SVP identification; a score of 4 or higher (moderate to high) should be used as the criteria for determining the eligibility for

further assessment by the CRC.

Recommendation 49

Amend *Code of Virginia* § 37.2-900 to include aggravated sexually battery of any age victim as an eligible predicate offense for civil commitment.

Recommendation 50

Amend *Code of Virginia* § 37.2-900 to include a violation of § 18.2-63, carnal knowledge, as a SVP eligible predicate offense.

Recommendation 51

Amend *Code of Virginia* § 37.2-900 to include kidnapping with intent to defile or rape (§ 18.2-48 (i) and (iii)) as predicate SVP offenses.

Recommendation 52

Amend *Code of Virginia* § 37.2-900 to include attempts of the following predicate sex offenses as eligible for SVP screening and commitment: Forcible Sodomy; Object Sexual Penetration; Rape; Kidnapping with Intent; Aggravated Sexual Battery ; and, Carnal Knowledge.

Recommendation 53

Amend *Code of Virginia* §§ 37.2-908(c) and 37.2-910 to require that conditionally released SVPs be subject to GPS monitoring as part of both the court ordered treatment programs.

Recommendation 53

Amend *Code of Virginia* §§ 37.2-908(c) and 37.2-910 to require that conditionally released SVPs be subject to GPS monitoring as part of both the court ordered treatment programs.

Recommendation 54

Amend *Code of Virginia* § 19.2-299 to require a Pre-Sentence Investigation Report (PSI), with national background check, be completed for all cases where the defendant is convicted of an offense eligible for civil commitment pursuant to § 37.2-900.

Recommendation 55

Amend *Code of Virginia* § 37.2-908 to allow the Office of the Attorney General of Virginia to allow continuances for good cause shown.

Recommendation 56

Amend *Code of Virginia* §§ 37.2-169.3, 37.2-904; 37.2-905 to allow the CRC to be statutorily charged with providing a review of a defendant found incompetent to stand trial, who the DHMRSAS deems eligible for commitment as a SVP.

As of May 20, 2005, the Virginia State Police Sex Offenders and Crimes Against Minors Registry database reported a total of 13,265 sex offenders on the Registry. The majority of the offenders (10,919, or 82%) are classified as Violent Sex Offenders and 18% (2,334) are classified as Sex Offenders.

Sex offender information is available to the public by means of the Internet at www.virginiatrooper.org

VIRGINIA STATE CRIME COMMISSION

Crime Commission Publications

Documents & Reports	Date of Publication	Publication Number
Campus Safety (Final Report)	2006	House Document 36
Commonwealth's Attorneys (Final Report)	2006	House Document 38
<u>Crawford</u> and <u>Booker</u> Cases	2006	Senate Document 14
Criminal Gangs	2006	House Document 40
Death Penalty for Juvenile Offenders	2006	Report Document 89
Embracery	2006	Report Document 277
Feebleminded	2006	Report Document 279
Dog Attacks in Virginia	2006	Report Document 275
Sex Offender Task Force Report	2006	Report Document 80
Use of Child Videotaped Statements	2006	Report Document 276
Use of Communication systems to Facilitate Offenses Involving Children	2006	Report Document 278
Campus Safety Interim Report	2005	House Document 42
Commonwealth's Attorneys Interim Report	2005	House Document 43
Computer Crimes Act	2005	Report Document 77
Division of Forensic Science	2005	Report Document 62
Guardian Ad Litem	2005	Report Document 61
Mistaken Eyewitness Identification	2005	House Document 40
Murder by Lying in Wait as a Capital Offense	2005	Report Document 64
Prisoner Litigation Reform Act	2005	Report Document 74

Documents & Reports	Publication Date	Publication Number
Bail Bondsmen and Bounty Hunters (Final Report)	2004	House Document 13
Definition of a Family or Household Member	2004	Report Document 40
Felony for Nonsupport; Penalty	2004	Report Document 41
Indigent Defense Commission (Final Report)	2004	Senate Document 13
Reorganization and Restructuring of Title 18.2	2004	House Document 15
21 Day Rule	2004	Report Document 52
Assault & Battery Against a Family or Household Member	2003	Report Document 48
Atkins v. Virginia	2003	Report Document 54
Bail Bondsmen and Bounty Hunters (Interim Report)	2003	House Document 21
Capital Murder of a Law Enforcement Officer	2003	Report Document 49
Facial Recognition Technology	2003	Report Document 53
Indigent Defense Commission (Interim Report)	2003	Senate Document 11
Mistaken Identity	2003	Report Document 50
Protective Orders in Dating Relationships	2003	Report Document 51
Procedures Involved with Protective Orders	2003	Report Document 46
Sentencing of Misdemeanor Offenders	2003	House Document 19
Special Conservators of the Peace and Special Police	2003	Senate Document 12
Subpoena Duces Tecum	2003	Report Document 52

For a more detailed listing of all our reports, or to download them, please visit the Virginia General Assembly website at <http://legis.state.va.us>.

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Commonwealth's Attorneys Final Report

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