# REPORT

# OF THE

# SUBCOMMITTEE

# TO STUDY

# SENTENCING

# FOR

# VIRGINIA STATE CRIME COMMISSION



MAY 1977

Suite 905, 701 E. Franklin Street
Richmond, Virginia 23219

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* Served as subcommittee chairman through March 29, 1977.

** Appointed subcommittee chairman March 30, 1977.

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# INTRODUCTION

The sentencing of those convicted is probably the most important element of the criminal justice process. The criminal justice system serves a variety of purposes, including deterrence, rehabilitation, isolation, and perhaps retribution. It is at the point of sentencing that these aims must be balanced against one another in reaching a decision as to what should be done with a particular individual.

It is often said that the imposition of sentences is one of the more important means through which society attempts to achieve its social goals. The difficulty arises from the fact that there is little agreement as to what those social goals are or should be. Some argue that the rehabilitation of convicted offenders is the best method of preventing crime. There are others who believe that it is the deterrent effect of criminal penalties that offers the greatest protection. Still others maintain that the detention of dangerous or anti-social offenders is the only guarantee that they will not commit further crime. Finally, there are those who feel that criminal penalties are justified through a moral right and duty given to the courts to inflict punishment as an expression of society's disapproval of crime. It is left to the judge (and less often, the jury) to balance these goals with each approach having its advocates. There is little evidence that any one of the principles is more correct than another in halting the rise of crime.

Legal standards in sentencing are far less developed than those in many other areas of the criminal process. At various other stages of the process the legal rights of the parties are defined fairly clearly and enforced by many guarantees. But perhaps because of the complexity of the sentencing process, fewer rules have been developed to insure regular procedures, rationality of decisions, and fairness in sentencing.

Great discretionary power is given to the courts without guidance as to how that power is to be exercised. High maximum penalties are provided by the legislatures, but it is left to the courts to decide what penalties should be imposed and for what purpose. With the lack of legislative guidelines and the controversy over the purposes of sentencing, it is not surprising that there is disparity among sentences.

Attempting to predict the impact of a sentence on an offender, or on potential offenders, is a most difficult task. It is hard to decide whether an offender before the court is likely to pose the risk of further crime and even more difficult to know whether that risk can be altered by choosing one form of sentence over another. Still more difficult is estimating whether the imposition of a deterrent penalty is likely to stop potential offenders from committing crime. There is also the problem of deciding to what extent it is morally right to punish individuals for crimes they have not committed.

The major problems in sentencing seem to come from disagreement as to the social purposes that sentencing should serve, the lack of evidence as to the effectiveness of penal measures to achieve these ends, and the lack of legal guidelines and standards for courts.[1]

Such deficiencies lead to disparity in sentencing. Disparity exists when there is variance in sentences for the same statutory offense and that variance is unrelated to the consideration of aggravating and mitigating circumstances. A lack of uniformity is, in some cases, justifiable. Judges are given discretion in sentencing in order that they may sentence according to individual needs. Disparity may result from statutory definitions of crimes including a broad range of conduct having varying degrees of seriousness. Also, a lack of uniformity may reflect differences in the priorities of various communities.

Unjustified disparity may detract from the objectives of the criminal justice system by promoting disrespect for law and by lowering public confidence in the ability of the courts to deal justly with those who come before them. Such disparity affects correctional administration. Prisoners compare their sentences and if they become convinced that they have been dealt with unfairly, they may become hostile and resist treatment and discipline.

## SENTENCING IN VIRGINIA

At the first meeting of the Virginia General Assembly in 1776 a statute was enacted which gave a jury the power to decide punishment for certain misdemeanors. Prior to this time the judge sentenced offenders under common law. Later, in 1796, the General Assembly extended the use of a jury to felony trials. In the middle of the nineteenth century, the power to assess punishment in misdemeanor cases was taken away from the jury. But this power was re-established in 1882 and has remained with the jury to the present.[2]

Virginia is one of eight states which retains the use of a jury in non-capital felony cases. The other states include Georgia, Tennessee, Texas, Arkansas, Missouri, Oklahoma, and Kentucky. Article I, Section 8 of the Constitution of Virginia provides for the ". . . right of the accused to an appeal to and a trial by jury." If the accused pleads guilty, the trial will be by the court. Should the accused plead not guilty, he or she has the right to waive a jury trial; but only with the concurrence of the commonwealth's attorney. The constitutional right to a trial by jury refers to the right to have a jury determine guilt or innocence but not the sentence.[3]

A Virginia jury is not empowered to grant suspension of sentence or probation; neither is it allowed to recommend suspension or probation. The judge is empowered to grant suspension of a jury verdict or to place a defendant sentenced by a jury on probation.[4] However, this statute is seldom used because of judges' reluctance to "tamper" with jury verdicts.

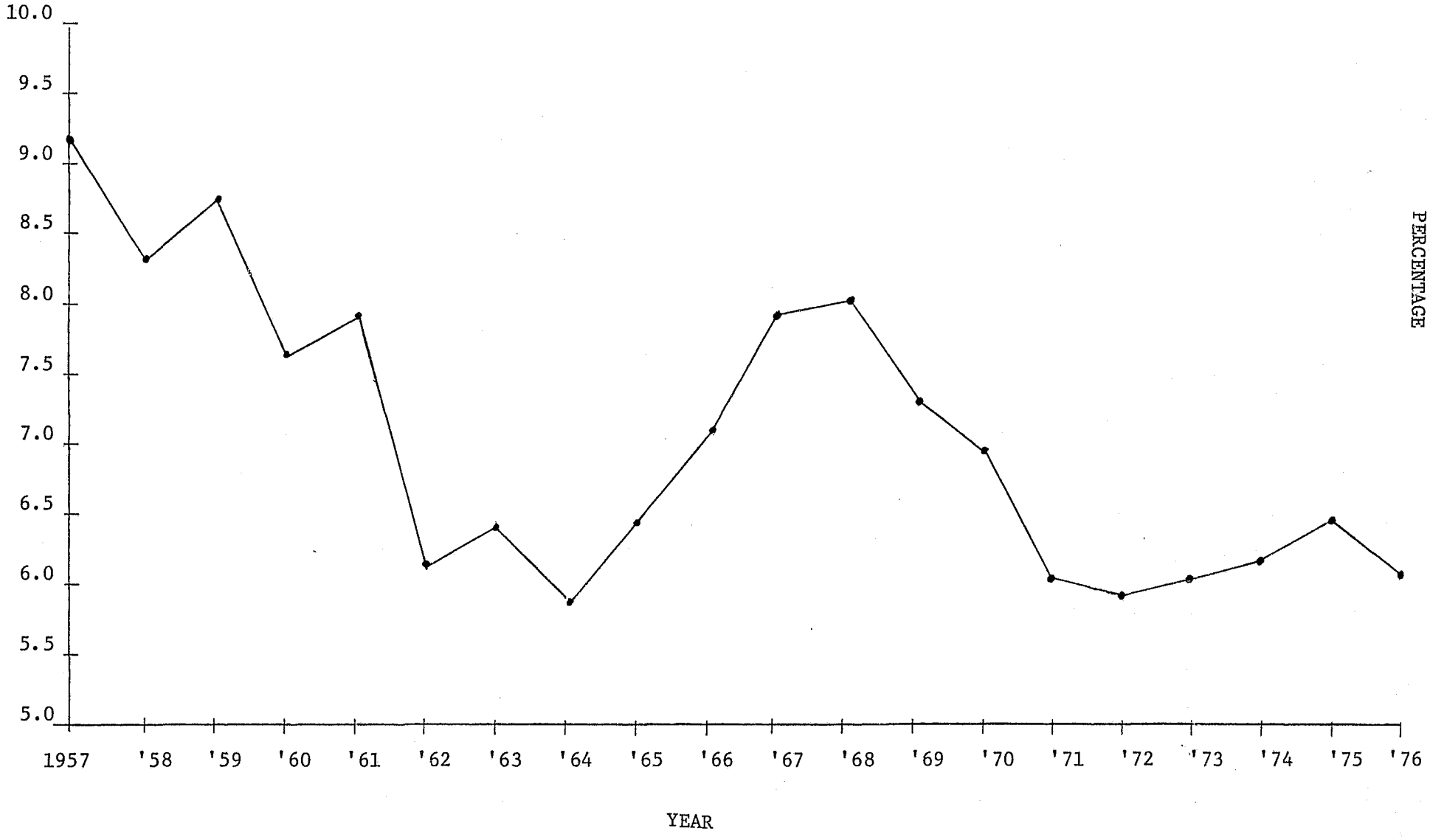
According to the latest figures (1976) from the Supreme Court of Virginia, there were 2,601 jury trials from a total of 42,250 criminal cases (misdemeanors and felonies) concluded during 1976. Graph I illustrates the percentages of jury trials in criminal cases for the past 20 years. Graphs II and III show the breakdown into felony and misdemeanor jury trials. (See Appendices for complete figures on jury trials and criminal cases concluded.) As shown by the graph, the number of jury trials has declined over the past 20 years. Over 90 per cent of criminal cases in Virginia are tried by judges.

## JUDGE VERSUS JURY SENTENCING

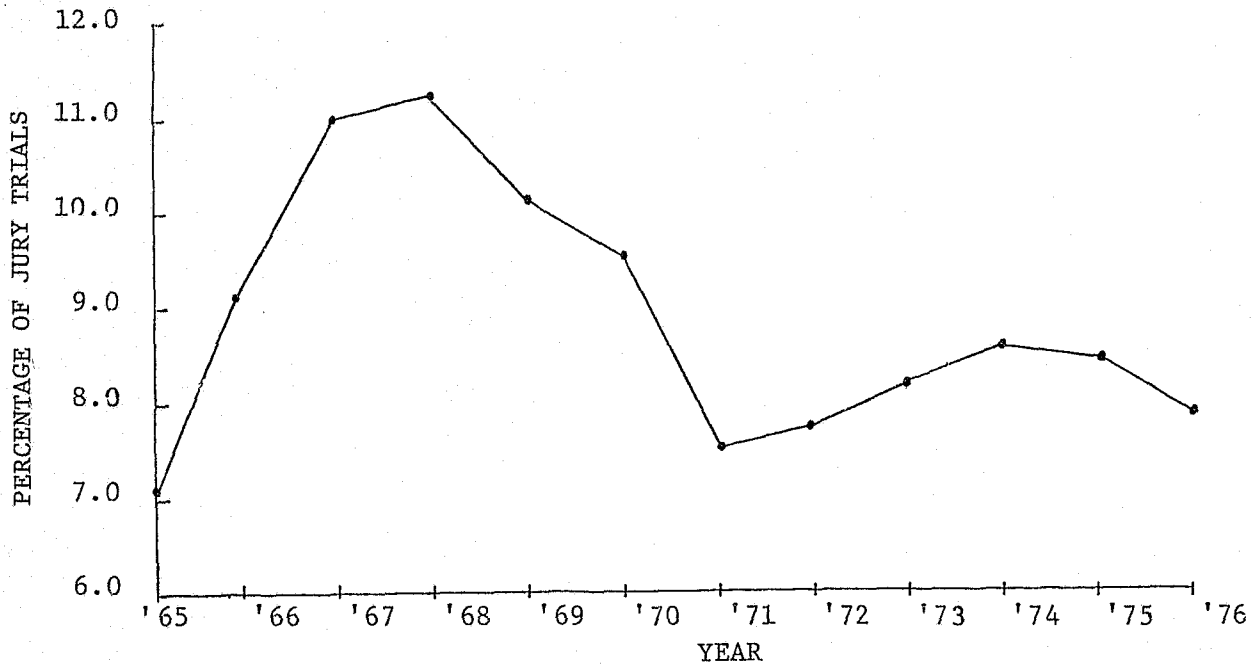
The issue of whether sentencing should be by judge or jury is not new in Virginia. In a 1934 study conducted by a legislative commission of the General Assembly, legislative revision was recommended allowing judges to impose sentence. In 1938, the Virginia Bar Association also endorsed judge sentencing.[5] More recently, judge sentencing has been advocated by the Council of Judges of the National Council on Crime and Delinquency in "The Model Sentencing Act (1963)," The President's Commission on Law Enforcement and Administration of Justice in their report *The Challenge of Crime in a Free Society* (1967), the Model Penal Code, the National Probation and Parole Association, and Governor Mills E. Godwin, Jr. in his 1976 "State of the State Address" to the General Assembly. In a survey conducted by the Crime Commission for this study a majority of circuit court judges (64%), former jurors (55%), and defense attorneys (65%) responding favor judge sentencing. The majority of commonwealth's attorneys responding did not favor judge sentencing (63%).

Proponents of judge sentencing contend that a simultaneous trial of the question of guilt and the question of treatment may result in the jury's confusing two issues deserving of separate consideration. The jury room becomes a "bargaining table" in which the concept of reasonable doubt is undermined as the question of punishment becomes intertwined with the determination of the defendant's guilt or innocence. They also argue that judges, because of their experience and background, are better able to make a more objective determination of the penalty and are generally

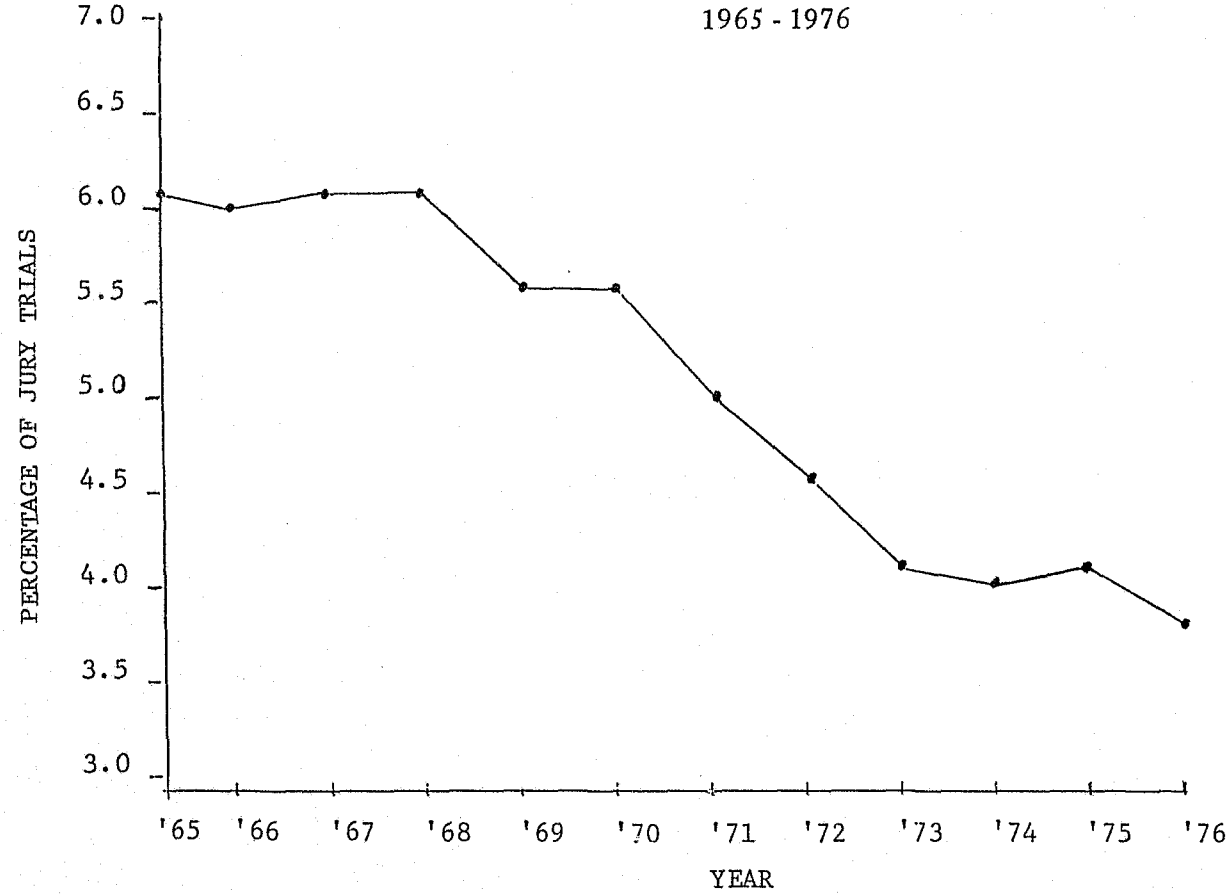
GRAPH I
PERCENTAGE OF JURY TRIALS
IN CRIMINAL CASES
(Felonies and Misdemeanors)
1957 - 1976



GRAPH II
FELONY JURY TRIALS IN
COMPARISON TO FELONY TRIALS
CONCLUDED
1965 - 1976




GRAPH III
MISDEMEANOR JURY TRIALS IN
COMPARISON TO MISDEMEANOR
TRIALS CONCLUDED
1965 - 1976



less affected by emotion and prejudice than is a jury. They feel judges are also less likely to respond to the persuasiveness of counsel's oratory.

Judge sentencing advocates maintain that juries do not possess nor can they acquire during their very short tenure, the technical training or the experience which sentencing determination requires. They are unaware of the rehabilitative possibilities offered by different correctional facilities operated by the state, whereas judges have had the opportunity to study offenders of all types as well as the institutions to which they are sentenced. Proponents argue that since the jury has no access to information regarding the sentences which have been imposed in like cases, that tends to increase the likelihood of sentence disparities.

Finally, supporters of judge sentencing point out that because juries are not informed of the parole laws, the danger of misinformed speculation about when an offender will be eligible for parole may result in distorted sentences. This also means that juries are able to circumvent parole statutes. They maintain that judges are in a better position to understand the operation and purposes of the parole system. Also, the task of fitting the punishment to the individual offender requires some knowledge of his background and character. This is unavailable to jurors in most cases. The rules of evidence prohibit the prosecution from introducing many facts about the offender such as education, employment history, socio-economic background, previous criminal behavior and potential for rehabilitation, which are necessary to a fair assessment of the penalty. This situation works to the advantage of the defendant with an unattractive history and to the disadvantage of the defendant with a good background.

Those who favor jury sentencing argue that the judgment of twelve people is more reliable and trustworthy than that of one person. A jury has the advantage of reaching decisions with the combined assistance of twelve different sets of values, opinions, and experiences. Also, the relative anonymity of the jury may make jurors more ready to shoulder the unpleasant burdens often associated with the sentencing function. Proponents of jury sentencing also maintain that the jury is less subject to political pressures than is the judge who is elected or appointed.

In answering the charge that juries do not receive enough background information (i.e., prior record), advocates of jury sentencing point to the concept that a defendant is tried only for the offense with which he is charged. By common law standards, if the defendant is found guilty of that offense, he is then sentenced for that offense only. The bad prior record should be dealt with through recidivist procedures. The remedy for deviating decisions of juries is already present in Virginia's statutes. Judges have the authority to correct or modify a jury's verdict.

An argument that judge sentencing would bring more uniformity to the sentencing process is refuted by advocates of jury sentencing. Citing various studies on the subject, they point out that judges are no more consistent than juries in their sentencing decisions.

Finally, the jury is seen as one of society's most important links with the judiciary. When a juror is given the important responsibility of determining another's punishment, that juror is bringing the values of his or her community into the judicial system. Jury sentencing advocates do not wish to see the judiciary lose touch with the citizenry.

Arguments in favor of judge sentencing center on the jury's lack of experience in and knowledge of the criminal justice system while those on the other side perceive the jury as a cornerstone in the system. The philosophies of the two groups seem to be the major point of conflict. There is little statistical evidence to back up the claims of either side.

Recently, the Virginia State Bar conducted a poll of its Criminal Law Section on the question of judge versus jury sentencing. The Bar received 307 responses representing 61 per cent of the Section membership. The majority (57 per cent) favored the present system of jury sentencing or converting to a bifurcated jury trial. Those favoring transferring the sentencing authority to the judge represented 40 per cent of the response. The remaining responses were miscellaneous answers. A private poll taken of the Board of Governors of the Section resulted in a vote to retain the present system of jury sentencing and to convert to a bifurcated trial. There was only one vote to the contrary.

## QUESTIONNAIRES

A questionnaire was developed for judges, prosecutors, defense attorneys, and former jurors to seek their attitudes on sentencing practices in Virginia. Each circuit court judge (101) received a questionnaire designed especially for that group. Another questionnaire was sent to each commonwealth's attorney (121). Clerks from almost every court in the State supplied jury lists from which 400 names were randomly chosen, and each received a questionnaire designed for former jurors. With the aid of the Virginia State Bar's Criminal Law Section membership list, 300 attorneys were randomly selected to receive the fourth questionnaire.

There were 27 questions asked all four groups. These questions related to penal philosophies, feelings on present practices of sentencing, and possible alternatives to the system. In addition to these questions, each group was requested to answer specific questions relevant to their particular position in the sentencing process.

The circuit court judges and former jurors received seven hypothetical cases for which they were requested to sentence the subjects. There were two versions of each case with one version containing more or different information than the second version. Half of the judges and former jurors responded to one version and the other half received a different set of facts. The purpose in using this method was to isolate factors which may lead to different sentences for like offenders.

The response rate of all those contacted was unusually high. A total of 922 questionnaires were distributed, of which 687 were returned, producing a total response rate of 74.5 per cent. The rate of response for each group is as follows: 90 per cent, or 91 judges responding; 75 per cent, or 91 commonwealth's attorneys responding; 68 per cent, or 254 former jurors responding; and 82 per cent, or 251 defense attorneys responding.

Using cross tabulation analysis to compare responses from judges, former jurors, defense and prosecuting attorneys concerning their philosophies, many similarities can be noted. All four groups agreed that the death penalty should be retained for certain types of murder. (Ninety-four per cent of the judges, 86 per cent of the former jurors, 91 per cent of the commonwealth's attorneys, and 75.5 per cent of the defense attorneys agreed.) But all groups agreed that the jury would be less likely to convict a defendant if they know the punishment would be mandatory death. (Eighty-three per cent of the judges, 57 per cent of the jurors, 80 per cent of the commonwealth's attorneys, and 80 per cent of the defense attorneys agreed.) While a majority of those responding favor the death penalty, most feel it would be harder to convict a defendant in a capital case.

Except for 63 per cent of the commonwealth's attorneys, the majority of judges (64 per cent), jurors (55 per cent), and defense attorneys (65 per cent) would like to have the jury determine only the guilt or innocence of the defendant and let the judge determine the sentence. Most felt that the judge is less likely to be ruled by emotions when issuing a sentence than a jury would be. And a majority believe the judge is less likely to be swayed by community pressures than the jury. However, jury sentencing is perceived as a way by which the values and feelings of the community may be reflected in the judicial process. This view seems to conflict with the desire to have the judge sentence after the jury determines guilt. This conflict may be caused by the jury's finding it more difficult to agree on a sentence than on the guilt or innocence of a defendant.

Most judges (80 per cent), commonwealth's attorneys (75 per cent), and defense attorneys (81 per cent) believe that a jury is likely to resolve doubt as to the guilt of a defendant by compromising on a light sentence. The jurors disagreed with that belief; only 44 per cent agreed.

When given the choice of prison, probation, restitution, or fine, a majority chose prison as the most effective kind of sentence for deterring both the general public and the individual offender from participation in crime. A majority believe the certainty of being caught is more important as a deterrence than the severity of the penalty which may be imposed. Most former jurors and commonwealth's attorneys believe that people will be deterred from committing crime if they know the exact sentence they would receive if caught and convicted. Only 44 per cent of the judges and 41 per cent of the defense attorneys agreed with this view.

Former jurors (87 per cent) and commonwealth's attorneys (78 per cent) would like to see tougher sentences imposed on offenders. Only 40 per cent of the judges and 37 per cent of the defense attorneys see the need for tougher sentences. An overwhelming majority of judges (97 per cent), commonwealth's attorneys (92 per cent), and defense attorneys (92 per cent), and a smaller majority of jurors (58 per cent), do not believe that people who commit similar crimes should receive the same sentence regardless of their background and prior record. A majority of all four groups feel that criminals should be punished for their crimes whether or not it results in their rehabilitation. Only a small majority (52 per cent) of defense attorneys agree that it is more important to sentence each offender on the basis of his individual needs than on the basis of the crime he has committed. The majority of the other three groups do not agree with that philosophy.

When asked if their community was dissatisfied with the courts, half of the commonwealth's attorneys and 55 per cent of the jurors responded in the affirmative. Over 72 per cent of the judges and 53 per cent of the defense attorneys did not feel that there was dissatisfaction within their communities. A majority of the former jurors (61 per cent) and defense attorneys (63 per cent) agree that the sentencing authority should be required to explain the sentence imposed with a brief written description of the reasons why it was imposed. The judges (75 per cent) and the commonwealth's attorneys (59 per cent) did not agree with that proposal. None of the groups favored a change whereby an offender may be sentenced to a maximum number of years with the parole board's having the authority to release him at any time they feel he has been rehabilitated.

"Flat-time" sentencing was favored by 76 per cent of former jurors and 52 per cent of the commonwealth's attorneys. A majority of the judges (65 per cent) and defense attorneys (62 per cent) did not favor this system for Virginia. A bifurcated trial in which the jury determines guilt or innocence in the first trial and then hears background and prior record information before determining the sentence was not favored by the judges (67 per cent), jurors (51 per cent), and defense attorneys (58 per cent). Only the commonwealth's attorneys (63 per cent) favored that proposal.

A number of questions were asked of the former jurors pertaining especially to their experiences during jury duty. The jurors were told that an offender had been sentenced to 40 years in prison. They were then requested to compute the number of years before that offender would be eligible for parole. Only 34 per cent of the jurors gave the correct answer of 10 years; the rest gave the wrong amount of years or no answer at all. The jurors were then asked if the parole eligibility date was taken into consideration when they decided the sentence of the offender in whose trial they participated. Over 55 per cent of the former jurors replied that they did take that into consideration when sentencing. It would seem that a fairly large number of jurors are considering erroneous information when deciding sentence. Approximately one-fourth of the former jurors responding felt it would have been desirable for the jury to have the authority to grant probation or suspend sentence in the cases in which they participated. Over 18 per cent of those desiring that authority believe that the lack of that authority had an impact on the sentence finally agreed upon. They felt that a more severe sentence was given so that the defendant would not be eligible for parole "too soon." Others found that the jury acquitted the defendant because they felt the probable sentence was too severe and the judge would not likely suspend such a sentence.

However, over 70 per cent of the former jurors thought they had enough information upon which to base their sentence. The jurors were evenly divided over whether they would rather have determined only the guilt or innocence of the defendant and left the sentencing to the judge. Those favoring allowing the judge to sentence (49 per cent) explained that the judge was more knowledgeable and experienced in sentencing and he would probably be more uniform than jurors. They also mentioned their lack of information (prior record, parole eligibility, etc.) as a reason for turning the sentencing over to judges. Over 60 per cent of all jurors found determining sentence to be the most difficult part of the trial. The remaining 40 per cent discovered determining guilt or innocence more difficult. Approximately 15 per cent of the former jurors indicated they sat on a "hung jury." Over one-third of them were unable to determine or agree on a sen-

tence and the remaining two-thirds were unable to decide the defendant's guilt or innocence.

The circuit court judges were questioned on their attitudes toward defense and commonwealth's attorneys, juries, and correctional facilities. Almost three-fourths of the judges agreed with the present requirement of allowing a defendant to waive a jury trial only with the consent of the judge and the commonwealth's attorney. Given a choice of "always, sometimes, rarely, or never," over 80 per cent of the judges replied they sometimes feel it necessary to follow the opinions or recommendations of the commonwealth's attorney. Approximately 16 per cent indicated that they never felt it necessary. Most judges (83 per cent) have observed that court-appointed attorneys are as well prepared as retained attorneys.

A consensus of the judges reveals that over 65 per cent of them agree that the jury possesses neither the information nor the training necessary for imposing a rational sentence. Only about one-fourth of the judges favored the establishment of sentencing councils composed of other judges within the same jurisdiction for the purpose of discussing their respective cases before making judgement. Some sources indicate that such councils may help increase uniformity of sentences. In cases where the defendant does not request a presentence investigation or it is not required by State law, 80 per cent of the judges always, or frequently, order one prepared when the offense is robbery. Approximately 65 per cent of the judges always, or frequently, request an investigation for breaking and entering cases. Over 86 per cent of the judges request an investigation for rape cases, and 80 per cent request it in drug cases.

Almost 80 per cent of the circuit court judges responding feel it is beneficial for a judge to visit all correctional facilities to which he sentences offenders. And only 2 per cent indicated that they have visited none of such facilities. Over half (57 per cent) of the judges believe they have been forced by the overcrowding of jails and prisons to increase use of probation and other alternatives to incarceration.

A majority of the commonwealth's attorneys responding (82 per cent) agree with the judges' view on allowing a defendant to waive a jury trial only with the consent of the judge and the commonwealth's attorney. Over three-fourths of the defense attorneys feel that the judge's and commonwealth's attorney's consent for waiver should not be compulsory. Neither the defense nor commonwealth's attorneys favored the establishment of sentencing councils. Over half of the commonwealth's attorneys and less than half of the defense attorneys indicated that the overcrowded conditions of penal facilities have forced them to increase recommendations for probation and other alternatives to incarceration.

## HYPOTHETICAL CASES

As explained earlier, the judges and former jurors were requested to sentence defendants in seven different cases, half of each group receiving more or different information than the other. This method allowed factors to be isolated which could lead to different sentences for like offenders. A T-test was used to analyze the results of the responses. This method allows the mean scores of two groups to be compared, occasionally producing significant differences between groups. The following tables contain the results of each case.

## COMPARISON OF JUDGES' AND JURORS' HYPOTHETICAL CASES

### CASE 1—SECOND DEGREE MURDER

| | Judges | | | | Jurors | |
|---|---|---|---|---|---|---|
| | avg. sentence | range of sentences | avg. yrs. suspended | avg. probation | avg. sentence | range of sentences |
| With Presentence Report | 15.7 yrs. | 5 to 40 yrs. | 6.5 | 1.6 yrs. | 13.8 yrs. | 1 to 20 yrs. |
| Without Presentence Report | 14.3 yrs. | 5 to 20 yrs. | 4.8 | 1.7 yrs. | 15.9 yrs. | 5 to 20 yrs. |

Only the jurors showed a significant difference in the sentencing of the subject without the presentence report.

### CASE 2—RAPE

| | Judges | | | | Jurors | |
|---|---|---|---|---|---|---|
| | avg. sentence | range of sentences | avg. yrs. suspended | avg. probation | avg. sentence | range of sentences |
| White Subject and Victim | 25.1 yrs. | 5 yrs. to life | 7.1 | 7.7 yrs. | 25.1 yrs. | 6 months to life |
| Black Subject and Victim | 23.5 yrs. | 10 yrs. to life | 6.9 | 6.8 yrs. | 26.4 yrs. | 3 yrs. to life |

There was no significant difference in the sentencing of the black and white subjects by either the judges or the jurors.

### CASE 3—DISTRIBUTION OF COCAINE

Judges

| | avg. sentence | range of sentences | avg. fine | range of fines | avg. yrs. suspended | avg. probation |
|---|---|---|---|---|---|---|
| Middle Class Subject | 8.6 yrs. | 5 to 40 yrs. | $1,650 | $10 to $29,999 | 5.8 | 0.2 yrs. |
| Lower Class Subject | 8.3 yrs. | 5 to 20 yrs. | $635 | $50 to $2,500 | 3.9 | 0.2 yrs. |

Jurors

| | avg. sentence | range of sentences | avg. fine | range of fines |
|---|---|---|---|---|
| Middle Class Subject | 11.9 yrs. | 0 to 40 yrs. | $9,291 | $150 to $50,000 |
| Lower Class Subject | 16.1 yrs. | 1 to 40 yrs. | $9,041 | $10 to $25,000 |

There was a significant difference in the sentencing of the college student and the construction worker by both the judges and the jurors. The judges suspended significantly more years for the student than for the worker. The jurors gave the worker significantly more years.

CASE 4—ARMED ROBBERY

| | Judges | | | | Jurors | |
|---|---|---|---|---|---|---|
| | avg. sentence | range of sentences | avg. yrs. suspended | avg. probation | avg. sentence | range of sentences |
| Heroin Addict | 16.1 yrs. | 5 yrs. to life | 5.5 | 7 yrs. | 18.4 yrs. | 3 yrs. to life |
| Non-addict | —— | —— | —— | —— | 14.4 yrs. | 6 months to life |

There was a significant difference in the sentencing of the heroin addict and the non-addict by the jurors. The heroin addict received significantly more years than did the non-addict. The judges received only the case with the heroin addict.

CASE 5—EMBEZZLEMENT

| | Judges | | | | Jurors | |
|---|---|---|---|---|---|---|
| | avg. sentence | range of sentences | avg. yrs. suspended | avg. probation | avg. sentence | range of sentences |
| With Probation Officer's Recommendation | 4.1 yrs. | 2 to 10 yrs. | 3.1 | 3.4 yrs. | 3.9 yrs. | 0 to 64.7 yrs. |
| Without Probation Officer's Recommendation | 6.5 yrs. | 2 to 30 yrs. | 5.6 | 4 yrs. | 4.8 yrs. | 6 months to 20 yrs. |

There was a significant difference in the sentencing of the subject with the probation officer's recommendation and the subject without by the judges. The subject with the recommendation received a significantly shorter sentence than the subject without the recommendation. Time suspended for the subject with the recommendation was significantly greater than that suspended for the subject without.

CASE 6—BURGLARY

| | Judges | | | | Jurors | |
|---|---|---|---|---|---|---|
| | avg. sentence | range of sentences | avg. yrs. suspended | avg. probation | avg. sentence | range of sentences |
| With Prior Record | 5.9 yrs. | 3 to 15 yrs. | 3.5 | 4 yrs. | 10.2 yrs. | 1.5 to 64.7 yrs. |
| Without Prior Record | 5.9 yrs. | 2 to 10 yrs. | 3.3 | 3.8 yrs. | 7.7 yrs. | 6 months to 20 yrs. |

There was a significant difference in the sentencing of the subject with the prior record and the subject without by the jurors. The subject with the record received a significantly longer sentence than the subject without the record.

CASE 7—MANSLAUGHTER

Judges

| | avg. prison sentence | range of sentences | avg. jail sentence | avg. fine | range of fines | avg. yrs. suspended | avg. probation |
|---|---|---|---|---|---|---|---|
| Single Subject | 4.7 yrs. | 0 to 10 yrs. | 12 months | $420 | $100 to $1,000 | 2.7 | 4.5 yrs. |
| Married Subject | 4.9 yrs. | 0 to 10 yrs. | 12 months | $750 | $500 to $1,000 | 3.1 | 4 yrs. |

Jurors

| | avg. prison sentence | range of sentences | avg. jail sentence | avg. fine | range of fines |
|---|---|---|---|---|---|
| Single Subject | 7 yrs. | 0 to 20 yrs. | 7.2 months | $906 | $500 to $1,000 |
| Married Subject | 7.3 yrs | 0 to 15 yrs. | 7.3 months | $889 | $100 to $1,000 |

There was no significant difference in the sentencing of the single subject and the married subject by either group. However there seems to be a difference in the fines imposed by the judges for the two subjects.

From the results of the first case involving second-degree murder, it has been shown that the jurors were influenced in their sentencing by the introduction of a presentence report. In this case the presentence report was sympathetic to the defendant and the jury responded by giving that defendant a significantly lighter sentence. The judges' sentences were unaffected by the inclusion of the report. Several jurors receiving the case including the report sentenced the offender to less years than required by statute. Had an actual jury returned a verdict less than the minimum required by law, the judge would send the jury back into deliberation until a lawful verdict was reached.

The factor tested in the second case of rape was race. Neither the judges nor the jurors were influenced in one way or another by the race of the victim and subject. However, again, some jurors sentenced the defendant to a term below the statutory limit. Charges made by some of racial discrimination in sentencing are not evident here.

Differences in the social backgrounds of two defendants were tested in the third case involving distribution of cocaine. The construction worker received a significantly higher sentence from the jurors than did the college student. And the judges suspended a significantly larger number of years for the student than for the worker. Again, a number of the jurors sentenced below the statutory minimum. It seems here that the more advantaged defendants may look forward to chances of lighter sentences given by juries. Even though the sentences by the judges for the worker and for the student are almost identical, the greater number of years suspended for the student would affect the total time served.

According to the results in the fourth case involving armed robbery, a drug addict could expect a longer sentence than a non-addict from a jury. The addict received a significantly higher sentence than did the non-addict. Several jurors, again, sentenced the defendant to a term below the legal minimum. The judges did not receive cases involving the non-addict.

From the results of the fifth case of embezzlement, it would seem that judges are influenced significantly by probation officers' recommendations. The defendant with the officer's recommendation received a lighter sentence than the defendant without the recommendation. Also, the amount of time suspended for the defendant with the recommendation was significantly greater than that suspended for the other defendant. The jurors, in this case, sentenced the defendant

below the minimum and above the maximum of legal limits. There was no significant difference between the sentences given in the jurors' cases.

A prior criminal record influenced the sentencing of the defendant in the burglary case by the jurors. The defendant without a prior record received a significantly shorter sentence than the defendant with the record. The jurors sentenced below the statutory minimum in both versions and exceeded the maximum in the case of the defendant with a prior record. The judges showed no significant difference between their sentences in the two versions of the case.

The final case involved a married subject in one version and a single in the other version of a manslaughter case. There were no distinctive differences between the two versions for either the judges or the jurors.

An overview of the hypothetical cases points to several factors which may have an effect on a defendant's sentence. The factors include sociological influences such as social status and family history, drug addiction, prior criminal record, and a probation officer's recommendation. There are numerous other factors which undoubtedly influence a judge or a jury in their sentencing capacity. But it would be almost impossible to name all of these influences and be able to predict a certain outcome as long as the human element is present in sentencing. When dealing with individuals the chances of highly accurate predictions are almost impossible. This questionnaire dealt only with a limited number of factors whose influence could change in a few years.

## OTHER SENTENCING DATA

According to the Department of Corrections most inmates (65 per cent) are serving a term of six or more years. Almost 11 per cent are serving five-year sentences. As of October 15, 1976, there were 371 inmates confined for life. There are approximately 6,700 inmates confined in State institutions. Chart I lists average sentences of inmates committed to State institutions from October 1, 1973 to October 20, 1976. The range of average sentences for courts indicates the distance between the lowest sentence given by any court in the State and the highest sentence given by a court for each offense. Life sentences were excluded by the Department. Wide variations should be expected for crimes such as homicide, which includes involuntary manslaughter through premeditated murder.

A definite geographic disparity exists within Virginia for certain crimes. For example, the average sentence for robbery in Alexandria was seven years and two months, but in Portsmouth the average was 15 years and three months. In Chesterfield the average sentence for robbery was ten years and ten months, while the average in Bedford was 32 years, two months. The statewide average was 12 years, three months for robbery. It is not possible to compare crimes such as homicide and sexual assault using data from Corrections because the various degrees of each crime are included in the average.

The geographic disparity of robbery in the State would seem to be a result of differences in areas of the State—Northern Virginia versus Southwest Virginia—and differences between urban and rural crime problems. One judge has noted that, in his circuit, there is not much disparity among judges but there is great disparity among jury sentences. The judge also pointed out that through his experience, most judges will try to sentence an offender to the amount of time they believe a jury would sentence that offender. A jury in Southwest Virginia would most likely have different feelings toward an armed robbery than would a jury in Northern Virginia. If the judges in those two areas try to keep in mind the feelings of the jury and thus the community when sentencing, there will be a difference in the two sentences.

## CHART I
## AVERAGE SENTENCES
## OF INMATES COMMITTED FROM
## OCTOBER 1, 1973 - OCTOBER 20, 1976

The following figures were taken from a computer report from the Department of Corrections. The number of inmates committed from each court and the average sentence given were listed for all offenses. Only the most serious offenses are listed here.

| Offense | No. of Inmates | Avg. Sentence (yr/mo)* | Range of Avg. Sentences for Courts |
|---|---|---|---|
| Homicide | 653 | 16/2 | 1 yr-52 yr |
| Kidnapping | 84 | 11/3 | 2 yr-43 yr |
| Sexual Assault | 317 | 13/5 | 1 yr-63 yr |
| Assault | 223 | 2/0 | 1 mo-15 yr |
| Burglary | 1988 | 5/4 | 1 yr-39 yr |
| Robbery | 1432 | 12/3 | 6 mo-32 yr |
| Arson | 67 | 6/10 | 1 yr-17 yr |
| Larceny | 1248 | 3/2 | 1 mo-12 yr |
| Stolen Vehicles | 203 | 2/0 | 4 mo-15 yr |
| Forgery | 505 | 3/11 | 1 mo-16 yr |
| Embezzlement | 16 | 2/2 | 6 mo- 5 yr |
| Dangerous Drugs | 956 | 5/1 | 7 mo-25 yr |

* Life sentences were excluded by the Department of Corrections. As of 10/15/76 there were 371 inmates confined for life terms.

## ALTERNATIVES

There are several alternatives to the present system of jury sentencing in Virginia. This State could join most of the other states and end the use of a jury except in capital cases. Or Virginia could retain the jury to decide guilt or innocence and allow the judge to sentence as is done in Georgia. The establishment of a bifurcated trial such as the one recently adopted by the General Assembly for capital cases would retain the jury. This system allows the jury to hear background information on the defendant after he or she has been found guilty but before imposing sentence. The bifurcated trial is now used in Texas.

In some states where the jury is still utilized for non-capital cases, an "habitual offender" statute is employed. If an offender is charged with being an habitual offender (having been previously convicted of two or more felonies), the jury considers the previous convictions in determining the sentence to be imposed for the felony of which the defendant currently stands convicted. The extended term to which the defendant may be sentenced is limited for each class felony. In another state, if the defendant is tried under the "habitual criminal act," the jury decides only the guilt or innocence and the judge imposes sentence. Virginia's recidivist trial is similar except that the Department of Corrections is responsible for bringing prior convictions to the attention of the court, and the offender is tried only in Richmond after he or she has been incarcerated for the current offense.

Another alternative to the present system in Virginia is called "flat-time sentencing." This system has been introduced in Maine and Illinois. Flat-time sentencing is the imposition of specific sentences for specific crimes, and it abolishes indeterminate sentencing and the parole system as presently practiced. Under the system the prison term would be fixed at the beginning of the

term by the judiciary, release would no longer be determined by the parole board, and the offender would know the length of his or her term prior to incarceration. Specific penalties are fixed according to each class of crime with the range in mitigation or aggravation substantially narrowed. Career criminals or really dangerous persons may receive enhanced or longer flat-time sentences as provided by the legislature.

Included in the flat-time sentencing system are provisions for early release on the basis of earned "good time." The parole board would no longer function to determine who is eligible for release since release can be obtained only after the term is completed. Current probation and parole personnel could be used to supplement services to persons placed on "mandatory supervision" and to ex-offenders and to provide alternatives to incarceration.

Revision of present sentencing practices to a flat-time sentencing system, however, appears to indicate that incarceration time would be lengthened for felony offenses. This increase in incarceration time would necessarily increase the cost of prison operations.

On the basis of the philosophy that certainty of confinement is more important than severity or length of confinment, a system called "presumptive sentencing" has been introduced. After studying both flat-time and mandatory minimum sentencing structures, it was found that both go too far in eliminating all flexibility. The 20th Century Fund Task Force on Criminal Sentencing proposes a system under which "the legislature would retain its power to make those broad policy decisions that can be made about crime and do not involve the particulars of specific crimes and criminals. The sentencing judge would have some degree of guided discretion to consider those factors that cannot be evaluated in the absence of the particular crime and criminal." [6]

The process would start with the legislature's breaking down crimes into several subcategories. For each subcategory of crime, the legislature adopts a presumptive sentence that should generally be imposed on typical first offenders who have committed the crime in the typical fashion. The legislature also would determine how much the presumptive first-offender sentence ought to be increased for each succeeding conviction according to a formula based on a predetermined percentage.

Specific aggravating or mitigating factors based on frequently recurring characteristics of the crime and the criminal would have to be defined by the legislature. Sentencing hearings should be mandatory to establish any aggravating or mitigating circumstances and to have the sentence pronounced. Only in truly extraordinary and unanticipated circumstances would the judge be permitted to deviate from the presumptive sentence beyond the range permitted by an ordinary finding of aggravating or mitigating factors.

For example, a typical first offender convicted of a typical armed robbery with no aggravating or mitigating circumstances would generally receive a sentence of two years. If the legislature had decided that a 50 per cent increase could be imposed where aggravating factors substantially exceed mitigating ones, the sentence would be three years for an aggravated offense. If the legislature also fixed a 50 per cent enhancement for second offenses, the sentence would become three years. If aggravating circumstances outweighed mitigating ones, then the sentence would be three years plus 50 per cent more, or four and a half years for the second offense. As far as is known this system has yet to be adopted by any state.

The Criminal Justice Research Center, Inc., of Albany, New York, has developed guidelines designed to minimize sentencing disparities.[7] Prepared by judges from various states, the guidelines are aimed at reducing instances where one defendant goes to prison while another gets probation in cases with similar facts. The guidelines are intended to be adopted only on an individual jurisdictional basis, and the concept will be transferrable from one state to another as the project is developed.

A chart is used which is similar in function to a mileage chart, where the distance between two cities is determined by reading down and across the chart to a common junction. In place of cities the chart uses "offender score" and "offense score." The chart assigns higher numbers of points based on the seriousness of the offender's prior criminal background. The judge reads across and down the chart to determine the recommended sentence. The use of the guidelines is not mandatory in Denver where the model was implemented in November of 1976. This was done so that the judge's discretion is not taken away in individual cases. The judge may sentence out-

side the guidelines, but written reasons for doing so are required.

Much further study is needed before any of the above alternatives could be adopted in Virginia. It must be decided whether the jury system as used in this State is in need of overhaul or even abandonment. Then, if this is done, the alternatives must be carefully studied for the best choice for Virginia.

## CONCLUSION AND RECOMMENDATION

The sentencing subcommittee along with the advisory committee met several times and discussed the data and information summarized above. The subcommittee could not agree on any one proposal to change the sentencing policies in Virginia. Several members favored abolishing the jury system and turning the sentencing power completely over to judges. Other members were satisfied with the present system and want to retain it. Still other members favored a bifurcated trial for Virginia or a presumptive sentencing system.

The subcommittee, however, did discuss the recidivist proceeding in Virginia and recommended changes. In 1976 there were 478 recidivist trials in this State. None of those tried was on an out-of-state conviction. The docket for these cases is extremely crowded; from January, 1977 until April, 1977, 70 trials per month are scheduled. The average is 30 to 50 trials per month.

According to statistics from the Department of Corrections 653 recidivists (from Virginia and elsewhere) were committed to the penal system for the year ending June 30, 1976. This points out that there are quite a few recidivists from out-of-state who are not being sentenced by the recidivist court.

The committee believes it is unfair to Virginia recidivists that they are being sentenced to an extra term in prison while those persons with convictions in other states do not receive such a term. The committee also pointed out that a judge sentencing a defendant pursuant to a presentence report is already taking the defendant's prior criminal record into consideration when making his decision. To sentence a defendant again for his prior record through the recidivist proceeding is seen as unnecessary.

Therefore, the committee recommended that the recidivist law be amended so that any offender tried by a judge and sentenced pursuant to a presentence report should be excluded from being considered a recidivist and sentenced under the recidivist statutes. A bill providing for this change was introduced by the legislative members of the subcommittee on sentencing. However, the bill was amended so that the intent of the bill as passed was contrary to the original intent of the legislation. The bill as passed by the legislature provides for mandatory terms of imprisonment for those previously confined in a penitentiary for felony convictions.

# ADDENDUM

## STATEMENT BY DELEGATE TED V. MORRISON, JR.

The single item of legislation introduced at the 1977 General Assembly Session to implement the very limited conclusions and recommendations of this study was House Bill #1960. The final form of that bill as passed is so contrary to the small area of agreement among members of the subcommittee as to warrent a complete explanation of such an extraordinary legislative result.

House Bill #1960 as recommended and introduced has the effect of *repealing* the recidivist statute in the large majority of felony trials in Virginia. The rationale of the bill was that one's record of past convictions is considered by the sentencing judge utilizing a presentence report. The usual result is a more severe sentence. Subsequent application of the recidivist law causes consideration again, and more punishment for, the same past convictions.

But House Bill #1960 as passed imposes mandatory recidivist penalties on *all* receiving penitentiary sentences—a result directly opposite to the original intent and philosophy of the bill.

Here, I believe, comments on the legislation in its final form are in order. To those who feel the recidivist statute has overtones of double jeopardy, or question its utility, passage of H.B. 1960 may be a bitter pill indeed, as it seems to stamp firm approval of the Commonwealth on the continuation and strict enforcement of recidivist punishment.

For the same reason those who have the notion that the recidivist statute deters crime, or who believe in the wisdom of mandatory sentences, may precipitously applaud its passage.

It may well be that neither conclusion is entirely correct. Before the amendments to the law effected by this bill, the statute allowed the imposition of an unlimited amount of additional time to be served by the recidivist. Although H.B. #1960 has mandatory sentences, it is not until the felon has returned to the penitentiary for the fourth time that he can receive unlimited additional punishment! For the second and third trips back to "the gate" the felon receives one and three years, respectively. The chance that such limited sentences will have a chilling effect on potential criminal behavior is, at best, extremely remote.

The chairman of the subcommittee studying sentences in Virginia, Delegate John Melnick, properly introduced House Bill #1960 in the form consistent with the recommendations of the study. Other legislative members of the subcommittee, including myself, signed the bill as co-patrons. Delegate Melnick thereby assumed the primary responsibility of managing the legislation *as the product of the study.* The chief patron fulfilled his responsibility before the House and Senate committees considering the bill, and on the floor of the House when first considered by that body. He represented the measure at these times to be the embodiment of the study's recommendation.

The move to completely discard the language recommended by the study and to provide mandatory sentences arose by way of floor amendments adopted by the Senate. It was on the question of agreeing to such Senate amendments put to the House of Delegates that Delegate Melnick departed from his roll as advocate for the study's recommendation by urging the House to *agree* to the Senate amendment.

Although the House rejected the Senate amendments, their substance was preserved and again came before the House in a Conference Committee report. Again, Delegate Melnick urged the House to accept the conference report. This was done, and H.B. #1960, in its radically amended form, was thereby passed.

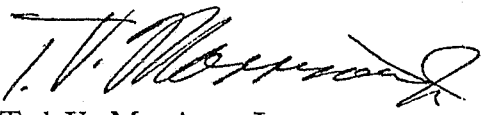
I opposed the adoption of the Senate amendments and the conference report. In my opinion, there was a responsibility to preserve the integrity of the study recommendation or else defeat the bill by simply moving to strike it from the House calendar. I stated to the House that in my

view to pass legislation so completely contrary to the original bill represented a breach of faith with the citizens who devoted time to the study.

In addition to their time, considerable public money has been expended on this project. It is regrettable that the only legislative recommendation of the study was rejected by the General Assembly, and that such rejection was accomplished with the active support of the subcommittee Chairman.

Insofar as any legislative impact is concerned, this study was rendered meaningless.

Respectfully submitted,



Ted V. Morrison, Jr.
Delegate, Virginia General Assembly

## FOOTNOTES

1. Hogarth, John, *Sentencing as a Human Process,* University of Toronto Press, 1971.

2. Note, *Jury Sentencing in Virginia,* Virginia Law Review, Vol 53: 968, 971 (1967).

3. *Fogg* v. *Commonwealth,* 215 Va. 164, 207 S.E. 2nd, 847 (1974).

4. Virginia Code Ann., §53-272 (1974).

5. Note, *Should the Jury Fix the Punishment for Crimes?,* 24 Virginia Law Review, 462 (1938).

6. *Fair and Certain Punishment,* The 20th Century Fund Task Force on Criminal Sentencing, McGraw-Hill Book Company, 1976.

7. Colpin, Gelman, Gottfredson, Kress and Wilkins; *Sentencing Guidelines: Structuring Judicial Discretion,* Law Enforcement Assistance Administration, U. S. Department of Justice, 1976.

# APPENDIX A

## Jury Trials[1]

| Year | Jury Trials in Criminal Cases | Criminal Cases Concluded | Percentage of Jury Trials |
|---|---|---|---|
| 1957 | 1,840 | 19,911 | 9.2 |
| 1958 | 1,876 | 22,490 | 8.3 |
| 1959 | 1,849 | 21,255 | 8.7 |
| 1960 | 1,612 | 21,304 | 7.6 |
| 1961 | 1,738 | 22,092 | 7.9 |
| 1962 | 1,472 | 23,610 | 6.2 |
| 1963 | 1,613 | 25,050 | 6.4 |
| 1964 | 1,521 | 25,731 | 5.9 |
| 1965 | 1,585 | 24,338 | 6.5 |
| 1966 | 1,628 | 22,507 | 7.2 |
| 1967 | 1,803 | 22,745 | 7.9 |
| 1968 | 1,880 | 23,317 | 8.1 |
| 1969 | 1,931 | 26,075 | 7.4 |
| 1970 | 2,087 | 29,500 | 7.0 |
| 1971 | 1,977 | 32,411 | 6.1 |
| 1972 | 2,040 | 33,909 | 6.0 |
| 1973 | 2,085 | 34,205 | 6.1 |
| 1974 | 2,249 | 36,351 | 6.2 |
| 1975 | 2,728 | 41,630 | 6.5 |
| 1976 | 2,601 | 42,250 | 6.1 |

[1] *State of the Judiciary Report* (1975), Office of the Executive Secretary, Supreme Court of Virginia, 37.

## APPENDIX B

Jury Trials by Catagory of Case[2]

Felony and Misdemeanor With Comparison to Cases Concluded 1965 through 1976

| | JURY TRIALS | | JURY TRIALS PER 100 CASES CONCLUDED | |
|---|---|---|---|---|
| Year | Felony | Misdemeanor | Felony | Misdemeanor |
| 1965 | 698 | 887 | 7.1 | 6.1 |
| 1966 | 807 | 821 | 9.1 | 6.0 |
| 1967 | 948 | 855 | 11.0 | 6.1 |
| 1968 | 1,009 | 871 | 11.3 | 6.1 |
| 1969 | 1,061 | 870 | 10.2 | 5.6 |
| 1970 | 1,061 | 1,026 | 9.4 | 5.6 |
| 1971 | 1,065 | 912 | 7.5 | 5.0 |
| 1972 | 1,161 | 879 | 7.8 | 4.6 |
| 1973 | 1,285 | 800 | 8.4 | 4.2 |
| 1974 | 1,434 | 815 | 8.7 | 4.1 |
| 1975 | 1,897 | 831 | 8.6 | 4.2 |
| 1976 | 1,876 | 725 | 8.1 | 3.8 |

[2] *State of the Judiciary Report* (1975), Office of the Executive Secretary, Supreme Court of Virginia, 26.

END